

QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL

CITATION: *Ibarra v Director-General, Department of Justice and Attorney-General* [2021] QCAT 225

PARTIES: **CAMILO ANDRES ARISTIZABAL IBARRA**
(applicant)

v

**DIRECTOR-GENERAL, DEPARTMENT OF
JUSTICE & ATTORNEY-GENERAL**
(respondent)

APPLICATION NO/S: CML334-19

MATTER TYPE: Childrens matters

DELIVERED ON: 22 June 2021

HEARING DATE: 17 December 2020

Further written submissions of 9 February 2021

HEARD AT: Brisbane

DECISION OF: Member Ellis

ORDERS:

- 1. The decision of the delegate of the Director-General, Blue Card Services, Department of Justice and Attorney-General made on 8 August 2019 that 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 confirmed.**
- 2. The decision of the Tribunal is to be delivered to the parties by email.**

APPEARANCES & REPRESENTATION:

Applicant: Self-represented (in person)

Respondent: G. Yates, In-house, Director-General, Department of Justice and Attorney-General

REASONS FOR DECISION

- [1] This is an application filed on 5 September 2019 by Camilo Andres Aristizabal Ibarra (the Applicant) to review the decision made on 8 August 2019 of a delegate of the Director-General, Blue Card Services (the Respondent) to issue a negative notice pursuant to the *Working with Children (Risk Management and Screening) Act 2000 (Qld)* (the “WWC Act”).

- [2] The decision to issue a negative notice followed the decision that the Applicant's case was an 'exceptional' case within the meaning of section 221(2) of the WWC Act in that it would not be in the best interests of children for the Applicant to be issued with a positive notice.

Summary

- [3] In 2016, the Applicant was employed as a Youth Worker on a casual basis with Families South Australia. In that role he worked within residential facilities with children under Child Protection Orders. During the course of his employment and on 16 October 2016, the Applicant assaulted two children under his care. His employment was terminated.
- [4] He was charged with criminal offences relating to the assaults and on 6 October 2017 in the Magistrates Court in South Australia, the Applicant entered guilty pleas to both offences and was sentenced to two years good behaviour bond with a \$1,000 recognisance.
- [5] The Applicant previously held a blue card in Queensland and under the WWC Act, such card having been issued on 11 January 2017.
- [6] On 4 June 2019, the Respondent was notified of a change in the Applicant's criminal history and, following receipt of submissions, issued a negative notice under the WWC Act on 8 August 2019.
- [7] The Applicant filed this application in time on 5 September 2019.
- [8] The matter was listed for hearing on 17 December 2020 and at that time the following evidence was relied upon:
- (a) Application filed on 5 September 2019;
 - (b) Life Story filed on 10 October 2019;
 - (c) Statement of Evidence filed on 11 February 2020;
 - (d) Statement of KC, Coordinator at AHSS Out of Hours School Care 25 July 2019;
 - (e) Statement of Alexandra Plazas, psychologist, 5 December 2019;
 - (f) Statement of FM, Coordinator at PCYC [suburb] 4 September 2019;
 - (g) Statement of TI, Manager at A Child Care Centre 21 August 2019;
 - (h) Statement of MM, Head Coach at G football Franchise 21 August 2019;
 - (i) Statement of KF, Coordinator at PCYC [suburb] 22 August 2019;
 - (j) Statement of MW, Principal at SA Primary School, 21 August 2019;
 - (k) Oral evidence from the Applicant and those witnesses mentioned in para (d), (e), (f), (g), (h);
 - (l) The Respondent's material BCS1-54;
 - (m) Documents produced pursuant to two Notices to Produce being NTP1-93 (documents from Department of Education and Child Development (South Australia) and South Australian Police).

- [9] The Respondent provided written submissions at the conclusion of the hearing and supplemented those with oral submissions. Following the hearing, the Applicant filed written submissions on 9 February 2021. The Respondent was given an opportunity to reply but elected not to reply.

