

QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL

CITATION: *KTG v Director-General, Department of Justice and Attorney-General* [2022] QCAT 157

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

APPLICATION NO/S: CML180-20

MATTER TYPE: Childrens matters

DELIVERED ON: 23 March 2022

HEARING DATE: 29 October 2021

HEARD AT: Caloundra

DECISION OF: Member Hemingway

ORDERS:

- 1. 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 confirmed.**
- 2. Publication of information that may enable an identification of the Applicant, the witnesses and children affected by this decision is prohibited pursuant to section 66(1) of the *Queensland Civil and Administrative Tribunal Act (Qld) 2009*.**

CATCHWORDS: FAMILY LAW AND CHILD WELFARE – CHILD WELFARE UNDER STATE OR TERRITORY JURISDICTION AND LEGISLATION – OTHER MATTERS – where applicant seeks a review of decision to issue a negative notice – where applicant has a criminal history without any serious or disqualifying offences – where the charged offences involved one conviction for fraud – dishonestly making off without paying – where disciplinary action – where standards of care investigations – cancellation of kinship carer certificate – sexual assault of child in care of Applicant – whether

exceptional circumstances exist – whether it is in the best interests of children to issue a positive notice.

Queensland Civil and Administrative Tribunal Act 2009 (Qld), s 19, s 20, s 66

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

Human Rights Act 2019 (Qld), s 13, s 48, s 58, s 23, s 26

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

Re TAA [2006] QCST 11

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

Briginshaw v Briginshaw (1938) 60 CLR 336

Commissioner for Children and Young People and Child Guardian v FGC [2011] QCATA 291

Commissioner for Children and Young People and Child Guardian v Eales [2013] QCATA 303

Kent v Wilson [2000] VSC 98

CEB v Director-General, Department of Justice and Attorney-General [2018] QCAT 26

Peri v Chief executive Officer, Public Safety Business Agency [2015] QCAT 57

RA and RJ General v Department of Justice and Attorney-General [2018] QCAT 95

APPEARANCES & REPRESENTATION:

Applicant: Self-represented

Respondent Ms A Sanders Legal Officer, Department of Justice and Attorney-General

REASONS FOR DECISION

Introduction

- [1] The Applicant held a working with children clearance (Blue Card) issued under the *Working with Children (Risk Management and Screening) Act 2000* (Qld) ('WWC Act').
- [2] The Applicant was the subject of disciplinary action under the *Child Protection Act 1999* (Qld) ("CP Act") in respect of his standard of care for a child in his care. As a result of the disciplinary action, on 16 August 2019 his kinship carer approval was cancelled. This disciplinary action and subsequent cancellation were communicated to Blue Card services as is provided for in the CP Act.
- [3] Blue Card Services reassessed his eligibility to hold a Blue Card after requesting and receiving submissions from him and subsequently his Blue Card was cancelled by Blue Card Services on the 8 May 2020.

- [4] The Applicant seeks a review of the decision to cancel his Blue Card. He wishes to regain his role as a kinship carer and return to certain employment which requires him to have a positive notice from Blue Card Services and so a valid Blue Card.

Background to the Decision of Blue Card Services

- [5] By letter dated 8 May 2020 the Applicant was advised that his eligibility to hold a Blue Card had been reassessed and that the Respondent had issued him a negative notice under the WWC Act. The Applicant was provided with written notice of this decision, reasons for the decision and the relevant review information.
- [6] The Applicant applied to the Queensland Civil and Administration Tribunal (QCAT) on the 18 May 2020 for a review of a reviewable decision by the Director-General (the chief executive officer), Department of Justice and Attorney-General ('the Respondent') that the case of KTG ('the Applicant') was an 'exceptional case' within the meaning of s 221(2) of the WWC Act.

Legislative Framework

- [7] The Queensland Civil and Administrative Tribunal ("the Tribunal") reviews the decision of the Respondent (referred to in these reasons as Blue Card Services) in accordance with the WWC Act.
- [8] The purpose of the review by this Tribunal is to produce the correct and preferable decision pursuant to the *Queensland Civil and Administrative Tribunal Act 2009* (Qld). ("QCAT Act").¹ The Tribunal stands in the shoes of the original decision maker and has the same functions as the original decision maker.²
- [9] The object of the WWC Act is to promote and protect the rights, interests, and wellbeing of children in Queensland through the administration of a scheme to screen persons seeking employment in particular areas or who operate relevant businesses.³ The welfare and best interests of children is paramount.⁴
- [10] The CP Act is legislation which provides protection for children and regulates the system of care of children by kinship carers as well as other matters.⁵ Both Acts are relevant to this review process.
- [11] Section 221 of the WWC Act provides for the issue of a positive notice (a blue card) except where the chief executive finds an *exceptional* case applies. The decision under review is whether an *exceptional case* exists such that the presumption under section 221 of the WWC Act is rebutted.
- [12] To issue a negative notice to the Applicant, the Tribunal must be satisfied on the balance of probabilities and bearing in mind the gravity of the consequences involved, that an exceptional case exists in which it would harm the best interests of children for a positive notice to be issued.⁶
- [13] The primary consideration in this Application for review is whether an exceptional case exists. The legislation does not define, 'exceptional case'. It is a matter which

