

QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL

CITATION: *Elliot v Director General, Department of Justice and Attorney General* [2020] QCAT 245

PARTIES: **NAOMI ELLIOT**
(applicant)

v

DIRECTOR GENERAL, DEPARTMENT OF JUSTICE AND ATTORNEY GENERAL
(respondent)

APPLICATION NO/S: CML039-19

MATTER TYPE: General administrative review matters

DELIVERED ON: 17 March 2020

HEARING DATE: 8 November 2019

HEARD AT: Toowoomba

DECISION OF: Member Wood

ORDERS: **The Decision of the Director General, Department of Justice and Attorney General that the Applicant’s case is ‘exceptional’ within the meaning of section 221(2) of the *Working With Children (Risk Management and Screening) Act 2000* (Qld) is set aside and replaced with the Tribunal’s decision that there is no exceptional case.**

CATCHWORDS: FAMILY LAW AND CHILD WELFARE – CHILD WELFARE UNDER STATE OR TERRITORY JURISDICTION AND LEGISLATION – OTHER MATTERS – where Application for removal of Negative Notice – where Applicant has convictions for significant offences, both in Queensland and elsewhere – where Applicant has convictions for possessing dangerous drugs, including methylamphetamine, amphetamine and cannabis – where Applicant has convictions for property offences including stealing and receiving and associated offending behaviour – where none of the offences ‘serious offences’ – where Applicant issued with Negative Notice – whether an exceptional case exists – whether the protective factors outweigh the risk – consideration of factors

Working With Children (Risk Management and Screening Act) 2009 (Qld), s 5, s 6, s 221, s 226, s 360
Queensland Civil and Administrative Tribunal Act 2009

(Qld), s 66

Commissioner for Young People and Child Guardian v Storrs [2011] QCATA 28

Commissioner for Children and Young People and Child Guardian v Maher and Anor [2004] QCA 492

Re TAA [2006] QCST 11

**APPEARANCES &
REPRESENTATION:**

Applicant: Self-represented

Respondent: Rajapaske

REASONS FOR DECISION

- [1] The Applicant was 42 years of age at the time of the Hearing, having been born on 14 October 1977. She has two daughters aged 11 and 14. The Applicant has a very significant criminal history, comprising a total of 31 criminal offences both in Western Australian and in Queensland, spanning a period from 2003 until 2015. Most of the offences were committed in the period of 2003 to 2009. The Applicant relocated herself to Queensland in 2009. There have however been offences in Queensland in 2013 and 2015 which I will detail later in these Reasons.
- [2] The Applicant gave evidence at the Hearing of this matter and was clearly anxious in doing so. As a result of the anxious manner in which she gave her evidence, I felt she did not properly give a good account of her own qualities or a full and complete account of her current circumstances.
- [3] The Applicant's criminal history consists primarily of drug offences, there are also offences of stealing, involving a motor vehicle, and 'dealing' of drugs consisting of a charge in 2006 of possession of prohibited drugs with intent to sell or supply (amphetamine) and charges of supplying dangerous drugs on 14 April 2013. In the early 2000s the Applicant was residing in Western Australia and was employed by the Department of Planning and Infrastructure but as a result of charges she was dismissed from this employment by Letter dated 24 November 2003. In material before the Tribunal the Applicant indicated that in 2002 an eight year relationship broke down and at the same time she was suspended from her employment by the Department of Infrastructure. In her own words, she then went into a 'downhill spiral' as she felt that she would not get another job as a result of the offending behaviour. She 'felt sorry for myself and made bad decisions' and is 'kicking myself for the stupidity but trying to change now'.
- [4] She is aware that the Negative Notice was issued a result of her criminal record and drug use history. The Applicant has never been diagnosed with any mental health issues. She also has not had any involvement with child safety authorities, either in Western Australia or Queensland.
- [5] As her criminal history shows, from 2003 to 2009 her pattern of behaviour continued in the use of drugs and associated offending and whilst she has not served any actual period of imprisonment, she has been sentenced to periods of imprisonment which were suspended.

