

QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL

CITATION: *NS v Director-General, Department of Justice and Attorney-General* [2019] QCAT 76

PARTIES: **NS**
(applicant)
v
DIRECTOR-GENERAL, DEPARTMENT OF JUSTICE AND ATTORNEY-GENERAL
(respondent)

APPLICATION NO/S: CML116-18

MATTER TYPE: Children's matters

DELIVERED ON: 27 March 2019

HEARING DATE: 20 February 2019

HEARD AT: Brisbane

DECISION OF: Member Murray

ORDERS:

- 1. The decision of the Director-General, Department of Justice and Attorney-General that the Applicant's case is an exceptional one within the meaning of s 221(2) of the *Working with Children (Risk Management and Screening) Act 2000 (Qld)* be set aside, and replaced by the Tribunal's decision that the Applicant's case is not an exceptional case.**
- 2. Publication of the names of the Applicant, her family and witnesses and any other information that could identify the children in any way other than to the parties to the proceedings is prohibited pursuant to s 66(1)(a) of the QCAT Act.**
- 3. Accordingly these reasons are published in a de-identified format.**

CATCHWORDS: ADMINISTRATIVE LAW – ADMINISTRATIVE TRIBUNALS – QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL – review of decision by respondent to issue a negative notice

FAMILY LAW AND CHILD WELFARE – CHILD WELFARE UNDER STATE OR TERRITORY JURISDICTION AND LEGISLATION – where there are breaches of Standards of Care – where applicant was convicted of offences that are not serious offences – where applicant issued with negative notice under the

Working with Children (Risk Management and Screening) Act 2000 (Qld) – whether exceptional case – whether or not in best interests of children to issue positive notice

Queensland Civil and Administrative Tribunal Act 2009 (Qld), s 19, s 20

Working with Children (Risk Management and Screening) Act 2000 (Qld), s 5, s 6, s 221, s 226, s 353, s 358

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

Chief Executive Officer, Department for Child Protection v Scott [No 2] [2008] WASCA 171

Re FAA [2006] QCST 15

RPG v Public Safety Business Agency [2016] QCAT 331

Child Protection Act 1999 (Qld) Division 3

APPEARANCES & REPRESENTATION:

Applicant: Self-represented

Respondent: A Webber, Solicitor and representative of the Director-General, Department of Justice and Attorney-General

REASONS FOR DECISION

- [1] This is an application for review of a decision by the Director-General, Department of Justice and Attorney-General ('DJAG') Blue Card Services ('BCS') to issue a negative notice under the *Working with Children (Risk Management and Screening) Act 2000 (Qld)* ('the WWC Act') to NS on 22 March 2018.
- [2] The applicant requires a blue card to be a foster carer. On 16 April 2018, NS filed an application in the Tribunal to review DJAG's decision that her case was an 'exceptional case' in which it would not be in the best interests of children for NS to be issued with a positive notice and blue card.
- [3] NS's criminal history in the Reasons contains three convictions between 1965 and 1994 of larceny from shop and theft from a shop. NS's eligibility to hold a blue card was previously assessed and considered and she was granted a positive notice and blue card on three earlier occasions with the most recent occasion being 22 June 2012.
- [4] BCS filed in the Tribunal complaint material received from Department of Child Safety Services, Youth and Women ('CSS')¹ and documents under a Notice to Produce to about:
 - (a) Child protection history recorded by CSS relating to NS's care of children as a foster carer.

¹ S 63 QCAT Act and s 187(3)(i) *Child Protection Act 1999 (Qld)*.

The ‘blue card’ legislative framework

- [5] Employment screening for child-related employment is contained in chapter 8 of the WWC Act.² The object of the WWC Act is to promote and protect the rights, interests and wellbeing of children by, in effect, screening persons engaged in employment or businesses that may involve working with children.³ It is protective legislation and has been described as ‘precautionary’ in its approach.
- [6] The Tribunal is to decide the review in accordance with the WWC Act and *Queensland Civil and Administrative Tribunal Act 2009* (Qld) (‘QCAT Act’). The Tribunal has all the functions of the decision maker for the decision under review. The purpose of the review is to produce the correct and preferable decision. In meeting that purpose the Tribunal must hear the review by way of a fresh hearing on the merits.
- [7] A child-related employment decision is to be reviewed in accordance with the principle that the welfare and best interests of children are paramount.⁴ The overriding concern is the potential for future harm to children.

