SUPREME COURT OF QUEENSLAND

CITATION:	*Commissioner for Children and Young People and Child Guardian v Maher & Anor* [2004] QCA 492
PARTIES:	**COMMISSIONER FOR CHILDREN AND YOUNG PEOPLE AND CHILD GUARDIAN** (appellant/applicant) v **LESTER THOMAS MAHER** (first respondent/first respondent) **CHILDREN SERVICES TRIBUNAL** (second respondent/second respondent)
FILE NO/S:	Appeal No 8689 of 2004 DC No 56 of 2004
DIVISION:	Court of Appeal
PROCEEDING:	Application for leave s 118 DCA (Civil)
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	23 December 2004
DELIVERED AT:	Brisbane
HEARING DATE:	23 November 2004
JUDGES:	McPherson and Jerrard JJA and Philippides J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Grant leave to appeal** **2. Dismiss the appeal with costs**
CATCHWORDS:	ADMINISTRATIVE LAW – APPEALS FROM ADMINISTRATIVE AUTHORITIES – where negative notice issued to first respondent by Commissioner – where Tribunal set aside Commissioner's decision – where District Court dismissed Commissioner's subsequent appeal – whether District Court erred in dismissing the appeal FAMILY LAW AND CHILD WELFARE – CHILD WELFARE OTHER THAN UNDER FAMILY LAW ACT 1975 AND RELATED ACTS – OTHER MATTERS – where first respondent convicted of indecent dealing with children – where first respondent was considered unsuitable for child-related employment pursuant and issued a negative notice by Commissioner – where Tribunal considered there was an "exceptional case" which would not harm the best interests of children – whether "exceptional case" test properly applied – whether Tribunal proceeded on the basis of an error of law in

being satisfied that there was an exceptional case

Children Services Tribunal Act 2000 (Qld), s 130
Commission for Children and Young People and Child Guardian Act 2000 (Qld), s 5, 6, 95, 96, 100, 102, 121
Commission for Children and Young People and Child Guardian Amendment Act 2004 (Qld)
District Court of Queensland Act 1967 (Qld), s 118

Briginshaw v Briginshaw & Anor (1938) 60 CLR 336, cited
Cabal v United Mexican States (2001) 180 ALR 593, cited
K v Cullen (1994) 126 ALR 38, cited
McKee v McKee [1951] AC 352
Perry and Browns Patents (1930) 48 RPC 200, cited
Re Imperial Chemical Industries Ltd's Patent Extension Petitions [1983] 1 VR 1, cited
United Mexican States v Cabal (2002) 209 CLR 165, cited

COUNSEL: D P O'Gorman with S M Hegedus for the applicant
P J Callaghan for the first respondent

SOLICITORS: Commissioner for Children & Young People for the applicant
Caxton Legal Centre Inc for the first respondent

[1] **McPHERSON JA:** I agree with the reasons of Philippides J, which I have had the advantage of reading.

[2] The *Children's Services tribunal Act 2000* authorises an appeal from the Tribunal to the District Court on a question of law. Section 118(3) of the *District Court Act 1967* permits an appeal to this Court by leave of the Court. Because we would, if leave were to be granted, be considering the correctness of the District Court decision, it follows that this Court is restricted to determining whether the District Court made an error of law in disposing of the appeal to it by dismissing it.

[3] It was said that in doing so, the learned District Court judge had perpetuated an error of law committed by the Tribunal. No such error of law has been shown. Section 6(1) of the *Commission for Children and Young People and Child Guardian Act 2000* declares that the Act is to be administered under the principle that the welfare and best interests of a child are paramount. More specifically, s 96 applies the principle to a decision under Part 76, which is what we are here concerned with. Expressions in that form have long been a feature of the law governing the affairs of children. Referring to that principle in *McKee v McKee* [1951] AC 352, 365, Viscount Simonds said it was the paramount consideration "to which all others yield".

[4] There is no basis for suggesting that in this case the Tribunal disregarded the statutory direction. It was submitted that the Tribunal had gone wrong in its application of s 102(4) of the Act, which requires the Commissioner, if aware of a conviction of a serious offence, must issue a negative notice "unless satisfied it is an exceptional case". An exceptional case in this context is one that does not conform to the general rule, which is that a negative notice must issue refusing a "blue card". The application "must" then be decided "having regard to" the matter specified in paras (a) to (e) of s 102(5), of which the last in para (e) is "anything else the

Commissioner reasonably considers to be relevant to the person" in respect of whom the application is made.