Legislative framework

- [10] The Queensland Civil and Administrative Tribunal (the Tribunal) has jurisdiction to decide the review pursuant to sections 17 and 18 of the *Queensland Civil and Administrative Tribunal Act 2009* (Qld) (“QCAT Act”) and section 354(1) of the WWC Act. In undertaking the review, the Tribunal has all the functions of the original decision maker and must decide the review in accordance with the QCAT Act and the enabling Act (in this case the WWC Act) under which the decision was made.¹
- [11] Section 24 of the QCAT Act outlines what the Tribunal may do on review. The Tribunal must hear and decide the matter by way of a fresh hearing on the merits, to produce the correct and preferable decision.²
- [12] Section 24(1) of the QCAT Act says that in proceedings for a review of a reviewable decision, the Tribunal may:
- (a) Confirm or amend the decision;
 - (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.
- [13] The findings of fact by the Tribunal are on the balance of probabilities, which is that the Tribunal must be “comfortably satisfied” having regard to the nature and consequence of the facts to be proved: *Briginshaw v Briginshaw* (1938) 60 CLR 336.
- [14] The object of the WWC Act is to promote and protect the rights, interests and wellbeing of children in Queensland through a scheme to screen and ensure that persons who wish to work with children are suitable to do so.³ An overarching principle is that the welfare and best interests of children are paramount.⁴
- [15] The WWC Act provides that where a person has been charged with or convicted of an offence other than a serious offence, a positive notice must issue unless the Respondent is satisfied it is an ‘exceptional’ case in which it would not be in the best interests of children for a positive notice to be issued.⁵ ‘Serious offence’ is now defined in section 15 of the WWC Act.⁶
- [16] The term ‘exceptional case’ is not defined in the WWC Act.
- [17] The Macquarie Concise Dictionary (third edition) defines exceptional as “forming an exception or unusual instance; unusual; extraordinary”.

¹ Section 19, QCAT Act.

² Section 20, QCAT Act.

³ Section 5(b), WWC Act.

⁴ Section 360, WWC Act.

⁵ Section 221, WWC Act.

⁶ At the time of the original decision, Serious Offence was defined in section 167 of the WWC Act.

[18] In the context of the WWC regime, ‘exceptional case’ has been considered in various previous authorities and in summary:

- (a) it is a matter of fact and degree;
- (b) it is a broad discretion to be decided in each case on the merits of that case;
- (c) it must take it beyond the ordinary circumstances reasonably expected to occur;
- (d) it is not relevant whether a negative notice causes an Applicant hardship;⁷
- (e) it must be considered in the context of the legislation, the intent and purpose of the legislation and the “interests of the persons whom it is here, quite obviously, designed to protect: children”.⁸

[19] Section 226(2) of the WWC Act states that when deciding whether an exceptional case exists in circumstances where a person has been charged with or convicted of an offence, the following must be considered, though it is not an exhaustive list:

- (a) in relation to the commission, or alleged commission, of an offence by the person—
 - (i) whether it is a conviction or a charge; and
 - (ii) whether the offence is a serious offence and, if it is, whether it is a disqualifying offence; and
 - (iii) when the offence was committed or is alleged to have been committed;
 - (iv) the nature of the offence and its relevance to employment, or carrying on a business, that involves or may involve children; and
 - (v) in the case of a conviction—the penalty imposed by the court and, if the court decided not to impose an imprisonment order for the offence or not to make a disqualification order under section 357, the court’s reasons for its decision;
- (b) any information about the person given to the chief executive under section 318 or 319; [Obtaining information from the Director of Public Prosecutions and Obtaining information from Corrective Services]
- (c) any report about the person’s mental health given to the chief executive under section 335;
- (d) any information about the person given to the chief executive under section 337 or 338; [Information obtained from Mental Health Court and Mental Health Review Tribunal]
- (e) information about the person given to the chief executive under *Disability Services Act 2006* section 138ZG;
- (f) anything else relating to the commission, or alleged commission, of the offence that the chief executive reasonably considers to be relevant to the assessment of the person.

⁷ *Chief Executive Officer, Department for Child Protection v Scott* [No. 2] [2008] WASCA 171.

⁸ *Commissioner of Children and Young People and Child Guardian v FGC* [2011] QCATA 291, [31].