Complaint information and Child Safety Services material

- [8] NS and her husband NL have been foster carers since 2008 and NS was first issued a blue card at this time.
- [9] In 2010 two siblings were placed with NS and her husband and later the children’s half sibling as a baby (sibling group (1)). On 28 April 2011 BCS received complaint information with details of incidents concerning these children in NS’s care. Under a Notice to Produce in 2018 BCS received further information about these allegations, that:
- (a) NS had smacked a child on the legs. She bit one of the children in response to the child biting another child in an effort to curb the biting behaviour.
 - (b) NS told a child she would use their head as a mop if they continued to urinate on the floor.
 - (c) NS told the children not to tell anyone she had done this.
- [10] NS denied to CSS and to the Tribunal that she smacked the child. She said she has never hit a child and did not smack her own children when they were growing up.
- [11] NS admitted to CSS that she bit the child. She said this strategy had worked on her own children to stop them from biting other children. She told the Tribunal she ‘mouthed’ the child’s arm and did not use her teeth. NS said the departmental officer told her she is not to bite children and this was not to be used as a behaviour management strategy. NS told the Tribunal she took this on board and never bit or mouthed a child again.

² Child-related employment decision is defined to include a chapter 8 reviewable decision: s 358.

³ WWC Act, s 5.

⁴ Ibid, s 360. See also s 6.

- [12] NS admitted to CSS that she told one of the children she would use the child's head as a mop if they urinated on the floor again. NS told the Tribunal this was the wrong thing to say and soon realised this after talking with CSS.
- [13] From this event an allegation was later raised by the child that NS flushed the child's head in the toilet. NS denied doing this. NS thought that this allegation related to either the situation when she said she would use a child's head as a mop or to a situation where the child had smeared faeces over the bathroom walls. She told the child this was wrong and sent them to their room and she cleaned it up.
- [14] NS believed the children's mother told the children to tell CSS that the carers smacked them and flushed their head in the toilet and had done this in an effort to have the children returned to her.
- [15] CSS recorded a breach of the Standards of Care in relation to these matters. The children were not removed from the carers.
- [16] Sometime later this sibling group was reunified with their mother for a period of time.
- [17] On 18 April 2012 BCS received complaint information that:
- (a) A community visitor was told that children (sibling group (2)) in NS's care would not be returning to her care as a bruise had been found on one of the children's ears. It was confirmed the children had been removed from NS's care during the investigation and assessment however the reason as to why was not confirmed.
- [18] Under Notice to Produce material in 2018 BCS received further information about this matter. Sibling group (2) was placed with NS and her husband NL in 2012. One of the children was running down the hallway in NS's home and photos fell off the wall and smashed onto the floor. The child started crying saying 'don't tell daddy' and appeared to be upset that the carer would tell their father and the child would be in trouble. It was reported by CSS that NS told the child it was 'ok', it was an accident and they must not run in the house.
- [19] The children were removed during the investigation. CSS substantiated physical harm and found NS breached Standards of Care.
- [20] NS maintained that the bruise was present after the child returned from contact with their family and has always denied twisting the child's ear. NS told CSS that she was ill-equipped to continue caring for the sibling group and asked that they not return to her care. NS was required to undertake specialised training to develop age appropriate behaviour management strategies before being considered for future placements.
- [21] NS's blue card was renewed 26 June 2012.
- [22] NS attended a presentation in July 2013 on 'Behaviour Management Ideas for Kids in Care'.
- [23] NS and NL moved interstate and did not continue fostering children and NS did not renew her blue card and it consequently expired.