[5] The Tribunal, as it was bound to do, considered each and all of these matters. That in s 102(5)(e) is plainly very wide extending as it does to anything reasonably considered to be relevant. Except in one respect, it was not suggested that the Tribunal took into account any irrelevant matters in reaching its conclusion. That respect was that the Tribunal had remarked that "work in the aboriginal community was extremely demanding and leads to high turnover of staff". But this remark was made in the context of explaining and finding that the person, in respect of whom this application was made, had demonstrated maturity in the way he had coped with his dismissal from employment upon his being refused a blue card; and so was now less likely to offend than he had when facing stress at a much younger age. Considered in that way, it was plainly capable of being reasonably considered a relevant matter within the meaning of s 102(5)(e) in determining whether this was an exceptional case.

[6] In my opinion the District Court Judge made no error of law in dismissing the appeal from the Tribunal. I agree that leave to appeal should be granted and the appeal to this Court should be dismissed with costs.

[7] **JERRARD JA:** In this application I have had the benefit of reading the reasons for judgment of McPherson JA and Philippides J, and respectfully agree with those reasons and the orders their Honours propose.

[8] **PHILIPPIDES J:**

The application

[9] This is an application by the Commissioner for Children and Young People and Child Guardian ("the Commissioner"), pursuant to s 118 of the *District Court Act* 1967, for leave to appeal against a decision of the District Court upholding the decision of the second respondent, the Children Services Tribunal ("the Tribunal"), concerning the issuing of a suitability notice under the *Commission for Children and Young People and Child Guardian Act* 2000 ("the Act"). The parties were content that the hearing of the application for leave also be treated as a hearing of the appeal, if leave were granted.

[10] The issue on the application concerns the approach to be taken in determining applications for a suitability notice pursuant to s 102(4) of the Act. The application raises matters concerning legislation yet to be the subject of judicial consideration and I would in the circumstances grant leave to appeal.

Background

[11] The first respondent, Mr Lester Maher, was born on 16 September 1954 and is of aboriginal descent. In 2002, an application was made to the Commissioner under s 100 of the Act for a suitability notice for child-related employment in respect of Mr Maher. The application was made by Mr Maher's employer, the Aboriginal and Islander Independent Community School, which had employed Mr Maher for about 6 years as a groundsman, janitor and bus driver. He was also employed as a pastor by the One Church in Christ Fellowship.

[12] Because of Mr Maher's criminal history, the Commissioner issued a negative notice, declaring him to be unsuitable for child-related employment. An application was then made to the Tribunal, pursuant to s 121 of the Act, for a review of the Commissioner's decision. On 10 November 2003, the Tribunal set aside the Commissioner's decision and substituted a new decision that the present case was "an exceptional case in which it would not harm the best interest of children for the Commissioner to issue a positive notice" in resect of Mr Maher, that is, one declaring him suitable for child-related employment.

[13] The Commissioner appealed to the District Court against the Tribunal's decision, pursuant to s 130 of the *Children Services Tribunal Act* 2000, which permits an appeal on a question of law. The District Court dismissed that appeal. It is in respect of that decision that the present application for leave is made.

The Relevant Provisions of the Act

[14] The office of the Commissioner is established under the Act, whose object, as outlined in s 5, is "to promote and protect the rights, interests and wellbeing of children in Queensland". The principles underlying the Act are set out in s 6 and include in s 6(1) that the Act "is to be administered under the principle that the welfare and best interests of a child are paramount".

[15] Employment screening for child-related employment is dealt with in Part 6 of the Act (s 95 to s128). The purpose of Part 6 is to ensure that only suitable persons are employed in certain child-related employment or carry on certain child-related businesses (s 95). The paramount consideration in making a decision under Part 6 is a child's entitlement to be cared for in a way that protects a child from harm and promotes the child's wellbeing (s 96).