- [20] The Tribunal should consider risk and protective factors⁹ when determining a review decision, though in doing so, it is not simply a balancing act between such risk and protective factors.
- [21] The interpretation of legislation and the application of facts within the statutory consideration must be undertaken with reference to the Human Rights Act¹⁰ (the HRA). In doing so, a decision maker must give proper consideration to a human right relevant to the decision.¹¹ In order to consider the HRA, *Storch v Director General, Department of Justice and Attorney General*¹² outlined three steps, in summary:
- (a) Identify the protected Human Right;
 - (b) Consider compatible statutory interpretations;
 - (c) Determine whether a limit or interference with a human right identified is or is not 'reasonable and justifiable'.
- [22] Work is not an express right in the HRA, however there is a right to privacy and reputation¹³ which may be interpreted to include a right to work prospects without interference. The HRA also provides the right to protection of families and children and the rights of every child to the protection that is needed and is in the child's best interests because they are a child.¹⁴
- [23] The HRA recognises that in a democratic society it may in certain circumstances be justifiable to limit the rights of one sector of the community in order to protect the human rights of a more vulnerable sector of the community.¹⁵

Evidence

- [24] The Applicant was employed on a casual basis as a social worker for Families South Australia for approximately two years. The Applicant's evidence was that at the commencement of his employment he undertook a two-month training program, which included non-violent crisis intervention training which he described as a form of physical restraint which is permitted in the circumstances that a child poses a risk of harm to themselves or others. In his Life Story he described the training as thorough. Prior to his employment he had completed a Certificate IV in Youth Work and a Diploma in Community Services.
- [25] He described the work he undertook during his employment with South Australia Families as challenging as the children would regularly verbally abuse and attack staff. He also felt generally unsupported by his employer.
- [26] On 16 October 2016 an incident (incident 1 and incident 2) occurred which resulted in the Applicant assaulting two children under his care. The incident is described in South Australian Police material as follows:

Incident 1

⁹ *Commissioner for Children and Young People and Child Guardian v Maher & Anor* [2004] QCA 492.

¹⁰ *Human Rights Act* 2019 (Qld).

¹¹ Section 58(1)(b), HRA.

¹² [2020] QCAT 152, 47-55.

¹³ Section 25, HRA.

¹⁴ Section 26, HRA.

¹⁵ Section 13, HRA.

Victim 1 is [C1] (12 years)

[C1] is a resident of [L] House which is a residential care facility ... on Sunday 16 October 2016, he was in the front yard of the premises playing; [C2] and [witness child] were outside running around playing in the water. The accused was also present as he was working that day and also in the front yard. [C1] started to play with a three wheeler bike and his shoes became muddy, he got a hose and used it to clean his shoes. The accused shouted at him resulting in him accidentally spraying the accused with the hose. The accused then grabbed [C1] by the back of his neck with one hand and used his other hand to push him in the back, they then fell to the ground as the ground was wet. The accused then placed his knee on his back near his spine and applied force which hurt, he began kicking his legs out to try and get him off and kicked the accused to the shin the accused then got off and began rubbing his shin.

[redacted] then started yelling at the accused and followed him inside; he followed them and saw the accused enter his office, and locked the door behind him.

He saw [C2] kick and pushing at the office door, the accused opened the office door and saw [C2] swing her arm at the accused. The accused then grabbed [redacted] behind her back and pushed her forward onto the ground. He saw [C2] hit her head on the ground and start to scream and cry, the accused then got off [C2] and they went to their room and later ran off as he didn't feel safe.

[C1] later looked at his neck in the mirror and saw it was red around the back and sides, a day later there was a bruise.

Incident 2

Victim 2 is [C2] (10 years)

C2 is a resident of [L] House which is a residential care facility ... on Sunday 16 October 2016, she was playing in the front yard of their premises when she saw [C1] cleaning his shoes with a hose, she then heard the accused who was also in the front yard yell. She looked around and saw the accused grab [C1] by the neck and push him to the ground. [Redacted] then started shouting and swearing at the accused to get off [redacted] she jumped onto the back of the accused to try and pull him off.

She followed the accused to his office where he later grabbed her arms and forced them behind her back and forced her to the ground resulting in her hitting her head. He then placed his knee into her neck preventing her from breathing; the accused then got off and went back to his office.

She later ran off from the residence with [redacted] as she did not feel safe, she later returned. She suffered no injuries.

- [27] There was a third child at the residence who witnessed these events.
- [28] The Applicant was subsequently charged with two offences of *commit assault – aggravated offence other – no weapon*.
- [29] The Applicant provided evidence of the incident.
 - (a) In his Life Story he said “I was attempting to stop an aggressive behaviour from one young person to another and I placed my hand on the back of his neck and he fell to the ground with me falling on top of him (no injuries were

sustained) and on the same day, a couple of hours later, after suffering non-stop verbal abuse from 2 of the young people ... a child threw a punch at my face and I grabbed hold of her arms from the back to move her away from me and I walked her into her bedroom (no injuries sustained)". He said that he had asked for help and support on various occasions from his Manager but did not get any.