- [24] While living interstate in 2017 CSS contacted NS and asked if she and NL would take the sibling group (1) who were placed with her in 2010. NS told CSS she did not hold a blue card at this time. The children were nevertheless placed with her.
- [25] Concerns were raised and assessed about NS's treatment of children in sibling group (1) in 2018:
- (a) NS told the children to pack their bags and said that CSS was going to take them away for misbehaving. She then returned their bags to their rooms.
 - (b) NS had discussed matters of conflict with the children's family in front of the children.
 - (c) NS and NL favoured one child over another.
- [26] NS admitted to packing the children's bags and telling them CSS was going to move them but then later returned their bags to their rooms.
- [27] CSS assessed these concerns and found NS breached three Standards of Care in relation to sibling group (1). It was noted that the carers required intensive training about trauma, attachment and behaviour management. The children were not removed from NS's care.
- [28] NS and her husband and the sibling group (1) moved back to Queensland in 2018. They sold their house and bought another property so the children could be closer to their school and family. The children remained living with NS and her husband until February 2018 when she unsuccessfully applied for a Blue Card and was issued with a negative notice on the basis of the complaint material provided to BCS in 2011 and 2012.

Personal history about NS

- [29] NS told the Tribunal that she was born in another country and moved to Australia with her parents as a child. She has two siblings one in another country and another interstate. She worked in a factory, operating machinery and in cafes since she was a teenager.
- [30] NS is challenged to read and write and requires assistance with this.
- [31] NS was previously married and had two children. She suffered considerable domestic and family violence at the hands on her first husband. Eventually when it was safe she left her husband and took her children. At some point she returned to live with her husband but it was not long before he was again abusive to her and she left again.
- [32] NS told the Tribunal that one of her children suffered from anxiety and stress as a result of the violence witnessed and experienced from their father. NS said she gave this child a lot of love and attention and took them to see counsellors over the years. She said her child 'went off the rails' over the years and sadly, eventually took their own life. NS has suffered grief and sadness through the loss of her child.
- [33] NS has been married to her current husband for about 15 years. She said they have a happy and loving relationship. They both share a love of children and are

committed to caring for disadvantaged children. They have a grandchild who lives interstate with whom they have regular contact.

What NS says about the child protection concerns and BCS's decision

- [34] NS said she and NL have cared for about 30 children including respite placements since 2008.
- [35] NS said the first placement was siblings with high needs. After about nine months she felt out of her depth in managing their behaviour and asked CSS if they could be placed elsewhere.
- [36] NS described various placements to the Tribunal that worked well and how much she enjoyed caring for these children. She said it can be hard work and she has spent a lot of time and money on each child to ensure they had new clothing and were well settled at school. NS described herself as a giving person, she likes to cook and enjoys having family, including where appropriate the foster children's extended families, over for meals and celebrations. She said she and NL transported the children to contact and picked them up. She said they were happy to do what was asked of them by CSS if it helped the children and their families.
- [37] NS said she didn't have a blue card when living out of Queensland and CSS still placed sibling group (1) with her and NL for more than a year. These were the children who were the subjects of concerns in 2011 and were not removed from their care at a finding she breached Standards of Care.
- [38] NS said she and her husband sold their house and moved back to Queensland in order for sibling group (1) to be closer to their school and family. She said that she loves these children and is committed to them and prepared to do whatever is necessary to provide them with a happy and safe home.
- [39] During the time the children were not in her care she maintained contact with them and their family. She said she often looked after them, picked them up from school, and bought them school supplies and clothes.
- [40] NS and NL took the children and their mother overseas for a holiday while the children were in the mother's care. CSS approved this trip.
- [41] NS and NL had periodic contact with the extended family of sibling group (1) such as family get-togethers on a weekend or Christmas. NS and NL looked after the cousins of sibling group (1) for a few days when their parents needed to attend a funeral interstate.
- [42] They took sibling group (1) interstate for Christmas with NS's family and grandchild.
- [43] NS said CSS only moved the children when she applied to renew her blue card once she moved back to Queensland to live and was unsuccessful in gaining a positive notice.
- [44] NS told the Tribunal the reason sibling group (1) are no longer in her care was because of her own behaviour. She said she has told CSS when she has done the wrong thing by the children. She admitted when she yelled at the children when she

lost her temper with them. She admitted to biting or mouthing one of the children to stop them biting other children. She said on a few occasions she was frustrated by the children's extreme behaviour. She admitted to saying to a child she would use the child's head as a mop. She also admits to packing the children's belongings and telling them that CSS would collect them due to their behaviour. She then told them this wasn't true and returned their bags to their rooms. She said she has been out of her depth in managing some of the children's behaviour and asked for help. She was worried this would be interpreted as not coping and the children would be removed or not placed with her.