[16] Division 2 of Part 6 of the Act establishes a scheme whereby an employer who proposes to employ or continue employing another person in "regulated employment" may apply to the Commissioner for a "suitability notice stating whether the employee is a suitable person for child-related employment" (s 100). Section 102 governs the way in which decisions on applications for a suitability notice are to be made. It provides:

> "(1) If an application for a suitability notice about a person is made under section 100 or 101, the commissioner must decide the application by issuing -
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> (a) a suitability notice declaring the person to be a suitable person for child-related employment (a *positive notice*); or
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> (b) a suitability notice declaring the person to be an unsuitable person for child-related employment (a *negative notice*).
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> (2) If the commissioner is not aware of any convictions or charges of the person for any offence or any teacher registration information about the person, the commissioner must issue a positive notice.
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> (3) If the commissioner is not aware of any convictions of the person for any offence but is aware of a charge of the person for an offence or any teacher registration information about the person, the

commissioner must issue a positive notice unless the commissioner is satisfied it is an exceptional case in which it would not be in the best interests of children for the commissioner to issue a positive notice.

(4) If the commissioner is aware of a conviction of the person for a serious offence, the commissioner must issue a negative notice unless the commissioner is satisfied it is an exceptional case in which it would not harm the best interests of children for the commissioner to issue a positive notice.

(5) If the commissioner is aware of a conviction or charge of the person for an offence, the commissioner must decide the application having regard to the following matters relating to the commission, or alleged commission, of the offence by the person –

(a) whether it is a conviction or a charge;
(b) whether the offence is a serious offence;
(c) when the offence was committed or is alleged to have been committed;
(d) the nature of the offence and its relevance to child-related employment;
(e) anything else the commissioner reasonably considers to be relevant to the assessment of the person.

…"

The Commissioner's Decision

[17] In considering the application for a suitability notice, the Commissioner had regard to Mr Maher's conviction on 21 April 1989 in New South Wales for an offence of assault with an act of indecency committed on 23 June 1988, which involved the improper touching of a 13 year old girl. Mr Maher was sentenced to 3 years' probation and required to undertake psychological or psychiatric treatment. (There is no dispute that that conviction was for a "serious offence" within the meaning of that term in s 102(4) of the Act as defined in schedule 4 of the Act). The Commissioner also had regard to evidence concerning the circumstances leading to Mr Maher's dismissal in July 1988, from his then employment as a youth worker at a residential care establishment accommodating children in crisis at Allanville. That dismissal followed upon his acting inappropriately in respect of an adolescent girl residing at the facility, after having been previously warned about such inappropriate conduct.

[18] The Commissioner stated in published reasons that, in addition to the circumstances of the conviction and the allegations leading to his dismissal, regard was had in assessing the application, to the applicant's personal history, the reports of Professor Nurcombe and Dr Kar, their expert opinions, various references and the fact that Mr Maher and his current wife had been permitted by the Department of Families to foster a child. However, it was determined that there were "no exceptional circumstances that existed in which it would be in the best interests of children" for a positive notice to be issued.

The Tribunal's decision

[19] The Tribunal conducted a merits review of the Commissioner's decision. In its reasons, the Tribunal identified the following matters, which it referred to as "risk factors":

- The past offence – and related allegation;
- Childhood history of abuse and neglect;
- History of fractured parenting and family bonding;
- Loss of cultural identity;
- An earlier history of managing stress through alcoholism and dysfunctional behaviour;
- Opportunity for contact with families and children in future work, some of whom may be vulnerable.

[20] The Tribunal also identified the following matters, which it referred to as "protective factors":

- The narrow timeframe of the offending behaviour;
- Age then and now, with increasing maturity;
- Mr Maher's candour in acknowledging his offences and vulnerability;
- Lack of resentment and blame on others;
- An acknowledgement that he was responsible and that he had harmed the young girls involved;
- A protective and successful parental role not only with his own five children but with subsequent foster children;
- Post the offence, his effective management of stress, eg marriage breakdown, loss of his job and the church melee;
- A stable relationship of 5 years' duration;
- Devotion to the church and the value of this role in his identity and self-esteem;
- The support of the Church and his family;
- The strength of this relationship with his children;
- Neither the School nor the Church knew of his offending history, and therefore would not have been alerted to any risk. Yet, there is no evidence of his re-offending during this period;
- His history of offending and associated risk are now in the public domain.