- [6] In her own words, she moved to Queensland to 'get away' from people. There have been two sets of offences since her relocation to Queensland, the first set of offences alleged to have been committed on 14 April 2013, being six charges of supplying dangerous drugs and possessing anything used in the commission of a crime as defined in Part 2 of the *Drugs Misuse Act 1986* (Qld).
- [7] The circumstances of this offending are that in the course of a covert police operation, it was identified that persons were supplying methylamphetamine and cannabis. In the course of the covert operation the police used telephone interception as well as covert police operatives, physical surveillance and tactical interception on several suspects. Ultimately the police executed a Warrant on the Applicant's residence which occurred early in the morning. At the time of the execution of the warrant the Applicant was at home with her children. In her evidence, she confirmed that the children were at home during the police raid and that the Applicant told the children the police were there to help her to look for something. The children did not see the police search the house as the Applicant took the children to school while the search occurred. When asked in evidence about the impact of drug use on her children, the Applicant's evidence was that the children were not exposed or aware of her drug use, however they have since become aware as a result of the Negative Notice issued by the Respondent. The Applicant denies that the drug use impacted upon her ability to care for the children.
- [8] At the time of the search of the residence, the police located a syringe and needle under the Applicant's bed which was not secured in a safe manner. This was seized however no charges were laid in respect of this.
- [9] The Applicant's explanation of these offences was that in 2013 she was involved in the offences with her sister. She says that it was a 'one off thing' and even though she had not had any cravings for drugs and had not been tempted, 'it was there so why not'. She continues to be close to her sister, however her sister does not use drugs any more. As a result of those offences she was placed on probation for a period of 12 months and in the course of completing that probation she attended Drug Arm. She had her name published in the local newspaper which she found embarrassing and assisted in her decision to change her lifestyle. In respect of the 2013 offences, she agrees that there is 'no excuse and that she had made a mistake'.
- [10] The 2015 offence of failing to take reasonable care in respect of a syringe arose as a result of an interception by police who located an uncapped syringe within her vehicle. She was unable to offer a lawful or emergent reason for failing to dispose of the syringe. On this occasion she was dealt with in the Holland Park Magistrates Court and fined \$250.00. The Applicant's explanation for this offending was that she had been to visit friends in Brisbane who were people that she had known for some time. She was aware that they had in the past been drug users but was not aware that they had not ceased using. The syringe was found in her car and she pleaded guilty to the offence. So far as the Applicant was concerned, she did not offend but pleaded guilty when it came before the Court.
- [11] When asked in cross examination what was different now for the Applicant, she said that she was 'clear minded and not on drugs'. Her children commenced involvement in the local AFL Club in 2011 and the Applicant has been actively involved in coaching and managing teams until the Negative Notice issued. She has a close relationship with both of her daughters and is very supportive of them in all ways.

- [12] On 30 November 2014 her youngest daughter was diagnosed with Type 1 Diabetes and she is the carer for her daughter and receiving a Carers Pension.
- [13] The Applicant says that she is surrounded by positive people and is committed to caring for her daughter and continuing her involvement in the AFL Club. She says that this is a motivator for her to remain abstinent from drugs. She says that her last drug use was in 2013, being the offending at that time.
- [14] She has not undertaken any formal drug rehabilitation, with the exception of the Drug Arm intervention whilst she was on probation. She does not believe that she requires any formal rehabilitation, believing it is about her mindset and she is now a 'stronger person'. She ensures that she does not associate with drug users in any way and has surrounded herself with good law abiding positive people. Her social circumstances have changes, she is involved with the AFL Club and says she now has a 'zest for life' and wishes to remain abstinent from drugs and support her daughters.
- [15] Other witnesses were called by the Applicant, including her mother Judith Elliot. She gave evidence that her daughter has changed in the last six years, and whilst she has had concerns in the past for her daughter given her offending behaviour and drug use, she does not now have any concerns for the future. She was well aware of the convictions in 2013 and 2015 and was aware of the previous drug use and has seen her criminal history.
- [16] In terms of changes she has made, she has noticed that her daughter has stopped using drugs, is involved in sport and has a strong social support group. She does realise that drug use and offending behaviour is detrimental to her family group and believes that she will continue to be abstinent.
- [17] Evidence was called from Mr Benjamin Lubben who is a principal at a local real estate agency. He was president of the football club in which the Applicant was involved. He has seen the Applicant's criminal history and aware that a Negative Notice has issued. He has known the Applicant since 2017 when they met through the Club. He has seen her associate with children, including his own, and has no concerns for her care.
- [18] The other witness called by the Applicant was Ms Karen Clark who is a Facility Manager for the Department of Human Services. Ms Clark impressed me as a level headed and sensible person who had genuine empathy for the Applicant. The witness is responsible for supervising staff employed by the Department of Human Services and through her employment dealing with vulnerable people. She is aware of the Applicant's criminal history. The witness has known the Applicant since 2011 and considers her to be a close friend. She had read the reasons for the Negative Notice and the criminal history.
- [19] Ms Clark was a previous president of the AFL Club and now considers that she is good friends with the Applicant with involvement outside football. She has no concerns about the Applicant caring for children, has seen her in various circumstances and has visited her at home. The witness was aware of the 2013 and 2015 offending behaviour and recalled that at the time that this behaviour occurred she was concerned for the Applicant but provided support to her. At that time she assisted her and talked to her about getting back on track. Ms Clark indicated that she was happy to provide whatever support she might need.