- [45] NS said she did not hit the children and she did not flush a child's head in the toilet. She believes these were false allegations made against her by the children's mother. She said she did not twist the ear of another child and a bruise was behind the child's ear after contact with their family.
- [46] NS said she has learned that her responses are not behaviour management strategies, they are 'old school' ways that particularly should not be used on foster children. She told CSS she could see the impact and acknowledged the trauma this has caused when CSS pointed this out to her.
- [47] NS said the children would have felt like they were going to be thrown out of their own home and tossed away when she told them CSS would be taking them to another placement. She said the children had a safe home with her and NL and she accepted she did the wrong thing. NS became upset and said she had taken CSS' words on board and would never do this again.
- [48] NS accepted the allegation she may have treated one of the children more favourably. She said she gave this child extra love as the child's siblings and mother treated this child differently as this child has a different father to the other children. NS said she was trying to balance out the affections and treatment of the child by the family. She said this child is closely bonded to NS and NL and seeks out extra affection. She said she didn't treat the other child any less and she loved them both but felt one child needed extra love.
- [49] NS admitted that she hadn't always felt equipped to deal with the trauma these children have suffered from their own families before they came into foster care where they should expect to feel safe, looked after and loved.
- [50] Other times she said she did feel capable. She said the children from sibling group (1) still call her to talk to her. She said she would always be available to them. She provided recent letters and drawings from the children expressing their love for NS and NL.
- [51] NS was not able to describe what she had learnt in the two courses she has undertaken and said she knows little about trauma, abuse and attachment and the effects of this on a child's developing brain. She said she is prepared to undertake more courses and education to help her better understand the needs of children who have suffered abuse.

Witnesses

- [52] Four family members of sibling group (1) prepared references and appeared in person and by telephone and spoke favourably of NS's care of the children.

- [53] The children's mother, maternal aunt, maternal grandfather and ex-partner of the maternal grandfather told the Tribunal that NS took good care of sibling group (1), they were well-fed and clothed. They said the children loved her, called her Nanny and her husband, Poppy. They said they only heard NS tell the children to settle down or sent them to their bedrooms as a form of discipline. They said the children felt loved by NS and reported to their family they were happy and looked after.
- [54] The children's maternal grandfather said that once the children were reunified with their mother he and his family met NS and NL and they had BBQ lunches together on occasions. The grandfather drove the children and NS and NL to and from the airport when they went on an overseas holiday which NS paid for. He said NS and NL have become extended family to the children and their mother. The children's mother relied on NS to help her with the children.
- [55] The grandfather said he never had any concerns with NS's care for the children. She was prepared to pick them up at a moment's notice and to help their mother whenever it was necessary. He NS and NL were focussed on the welfare and safety of the children.
- [56] The maternal aunt said she has a distant relationship with her sister, the children's mother. She has had contact with the CSS to try to enable her children to see their cousins and to be involved in the lives of the sibling group (1). She said she trusts NS to the point that she asked her to care for her own children for a few days while she and her husband needed to attend a funeral interstate. Her children spoke well of the care and kindness they received when they stayed with NS and NL.
- [57] The maternal aunt described a complex and traumatic childhood for sibling group (1) that required particular skills to care for them. She had no concerns about any children being in NS's care.
- [58] The mother of sibling group (1) said that her children went into the care of NS and NL in about 2010 for about 18 months and the children were happy with her. The mother said she disciplines her children herself and has not seen or needed NS to discipline them. She said NS and NL took her and the children overseas for a holiday. NS has stayed in touch with the mother and helped her with the children when the children were reunified with her. She said the children were again placed by CSS with NS in 2017 and she was happy about this at the time.
- [59] There was information that the mother may have influenced the children or may have made false reports herself about NS to CSS so that the children would be reunified with her. This was put to the mother by BCS. The mother reacted very strongly and said she could not remember if she did or did not make any complaints about NS. She said she and NS had issues when the children were first placed with NS but did not want to elaborate or add anything further apart from the fact she considers NS favoured one child over another.