- (b) In his Statement of Evidence filed on 11 February 2020, he said "Prior to the incident the children had been verbally abusive towards each other. Prior to the incident involving C1 I was attacked by C1 and attempted to use my non-violent crisis intervention training to stop C1 attacking me and calm him down. I executed my attempt poorly..... After the incident involving C1 I reported the incident and asked for assistance... no assistance was provided.... C2 then attempted to slap me in the face. After this I grabbed her by the shoulders, turned her around, grabbed her hands behind her back and walked her towards her bedroom".
 - (c) In oral evidence the Applicant clarified that the 'attack' by C1 was a splash with water from the hose. He conceded the child posed no threat of harm to himself or another and that his use of force was poor judgment. He removed himself from the situation and placed himself in his office. During that time the children were alone and unsupervised.
 - (d) Between incident 1 and incident 2 the Applicant gave evidence that the children were verbally abusive towards him calling him "cunt", "motherfucker", "asshole" and "dipshit" amongst other names. The Applicant said that he recorded some of these interactions as evidence to support his assertions, such recording he acknowledged was a breach of policy conditions. He said he had requested employer support and assistance during this time.
 - (e) Incident 2 occurred several hours later, during which the verbal abuse persisted. C2 approached the Applicant and tried to slap him. He held her hands behind her back with his hands and walked her down to her room and shut the door.
- [30] There is clearly a disparity between the events as alleged in the NTP South Australian Police material and the facts as asserted by the Applicant. The Applicant asserts that there was some negotiation as to facts at court and that the facts he entered a plea of guilty to incorporated some change put forward by his lawyer, though the evidence on this point is unclear (and at times contradictory).
- [31] Following the incident the Applicant received no further work from SA Families. He subsequently moved to Queensland as his partner secured employment in this State. After his relocation he was charged with the offences and had to return to South Australia to have those offences dealt with. On 6 October 2017 he was convicted upon a plea of guilty and sentenced to two years good behaviour bond with a \$1,000 recognisance.
- [32] Upon arrival in Queensland the Applicant was issued a Blue Card, on 11 January 2017 and worked in varying capacities with children without complaint.
- [33] The Applicant's witnesses, a number of them being employers/supervisors during the intervening period, spoke of him highly and all indicated that no concerns had arisen in his interactions with children. [TI] who gave evidence that she was operations Manager at a day care where the Applicant worked said that the

Applicant was very patient and compassionate and had great relationships with families. However, each of the witnesses had a limited knowledge of the offending and it was unclear whether any of them had read the reasons document prepared by Blue Card Services.

- [34] The Applicant attended upon a psychologist after the incident, Alexandra Plazas, clinical psychologist. Ms Plazas gave evidence that the Applicant attended two sessions with her face to face, in South Australia, prior his relocation to Queensland and then since then has attended a further seven 'check ins' via telephone approximately once every six months. It was her evidence that the Applicant reported that he had limited support from his employer. The first two sessions were to support him emotionally after the incident. She provided support managing emotional distress and supported him identifying triggers and to find other options to manage situations. She helped him to understand the trauma background the children came from and why they may react a certain way and how he can be supportive of them in that situation without wanting control.
- [35] In her Statement dated 5 December 2019 Ms Plazas says that "it is my opinion Mr Aristizabal Ibarra has developed an understanding of his own emotions and feeling related to this incident. He has also stated that as a result of this episode he has become more resilient and has also learnt to better manage difficult situations in his life in general".
- [36] Ms Plazas was unable to recall if she had seen the reasons document and had not seen a copy of directions dated 11 December 2019 of this Tribunal.
- [37] During cross examination it was suggested to the Applicant that "you don't have the skills to appropriately respond to the behaviours of children with trauma backgrounds in your care do you?". He replied "I'll say with distinction yes that is correct".
- [38] The Applicant expressed significant remorse for his actions. He reflected insight as to the impacts his actions may have had on the children and that his actions were wrong. He stated that he has undertaken different training and that he now knows how to properly assess the seriousness of any given situation and to act accordingly.