- [20] Ms Clark said that she became aware of the Applicant's criminal history very shortly after the Applicant came to the club in 2011. There was an executive meeting which the Applicant attended and was very open about her criminal history and I felt that she was looking for help from people associated with the Club.
- [21] In terms of the Applicant's insight into the effect of her behaviour, Ms Clark felt that the Applicant had developed insight, realising that the decisions that she had made in the past would impact upon her future, and is now conscious of the behaviours and the effect on herself and her children. She would agree that the insight has been developed mostly over the last two years and the process involving QCAT has assisted. She sees the Applicant frequently, seeing her either weekly or by phone and is aware that she has a friendship group of people who contact her regularly.
- [22] As outlined previously, I was impressed by Ms Clark's evidence and felt that she had a genuine empathy for people and a desire to assist the Applicant but also was honest in her views regarding the Applicant.

Statutory framework

- [23] The Applicant applied for a Blue Card by Application dated 30 November 2017. That Application was refused with a Negative Notice issued on 2 January 2019.
- [24] None of the offences with which the Applicant has been convicted are 'serious offences' as that term is defined. In the circumstances, a Positive Notice must issue unless I am satisfied, that this is an exceptional case in which it would not be in the best interests of children for the Applicant to be issued with a Positive Notice.¹ The Respondent was of the view that it was an exceptional case and issued the Negative Notice.
- [25] The term 'exceptional case' is not defined in the legislation. The *Working with Children (Risk Management and Screening) Act 2000* (Qld) ('WWCRMSA') sets out criteria that must be considered when determining when there is an exceptional case;² however, the Tribunal must exercise its discretion in each case within the parameters of the legislation.³
- [26] The Tribunal is required to determine whether an exceptional exists or not without any party bearing the onus of proof that an exceptional case exists.⁴
- [27] In the event that the Applicant was to be issued with a blue card then that blue card is transferable for all purposes. The Tribunal is unable to place any conditions upon the issue of the card.
- [28] The principles for administering the Act are that the welfare and best interest of a child are paramount and that every child is entitled to be cared for in a way that protects the child from harm and promotes the child's wellbeing.⁵
- [29] In making my Decision I need to take into account the protective and risk factors.⁶

¹ *Working with Children (Risk Management and Screening) Act 2000* (Qld), s 221(2) ('WWCRMSA').

² *Ibid*, s 226.

³ *Commissioner for Young People and Child Guardian v FGC* [2011] QCATA 291.

⁴ *Commissioner for Young People and Child Guardian v Storrs* [2011] QCATA 28.

⁵ WWCRMSA, s 6.

⁶ *Commissioner for Children and Young People and Child Guardian v Maher and Anor* [2004] QCA 492.

[30] In making, my Decision I need to make the correct and preferable decision⁷ and proceed by way of a fresh hearing on the merits.

Risk assessment

[31] There are a number of protective factors in this case:

- (a) The Applicant has a commitment to care for her children and to be involved in their lives in a positive and supportive way going forward;
- (b) The Applicant has not used any drugs since 2013 when she was charged with a number of offences relating to the supply of dangerous drugs;
- (c) The Applicant has recently developed insight into the impact of her offending behaviour on herself and her children and the negative consequences of continuing to offend and involve herself in drug use;
- (d) The Applicant is now involved in a local sporting club and volunteering and has developed a social network which is a supportive network enabling her to reach out should she have any concerns;
- (e) Her mother is now residing in Warwick and family support is available to her;
- (f) Although compelled by a probation order imposed by the Magistrates Court in 2013, the Applicant has engaged in Drug Arm counselling. There has been no offending behaviour since 2015; and
- (g) None of the offences involve children and there has been no involvement with child safety.