¹ *Queensland Civil and Administrative Tribunal Act 2009* (Qld) ("QCAT Act"), s 20(2).

² QCAT Act, s 19.

³ *Working with Children (Risk Management and Screening) Act 2000* (Qld) ("WWC Act"), s 5.

⁴ WWC Act, s 6(a).

⁵ Child Protection Act 1999 (Qld), s 4.

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

should be determined on an individual case basis not hampered by a general rule.⁷ The interpretation of the term ‘exceptional case’ has previously been determined to be a matter of discretion.⁸ Generally, the term has been interpreted by the Courts by reference to the ordinary meaning from the Oxford Dictionary, which is “*unusual, special, out of the ordinary*”.⁹ In other cases the words have been considered to mean something “*unexpected*.”¹⁰

- [14] In reaching a decision concerning *exceptional* cases the Tribunal is required to consider the mandatory considerations under section 226 of the WWC Act in addition to the paramount principle under sections 360 and 6(a) of the WWC Act and any other relevant factors, which in this case included child protection concerns and disciplinary action against the Applicant.
- [15] It has been long established that any hardship or prejudice suffered by the Applicant due to this determination is not relevant to the finding of an exceptional case.¹¹ The paramount principle, being the best interests of children, is the primary consideration which the Tribunal must place above all other considerations.

The Material for the Applicant

- (a) Oral Evidence
- (b) Life story
- (c) References
- (d) Written submissions handed up at the hearing
- (e) Written submissions 14 July 2020, 19 September 2020
- (f) Witness statements
- (g) Foster care Training Register
- (h) Reasons letter of Blue Card Services
- (i) Kinship carer reports and genogram
- (j) Certificates and Awards and Statements of Achievements and Certificate IV in Community Services

The Material for the Respondent

- (k) Reasons for Negative Notice
- (l) Applicant’s criminal history
- (m) Disciplinary information relating to the Applicant
- (n) Applicant’s submissions to Blue Card Service
- (o) Material obtained in response to and Notice to Produce by the Department of Children, Youth Justice and Multicultural Affairs (the Department)

⁷ *Commissioner for Children and Young People and Child Guardian v Maher* [2004] QCA 492, [28].

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

⁹ *Kent v Wilson* [2000] VSC 98.

¹⁰ *Schwerin v Equal Opportunity Board* [1994] 2 VR 279.

¹¹ *Chief Executive Officer, Department for Child Protection v Scott [No2]* [2008] WASCA 171, [109] (Buss J).

(p) Information from Queensland Police Service

Mandatory considerations under section 226 of the WWC Act.

Whether the Offence is a serious and whether it is a disqualifying offence

- [16] The Applicant is not charged or convicted with any serious or disqualifying offences, but the Tribunal is required to consider all offences in the criminal history in determining if a person meets the eligibility criteria to work with children in regulated employment.

Whether it is a conviction or charge

- [17] The Applicant has one criminal charge, resulting in an Order that no conviction be recorded in the history. The charge was for fraud –dishonestly make off without paying.

When the Offence was committed

- [18] The offence took place in 2001. It is a single offence in the criminal history.

The nature of the offence and its relevance to employment, or carrying on a business, that involves or may involve children.

- [19] Children have a right to be cared for in a protective environment by adults acting as role models of appropriate behaviour in keeping with societal standards. This offence is a single event and is relevant when considered together with the disciplinary information provided to the Tribunal. There is no direct evidence that this offence was known or understood by the actual children in the Applicant's care or children generally. But it remains a factor for the Tribunal's consideration as children must be able to rely upon and have respect for the adults in their lives to promote their well-being.

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 decision.

- [20] The penalty imposed by the Court for this single offence was a fine of \$200.

Information provided under sections 318, 319, 335, 337, 338 of the WWC Act

- [21] No information has been provided or has been considered relative to these provisions.