Mandatory Considerations

- [39] Pursuant to section 226(2):
 - (a) This case concerns convictions for two offences being *common assault – aggravated offence – no weapon*.
 - (b) The offences are neither serious offences nor disqualifying offences.
 - (c) The offences were committed on 16 October 2016. There has been almost five years since the offences and in this regard it is relevant that there has been no further offending during that time. However, the Applicant's evidence is that he has not been in circumstances where he lacked employer support and had to deal with trauma behaviours since that time.
 - (d) The nature of the offending is concerning. The offences were committed upon children and in the course of his employment. Such employment was specifically to provide care to children, and indeed the most vulnerable of children, those who have a trauma background and have been removed from

their families under a Child Protection statutory regime. In his role the Applicant undertook a position of trust.

- (e) The applicant was sentenced to two years good behaviour bond with a \$1,000 recognisance. The court's reasons for imposing this penalty are not known.
 - (f) No information was received pursuant to sections 226(2)(b), (c), (d) or (e) of the WWC Act.
 - (g) Any other relevant factors will be considered further below.
- [40] The violence perpetrated against the children was concerning. There was no risk of harm identified that would warrant physical discipline. The Applicant in his Life Story said that with respect to incident 1, he grabbed the child by the neck area and they fell to the ground. Such an altercation could have had worse or even dire consequences. The children were only 10 and 12 years of age at the time of the offending against them.
- [41] I accept that the children were verbally abusive towards the Applicant in between Incident 1 and Incident 2, and that they had likely been verbally abusive towards him on previous occasions. The children's responses were not acceptable, but in circumstances where they are vulnerable and come from trauma backgrounds, those responses are not unforeseen.
- [42] I identify the following protective factors:
- (a) The Applicant has no other criminal history.
 - (b) The supporting witnesses reported positively as to his interactions with children post the incident. The weight attached to the evidence provided by such witnesses though is tempered due to their limited understanding of the offences and other factors.
 - (c) He sought psychological assistance post incident and has, albeit irregularly, maintained that connection.
 - (d) The Applicant has undertaken further training to support his skills.
 - (e) He reflects remorse and generally appears to have insight into his behaviour.
- [43] I identify the following risk factors:
- (a) The Applicant had already had significant training prior to the incident. Despite that training, he was unable to react appropriately to the children's behaviours.
 - (b) The Applicant admitted in cross examination that he does not have the skills to appropriately respond to behaviours of children with trauma backgrounds.
 - (c) The psychological intervention has been limited.
 - (d) The offending came from an inability to control his emotions.
 - (e) There is a concern as to the level of the Applicant's insight and acceptance of responsibility. He sought to downplay the incidents in earlier written material and classified the child's spraying with water as an 'attack'.

Overall Findings

- [44] It is without doubt that the actions of the Applicant likely caused physical and psychological harm for the children involved and placed them at risk of harm by then (between incident 1 and Incident 2) leaving them unsupervised.
- [45] I am satisfied that the Applicant would be able to provide day to day care of children in a satisfactory manner. However, providing care of children can be hard. It is not always going to be a ‘walk in the park’ so to speak. There will be challenges and occasions where children act badly. I am not satisfied that the Applicant has undertaken the steps necessary to be able to handle the bad days.
- [46] I see the Applicant’s passion to work in a meaningful field and make a positive contribution. His passion for same is noted. However, such considerations do not guide this Tribunal’s considerations.¹⁶ It may be that the Applicant can find his niche for contributing positively regardless of whether or not a blue card issues.
- [47] The decision of the Tribunal is not intended to punish. The issuance of a Blue Card is transferable, meaning that the Applicant is able to work in any child related employment. Conditions are not able to be placed on issuance of blue cards. Thus upon the issuance of a positive notice and Blue Card there would be no impediment to the Applicant applying for employment with vulnerable children with trauma history.
- [48] I have considered the competing human rights in reaching my conclusion. I consider a limit on the Applicant’s applicable human rights are justified in the circumstances of this case.

Orders

- [49] The orders are as follows:
- (a) The decision of the delegate of the Director-General, Blue Card Services, Department of Justice and Attorney-General made on 8 August 2019 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 confirmed.
 - (b) The decision of the Tribunal is to be delivered to the parties by email.

¹⁶ *Grindrod v Chief Executive Officer, Department for Community Development* [2008] WASAT 289, [33].