[32] There are risk factors:

- (a) The Applicant has a lengthy and concerning criminal history, including offending in Queensland following her relocation from Western Australia to Queensland in order to cease her drug use. The offences in Queensland were committed in 2013 – offences of supplying dangerous drugs and possession of implements used in the commission of crime, and in 2015 failing to take reasonable care and precautions in respect of a syringe;
- (b) Notwithstanding the Applicant's involvement in the local sporting club since 2011 and the diagnosis of Type 1 Diabetes of her daughter in 2014, she has committed an offence in 2015 for which she pleaded guilty;
- (c) The Applicant minimises her involvement in the offending behaviour and failed to accept that the offending behaviour has had any impact on her children;
- (d) At least until 2015 the Applicant was associating with people involved in drug use, based upon the Applicant's own evidence that the syringe found in her vehicle by police must have been left there by one of her associates. She denies that she was aware that they were drug users; and

⁷ QCAT Act, s 20.

- (e) The Applicant has not voluntarily undertaken any formal drug rehabilitation as she feels that there is no need as the drug use was situational.

Applicant's submission

- [33] The Applicant submits that the Negative Notice should be removed and that this is not an exceptional case. She acknowledges in her submissions that there are significant criminal offences, but points out the majority of those were committed between 2003 and 2009, and did not involve harm to any person or child. The Applicant submits, and I accept, that there is no involvement with the child safety bodies, either in Queensland or Western Australia.
- [34] The Applicant submits that through her involvement in volunteering and receiving a number of awards as a result of volunteering, and her commitment to assisting her daughter with her serious health issues, that she has turned her life around. In dealing with the question of insight in her submissions, the Applicant says again that her children were not aware of her prior convictions and have never been exposed to intravenous drug use or drug related activity. She accepts however that they were present in the house when the police attended in 2013.

Respondent's submission

- [35] The Respondent submits that I should find that this an exceptional case and that the Negative Notice should stand. In doing so they correctly identified the law to be applied in this case, including that insofar as the question of 'exceptional case' is concerned, that it is a matter of discretion with each case to be considered on its own facts. I accept that their submissions address correctly the relevant matters to be considered and identified in considering the proper exercise of those discretions.
- [36] The Respondent quite correctly points out that the Applicant has a lengthy criminal history, including since her relocation to Queensland. They submit however that in this case that the risk factors outweigh the protective factors and point to the drug related criminal offending, and the lack of strategies to prevent that re-offending. They point to the fact that there have been offences committed since the relocation from Western Australia. They further submit that the issue of insight is a live issue in this case, having regard to the Applicant's evidence. They correctly identify the tests outlined in *Re TAA*.⁸
- [37] The Respondent also correctly submits that I should take into account that if a Blue Card is issued that it is not limited to the purposes of volunteering at the Football Club, but would then mean that the Applicant was able to work in any child related employment, or conduct any child related business. I am unable to issue a conditional Blue Card.

Conclusion

- [38] The Applicant applied for a Blue Card in order to enable her to continue to be involved in volunteering at the local football club and to become involved both in that club and at a representative level as a Coach and a Manager, although if the Negative Notice is removed could engage in other child-related employment.

⁸ [2006] QCST 11.

- [39] The Applicant has a criminal history which extends over a period of 12 years, involving committing 31 offences, some of which are offences involving the supply of drugs, among others. There has been no offending since April 2015.
- [40] The Applicant has not undertaken any drug rehabilitation and again in her submissions confirmed that in her view there was no need for her to do so as the drug use was due to circumstances rather than a physical or physiological cause.
- [41] In accordance with section 20(1) of the QCAT Act, my role in reviewing the Decision of the Respondent is to produce the correct and preferable decision. It must be kept in mind that in doing so the Decision of the Respondent was made some 10 months prior to the Hearing and there is no evidence that there has been any offending behaviour by the Applicant since the Decision has been made.
- [42] In this case it is accepted that the Applicant has a lengthy and concerning criminal history. This criminal history involves dishonest offences as well as primarily significant and concerning drug use and supplying dangerous drugs to others. There has been no offending behaviour since 2015 and, on the evidence before me, no drug use since 2013.
- [43] Since moving to Queensland however, the Applicant has become involved in volunteering with a local sporting organisation and now has in place a support network of people involved in this organisation not associated with drug use, and now has family supports. Her evidence is, and I accept, that she is motivated to continue in these endeavours for the benefit of her children.
- [44] The fact that a person has significant criminal history, even a history of offences as concerning as those shown on the Applicant's criminal history, does not of itself mean that this is an exceptional case. I am satisfied that the Applicant now has protective factors as a result of changes which she has made to her own lifestyle, some of which were brought about by a medical condition now suffered by her daughter, however given the supports which she now has in place, it is my view that this is not an exceptional case in which it would not be in the best interests of children and young people for a Blue Card to be issued to the Applicant.