Other relevant Matters

S 228 (2) of the WWC Act

- [22] This section of the WWC Act addresses the situation where there is disciplinary information against the Applicant. The section sets out certain matters that the Tribunal must have regard to in deciding whether the Applicant's case is exceptional. Those matters are set out in s 228(2) of the Act.

- [23] They are as follows:

- (a) The decision or order of the decision-maker relating to the disciplinary information and the reasons for the decision or order.

- (b) Any decision or order of an entity hearing and deciding a review of, or appeal against, a decision or order mentioned in paragraph (a), and the reasons for the decision or order.
 - (c) The relevance of the disciplinary information to employment, or carrying on a business, that involves or may involve children.
 - (d) Anything else relating to the disciplinary information that I reasonably consider to be relevant to the assessment of the person.
- [24] The Tribunal has been provided with disciplinary material related to the Applicant who held a certificate of approval as a kinship carer. The Applicant had been a kinship carer of four children originally, three of whom had some level of intellectual impairment and physical impairment. At the time of the cancellation of the kinship carer certificate, the Applicant and his partner T had two female children in their care.
- [25] The Tribunal notes that Kinship carer certificates are issued for a limited period and can be renewed. A Kinship carer is required to hold a Blue Card.
- [26] On 16 August 2019, after a *Standards of Care Review* the Applicant who had been a kinship carer since 2013 had his kinship carer certificate cancelled. The grounds were found to be that the Applicant and T failed to protect a child in their care from sexual abuse by an adult member of the household. The CP Department found that the Applicant was responsible for *emotional and physical harm caused by the sexual abuse of a child in his care*.
- [27] The Applicant states in his material that on legal advice he commenced and then withdrew his Appeal against this decision to cancel his kinship carer's certificate and to remove the children from his care.
- [28] The Tribunal is directed to consider any other relevant considerations in terms of section 228(2) of the WWC Act. In this case this includes complaints to police regarding the alleged conduct of the Applicant.
- The Applicant was involved with police investigations of complaints as follows:*
- [29] On 19 January 2008, a Police report was made regarding a complaint about the Applicant that he had sexually assaulted a 14-year-old girl for whom he had been a swimming coach for five years and whose mother was his then partner. The Police investigated the allegation, but did not charge the Applicant, finding the allegations were unable to be substantiated due to insufficient prima facie evidence.
- [30] On 1 October 2016, B, a child in the Applicant's care stated to the Applicant that she had been inappropriately hugged by a family member. The Applicant failed to raise this issue with Police or the Department. When it was raised and investigated by Police the Applicant indicated that he had not seen the alleged hug. Police comment in their report that they considered the allegation by the child to be *rehearsed*. Police made a remark in their report concerning on-going family court conflict (involving the Applicant and his partner, T) and extended family of T over custody of the children. As a result of the police complaint, Child Safety reduced contact arrangements for B with her father to 2 hours per week, fully supervised.

- [31] On 2 October 2016, police received a complaint that the children J and F in the care of the Applicant and other carer were being abused physically, emotionally and sexually. It was alleged that on several occasions the Applicant had tried to obtain sleeping tablets for a child in his care for immoral purposes. Police submitted a *child harm* referral report to the Department.

The Applicant was involved in child protection concerns as follows

- [32] In March 2015 a child concern notification was made that the Applicant had straddled a child and held her down. The Department concluded that there was insufficient context to suggest there had been harm. The current information was to be recorded as an *intake inquiry*.
- [33] In May 2015, an allegation was made that the Applicant had sat on a child and pulled out his two top teeth. The notifier expressed concern as to whether the Applicant and other carer were the “*right people for the job*”.
- [34] In November 2015 the Department had received numerous complaints of excessive discipline of the children.
- [35] One child, B, reported numerous concerns at interview on 10 November 2015. She stated that she did not wish to return to the home of the Applicant and other carer.
- [36] B stated that she did not feel safe, due to the Applicant and the other carer hitting and yelling at the other children which was alleged to occur most afternoons. She stated that she had been hit with force regularly. She stated that she had been slapped across the face. She stated that the boys were hit repeatedly about the head. B said that the Applicant was always pushing the boys into walls and doors and slinging them around and that the Applicant grabbed a child by the neck because he was being too slow. The allegation was that the Applicant would rip the children's hair when they failed to eat lunch. B stated that the boys were too scared to complain.
- [37] The Applicant was alleged to discipline a child weekly by making a child sit under a tree for two and a half hours as a punishment. It was alleged that another child threatened to kill himself and the Applicant gave him a knife and told him to do it. B stated that when the child returned home, the school had telephoned the Applicant and the Applicant hit the child.
- [38] B stated that the children were made to do chores and that one child works with the Applicant on weekends doing the Applicant's work. She stated that the punishments are related to failure to do chores or if the school calls. She stated that the situation became worse after the Applicant had moved into the house.
- [39] A *Standards of Care* review was undertaken on 26 November 2015. The Applicant was interviewed by the Department on the 26 November 2015 and denied the events of abuse and assault of the children as alleged. He said that the incident that a child was forced to sit under the tree to teach the child discipline was to assist the child to be able to sit on the bus. The Applicant said that the incident where the child was bringing the knife to self-harm, was a joke by the child.