[21] The Tribunal stated that its determination to set aside the Commissioner's decision was also influenced by other considerations. These included the manner in which Mr Maher had reacted to the demands and pressures of working in the aboriginal community in a contained and mature manner, which the Tribunal regarded as indicating personality traits showing a capacity to withstand pressure and sustain a commitment to his people. This was seen as another protective factor in terms of assessment of a risk to children.

[22] In addition, the Tribunal took into account Dr Kar's assessment of Mr Maher as being a "low to very low risk of offending" and his view that, given that it was not possible to have a "no risk" situation, "the assessment process ought to consider the full cluster of risk and protective factors". It also considered Professor Nurcombe's observations that Mr Maher's offending conduct took place in 1988 when he was

experiencing severe marital stress following the disintegration of his relationship with his first wife. Reliance was placed on Professor Nurcombe's opinion that given his current good marital relationship, supportive wife, religious beliefs, freedom from alcohol or drug abuse and genuine remorse, it was unlikely that Mr Maher would offend again.

[23] The Tribunal referred to the statement of Kirby J in *Cabal v United Mexican States* (2001) 180 ALR 593, that for something to be unusual and extraordinary it "is necessary to depart from [the normal] rule." It also had regard to Moore J's judgment in *K v Cullen* (1994) 126 ALR 38 that "exceptional" implies something out of the ordinary and that the test is to compare "the circumstances of the case and what might be thought to be usual circumstances." The Tribunal relied on these judgments for guidance in its weighing of the evidence. It took the view that under the provisions of the Act the norm in cases such as the present was that a negative notice was to be issued, but that the protective factors in the present case moved it out of the "normal rule".

[24] The Tribunal thus concluded that:

> "[46] Whilst the Tribunal acknowledges the Commissioner's position that the community may expect a card holder to have no offending history, it notes that the Act does make provision for a different decision to be made in a case where exceptional circumstances are believed to exist. Thus it is not accurate to say that "at all times and in all cases", a card holder is a person without any criminal history related to risk for children.
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> [47] There are a significant number of protective factors in this case which constitute exceptional circumstances such that it would not harm the best interest of children for a positive notice to be issued under section 102(4) of the [Act].
>
> [48] Under the powers pursuant to section 38 of the [Act], the Tribunal decided to set aside the decision under review and substitute a new decision that it is satisfied that it is an exceptional case in which it would not harm the best interest of children for the commissioner to issue a positive notice to Mr Lester Maher."

The decision of the District Court

[25] In dismissing the appeal from the Tribunal's decision, the learned primary judge stated:

> "[28] In this case the Tribunal was persuaded that it should make a finding that the circumstances were such that it would not harm the best interests of children for a positive notice to issue. It then declared that it was satisfied that this was an exceptional case in which the best interests of children would not be harmed if a blue card were to issue. I can see no error in this approach.
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> [29] It is true that in paragraph 8 of the judgement the members of the Tribunal say that the issue to be determined is whether "exceptional

> circumstances exist such that it would not harm the best interests of children for a positive notice to be issued." The members do then go on to discuss the evidence, and to note a number of facts or circumstances which, in my view, they were entitled to consider. The consideration of those matters led them to conclude that the best interests of children would not be harmed by the issuing of a notice. That, in my view, was the critical finding. In my view, in making that finding, the members of the Tribunal were clearly conscious of the fact that such a finding was "exceptional."
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> [30] In my view it has not been demonstrated that the Tribunal failed to take into account relevant considerations, nor that it took into account irrelevant considerations."

The Grounds of Appeal

[26] There are 12 proposed grounds of appeal raised in this application. However, these may be reduced to 6 grounds, since they are expressed in terms of alleged errors of the Tribunal, and repeated as alleged errors made by the learned primary judge. Grounds 9 and 10 were abandoned, so the proposed grounds of appeal are now five. I now turn to the grounds of appeal.

Grounds 1 and 2 - Error in considering whether there were exceptional circumstances rather than whether there was an exceptional case

[27] It is alleged that the Tribunal erred in considering whether there were "exceptional circumstances", as opposed to whether there was an "exceptional case", in which it would not harm the best interests of children for a positive notice to be issued. It is contended that the learned primary judge also erred in not finding such an error on the part of the Tribunal. Complaint was also made of what was said to be the Tribunal's failure to explain why it considered it to be an exceptional case, it being contended that the presence of a number of exceptional circumstances did not necessarily make a case an exceptional one.