Issuing a positive notice unless it is an 'exceptional case'

- [60] The WWC Act deals with 'blue card' applications in two broad categories:

- (a) Where a positive notice **must be** issued unless the chief executive is satisfied it is an exceptional case in which it **would not be** in the best interests of children for a blue card to be issued;⁵
- (b) The chief executive **must** issue a negative notice to a person if the person is (or was) a disqualified person **or** has been convicted of a serious offence.⁶

[61] Where a person has been charged with, or convicted of an offence, the Tribunal must have regard to considerations prescribed by s 226 of the WWC Act in determining where an exceptional case exists.

[62] NS has three convictions for the offences of ‘larceny from shop’ and ‘theft from shop’. These offences occurred between 1965 and 1994. NS’s eligibility to hold a blue card, was previously assessed and consideration was given to these offences. She was granted a positive notice and blue card on three occasions since 2008. The most recent issue was 22 June 2012.

[63] It was on the basis of the concerns contained in complaint information that had been provided to BCS in 2011 and 2012 that formed the reasons for issuing a Negative Notice. Material received from CSS that included concerns received in 2018 also formed the reasons for issuing a negative notice.

What is meant by ‘exceptional case’?

[64] The decision under review is whether NS’s case is an ‘exceptional case’⁷. What constitutes an ‘exceptional case’ is a matter of fact and degree in the whole of the circumstances of each particular case.⁸

[65] The Oxford Dictionary defines exceptional as ‘of the nature of or forming an exception, out of the ordinary course, unusual, special’.

[66] The application of the WWC Act is intended to put gates around employment to protect children from harm⁹; the legislation is ‘protective’.

[67] Section 226(2) of the WWC Act sets out a non-exhaustive list of matters, which must be considered in deciding whether an exceptional case exists, such as time passed since committing offences and changes in their lives and insight into their past. The Tribunal must consider these, but is not confined just to these matters.

Relevant risk and protective factors arising from the material

[68] The Court of Appeal in *Commissioner for Children and Young People and Child Guardian v Maher*¹⁰ accepted the approach of considering relevant risk and protective factors in deciding whether a particular case is exceptional. BCS considered the following risk factors are prevalent -

⁵ Ibid, s 221.

⁶ Ibid, s 225(1)(c).

⁷ WWC Act, s 353

⁸ *Re FAA* [2006] QCST 15, [22].

⁹ Ibid [29], citing the second reading speech *Commissioner for Young Children and Young People Bill*, 4,391.

¹⁰ [2004] QCA 492

- (a) NS was of a mature age when the child protection concerns were raised where she should have understood how harmful her behaviours were to vulnerable children.
- (b) CSS found NS breached three Standards of Care in relation to children in her care in 2011. This is harmful to children who have already experienced abuse and trauma from their parents.
- (c) CSS has substantiated physical harm to a child in 2012 when his ear was twisted and it caused bruising.
- (d) Despite NS participating in a CSS course in behaviour management there were further concerns in 2018.
- (e) BCS considered there is a pattern of inappropriate behaviour towards vulnerable children and that NS has not accepted responsibility for the majority of concerns and insight into the effects of her behaviour on the children. Further NS is not able to identify any triggers to her inappropriate behaviour or the strategies she has put in place to ensure that she does not resort to similar behaviour in the future.

[69] These matters were further explored during the hearing and discussed further under NS's evidence.