[28] There is however nothing in the Tribunal's reasons to suggest that it proceeded on the basis that the presence of exceptional circumstances necessarily rendered the case an exceptional one. Rather, the view taken by the Tribunal was that, in this particular case, the exceptional circumstances rendered the case an exceptional one. Furthermore, notwithstanding that the Tribunal found that there were present a number of significant protective factors which constituted "exceptional circumstances", such that it would not harm the best interest of children for a positive notice to be issued, its ultimate determination was made having regard to the criterion specified by the Act and its satisfaction that that criterion had been met. I can see no error in that approach.

[29] Nor do I accept that there can be any complaint that the Tribunal failed to state why it formed that view. The published reasons make it clear that, in the circumstances of this case, the exceptional circumstances identified by the Tribunal were considered by it to take the case outside the normal rule and thus make it an exceptional case. I therefore do not consider that any error is identified by these grounds of appeal.

Grounds 3 and 4 – Whether there was an exceptional case in which it "would not" harm the best interests of children for a positive notice to be issued

[30] On behalf of the applicant it is contended that even though the Tribunal correctly stated, in paragraph 48 of its reasons, the test to be applied under s 102(4) of the Act, it did not meaningfully address the phrase "would not" in that provision. The applicant did not by this ground seek to advance an argument that, in order for there to be satisfaction for the purpose of s 102(4), there must be certainty that it would not harm the best interests of children that a positive notice be issued. It was accepted by both parties that the test in *Briginshaw v Briginshaw* (1938) 60 CLR 336 was applicable in respect of the level of satisfaction needed for the purposes of s 102(4); that is, that the Tribunal was required to be satisfied on a balance of probabilities, bearing in mind the gravity of the consequences involved, that there was an exceptional case, in which it would not harm the best interests of children for a positive notice to be issued.

[31] The crux of the submission advanced under these grounds was that the Tribunal did not turn its mind as to why the present case was an exceptional case in which it would not harm the best interests of children for a positive notice to be issued. It is said that the Tribunal did not specifically consider whether the issue of a positive notice "would not" harm the best interests of children and instead directed its enquiry as to whether the issue of a positive notice would constitute "too much risk". This ground raises a similar complaint to that in grounds 1 and 2. In my view, it is apparent from the reasons given by the Tribunal, that it did consider whether there was an exceptional case in which the best interests of children would not be harmed by the issuing of a positive notice. Importantly, as was acknowledged by counsel for the Commissioner, this is not the occasion for a merits review of the decision of the Tribunal. It is therefore not appropriate on this appeal to review the evidence in order to determine whether a suitability notice ought to be issued. The body charged with jurisdiction to conduct a merits review was the Tribunal.

[32] I do not consider that there is substance in these grounds.

Grounds 5 and 6 – Whether there were sufficient factors to move the case out of the normal rule

[33] It was submitted that the Tribunal erred in considering whether there were sufficient factors to move this case out of the normal rule and that the learned primary judge should have so determined. This raises matters which overlap with grounds 3 and 4. Reliance was placed on authorities in which the concept of "exceptional case" has been considered. It was contended that there was nothing out of the ordinary or exceptional or unusual about the circumstances relied upon by the Tribunal in reaching its decision.

[34] I would endorse the approach of Fullagar J in *Re Imperial Chemical Industries Ltd's Patent Extension Petitions* [1983] VR 1, in adopting the warning of Luxmore J in *Perry and Browns Patents* (1930) 48 RPC 200, that "it would be most unwise to lay down any general rule with regard to what is an exceptional case […] All these matters are matters of discretion." I do not consider that the Tribunal proceeded on the basis of any error as to what was required as a matter of law to be demonstrated by way of exceptional case under the Act. As I have mentioned, it is not

appropriate for this court to conduct a merits review of the Tribunal's decision. This ground also fails.

Grounds 7 and 8 – Whether there was an error in applying the test outlined by Kirby J in Cabal v United Mexican States

[35] It was contended that the primary judge erred in failing to find that the Tribunal erred in law in applying the test referred to by Kirby J in *Cabal v United Mexican States* (2001) 180 ALR 593, rather than that of the Court in *United Mexican States v Cabal* (2002) 209 CLR 165, which determined the appeal from Kirby J's decision. I do not consider that the Tribunal's reference to the decision of Kirby J results in any demonstrable error of law. The Tribunal's conclusion in paragraph 48 of its reasons was reached applying the criterion specified in s 102(4) of the Act. And, in any event, I can see no error in the underlying approach taken by the Tribunal, that what was needed to be shown was something "extraordinary" which removed the case from the "normal rule", the norm being that, in cases such as the present, Mr Maher's conviction would result in a negative notice.

Grounds 11 and 12 - Whether irrelevant considerations were taken into account

[36] It was contended that the Tribunal erred in taking into account irrelevant considerations and that the learned primary judge ought to have so found. It was submitted that the matters to which regard is to be had in deciding whether there was an exceptional case for the purposes of s 102(4) are those specified in s 102(5). It was argued that in order that a matter fall for consideration under subsections 102(5)(a) to (e), it was necessary that the matter be one "relating to the commission or alleged commission" of an offence.

[37] In its written submissions the Commissioner asserted that the irrelevant considerations which the Tribunal took into account were the considerations:

(a) that "work in the aboriginal community… is extremely demanding and results in a high turn over of staff" (see para 37);

(b) concerning Mr Maher's reaction to his dismissal from the Murri school (see para 38).

[38] In oral submissions this ground was expanded to one that many of the matters stated as forming part of the exceptional case were irrelevant because they were unrelated to the offence for which Mr Maher was convicted.

[39] In support of its submission that each of subsections 102(5)(a) to (e) of the Act are to be construed as qualified by the words "relating to the commission or alleged commission of the offence" which appear in the opening part of s 102(5), counsel for the Commissioner referred to the *Commission for Young Children and Young People and Young Guardian Act* 2004, which provides in s 102A for a new provision to replace s 102(5) as follows:

"(1) This section applies if the commissioner is deciding whether or not there is an exceptional case as mentioned in section 102(4) or (7).

> (2) If the commissioner is aware that a person has been convicted of, or charged with, an offence, the commissioner must have regard to the following -
>
> (a) …
>
> (b) anything else relating to the commission, or alleged commission, of the offence that the commissioner reasonably considers to be relevant to the assessment of the person."

[40] While that provision clarifies the position under the Act, I do not consider that it is of assistance in the interpretation of s 102(5) of the Act. In any event, I do not consider it necessary for the purposes of this appeal to determine that issue of construction of s 102(5), as I do not consider that the matters to which the Tribunal had regard fell outside s 102(5)(e) on either view, nor do I consider that s 102(5) precluded the Tribunal from having regard to the considerations in question, even if they did fall outside the parameters of that provision.

[41] If the correct interpretation of s 102(5)(e) is that contended for by the Commissioner, I am nevertheless of the view that the matters to which the Tribunal had regard were relevant matters "relating to the commission or alleged commission" of an offence and "reasonably … relevant to the assessment" of Mr Maher. The manner in which the considerations complained of by the Commissioner were taken into account is identified in the Tribunal's reasons. It is apparent that the various matters and in particular the matters complained of in the written submissions were considered by the Tribunal as relevant to Mr Maher's ability to cope with stressful situations in a mature manner and without resorting to abuse of alcohol as had occurred in the past. Seen in that light, these matters can be regarded as matters reasonably considered to be relevant to the assessment of Mr Maher and as "relating to the commission of the offence" in a broad sense, in that they related to an inquiry as to whether circumstances present at the time of the commission of the offence are now absent.

[42] Furthermore, even if that were not the case, I do not consider that s 102(5) of the Act is to be construed as prescribing the only matters to be considered by the Commissioner in determining an application under s 102(4). Section 102(5) does not expressly or impliedly confine the Commissioner to considering only the matters specified therein and there is no basis for construing the provision in such a restrictive manner. In my view, s 102(5) merely specifies certain particular matters which the Commissioner is obliged to consider in deciding the application.

[43] In the circumstances, I do not consider that the learned primary judge erred in dismissing the appeal and upholding the decision of the Tribunal. The orders I would make are that leave to appeal be granted and that the appeal be dismissed with costs.