[70] There are positive factors concerning NS:

- (a) NS has provided references, mostly from sibling group (1)'s family who positively expressed her abilities as a carer for these children. Four family members gave evidence during the hearing that they witnessed the way she was committed to these children and how well she cared for them. They described the children's extended family with conflicting dynamics with the sibling group experiencing a number of placements.
- (b) NS has demonstrated her commitment to care for foster children. She and NL have cared for about 30 children including respite placements since 2008.
- (c) BCS renewed NS's Blue Card in 2012.
- (d) NS is committed to sibling group (1). She sold her house located outside of Queensland and bought another property so the children would be closer to their school and their family.
- (e) Children from sibling group (1) have recently sent letters and drawings to NS expressing their love for her.
- (f) It is noted NS denies some of the allegations, most of them are historic, however she has readily accepted responsibility for her actions and behaviour for those concerns she says she is responsible for and this is recorded in the CSS material.
- (g) NS did express insight into and remorse about her behaviour and the Standards she breached. She believes her behaviour would have had a traumatic effect on the children. She believes she was ill-equipped to manage their behaviour. She

did attend two presentations about behaviour management and perhaps her poor literacy has challenged her ability to properly understand this information.

- (h) NS believes the children from sibling group (1) are currently living in residential care and she blames herself for this. NS believes CSS has not been able to find an appropriate home placement for the children. She said the children had a safe and happy home with her and her actions resulted in a negative notice which means the children had to be moved. NS said she has taken on board what CSS has told her and is prepared to undertake any course necessary to ensure she understands the needs of vulnerable children and how to better manage their behaviour. This was recommended by CSS at the finding that NS breached Standards of Care in 2018.

Conclusion

- [71] CSS did not remove sibling group (1) in 2011 from NS's care after the concerns were assessed.
- [72] After finding NS breached Standards of Care in 2012 CSS was satisfied NS was a suitable carer under the legislation¹¹ and continued to place children with her.
- [73] BCS issued a blue card to NS after the concerns were assessed in 2012.
- [74] CSS placed sibling group (1) with NS again in 2017. CSS assessed concerns about NS's behaviour management strategies for these children in 2017 and did not remove the children but recommended intensive training for her. This training did not occur and NS said she has approached CSS to undergo this training in the future.
- [75] The Tribunal considered that even though NS attended two presentations about behaviour management her poor literacy may have challenged her ability to properly understand this information. This seems insufficient training for a foster carer to undertake since becoming a foster carer in 2008.
- [76] NS has shown a commitment to sibling group (1) when she sold her home and moved back to Queensland in 2018 so the children could be closer to their family and school. She applied for the renewal of her blue card at this time. This was refused and the children were consequently removed by CSS.
- [77] The Tribunal found that NS did express insight into and remorse about her behaviour and the Standards she considered she breached. NS readily accepted responsibility for her behaviour for those concerns for which she says she is responsible. NS admitted to her lack of knowledge of abuse and trauma experienced by children before coming into care but she expressed the detrimental effects of her behaviour on vulnerable children. She was sincere in her expression of deep regret and remorse.
- [78] The Tribunal did not find evidence that these concerns over a ten year period demonstrated a pattern of inappropriate behaviour that amounts to an exceptional case as considered by BCS. The concerns are mainly historical occurring seven and eight years ago.

¹¹ Child Protection Act 1999 (Qld) Division 3

- [79] Based on the findings of fact, weighing the risk and protective factors identified and the other circumstances during the proceedings, the Tribunal considers, this does not render the case an exceptional case in which it would not be in the best interests of children and young people for NS to be issued with a positive notice a blue card.
- [80] The decision of the Director-General, Department of Justice and Attorney-General that the Applicant's case is an exceptional one within the meaning of s 221(2) of the Working with Children (Risk Management and Screening) Act 2000 is set aside, and replaced by the Tribunal's decision that the Applicant's case is not an exceptional case.

Non-publication

- [81] The Tribunal orders that publication of the names of the Applicant, her family and witnesses and any other information that could identify the children in any way other than to the parties to the proceedings is prohibited pursuant to s 66(1)(a) of the QCAT Act. Accordingly these reasons are published in a de-identified format.