- [40] The Applicant raised B's conduct saying that her rebellious behaviour was the reason he and T placed restrictions on her. The Applicant described his discipline strategies to be sending the child to their room, withdrawing privileges but not corporal punishment. The Department concluded that the allegations were not supported by evidence and that the Standards of Care were met by the Applicant. B was not returned to the Applicant's care.
- [41] In October 2016, police were involved. Police notified the Department of concerns under the mandatory reporting guidelines. The police were advised of concerns that the Applicant and other carer were being, 'heavy handed with the children' including bruising and other physical injuries, punishment being made to sit under a tree, administration of drugs, allegations of sexual abuse, drug use by the Applicant and "standover conduct to avoid police intervention." There were reported to be frequent visitors to the house who were not approved by the Department to reside or remain overnight at the property.
- [42] A concern was raised that one child in care appeared *rehearsed* in her responses. At the case discussion with the Applicant and T, the Department held a discussion and found that it should continue to *monitor the standards of care*.
- [43] Further allegations were made in August 2018 that a child in care was getting *hit and bashed*. The Department response was that it would *continue monitoring the standards of care*.
- [44] The Applicant's household comprised two female children, one with an intellectual disability; both in the care of the Applicant and his partner and two adult males (formerly children under the care of the Department) and who were still resident with the Applicant, the other carer, T.
- [45] The Applicant and the other carer made attempts to keep the males separate from the girls. The males each lived in caravans on the property while the carers and female children lived inside the house. The males and female children were not allowed to be alone together, or for the males to enter the girls' rooms. The males were supervised in the lounge when the girls were bathing. The Applicant would get up early to supervise and the other carer would stay up late. The Applicant stated that if the boys, "*grab the girls, they say*". The Applicant and other carer stated that they relied upon the girls to *yell out* if attacked by the males.
- [46] The events of 10 March 2019 are relevant to the decision of the Department to subject the Applicant to disciplinary proceedings and to remove the children from the care of the Applicant and T. A 15-year-old female child was allegedly raped by an adult male member of the household. The Applicant was not present when the offence occurred but had left early for a social activity and had left the other carer with both children and adult males.
- [47] The evidence was that an adult male took one girl to his caravan and removed her clothing and raped the girl in his caravan. The other carer, T stated that she was unwell and not supervising at the time and so did not notice what had transpired.

- [48] There was a history of sexualised and predatory behaviour by males and the Applicant and T had received complaints from the public concerning their behaviour.
- [49] The Applicant and T had placed restrictions on the children and young men. The Applicant advised the CP Department that the males had previously been watching a female child in the toilets at a camping event on New Year's Eve resulting in a complaint. On another occasion, the males had been apprehended whilst looking at the genitals of a male in the public toilets. The Applicant was made aware of each of these instances by members of the public when the incidents occurred.
- [50] The Applicant referred to the male perpetrator as an *opportunist*, and that he had wanted him to leave the household, but that the male had not been offered alternative placement.
- [51] Following the alleged rape, the Department removed the girls on 11 March 2019 and stated that the continued care for the girls by the Applicant and T was not sustainable. This decision was confirmed by letter dated 4 April 2019.
- [52] An investigation concluded that the Applicant and other Carer were responsible for substantiated harm and cancelled his Approval as a Kinship Carer on 16 August 2019. On 8 May 2020 the Applicant's Blue card was cancelled.

The Respondent's Evidence

- [53] In the reasons for decision to issue a negative notice, the Director of BlueCard services stated that of particular concern is that the children in the Applicant's care were especially vulnerable. The children entrusted to his care were particularly vulnerable and disadvantaged members of the community; namely they were children who did not have parents willing or able to care for them. The Applicant failed in his duty to these vulnerable children resulting in a child suffering serious and avoidable harm.
- [54] The Respondent submits that the disciplinary action against the Applicant forms part of the concerns of the Respondent. There were numerous notifications, including police investigations concerning the Applicant in the period dating from January 2008. These reflect upon his suitability to hold a blue card. Though not amounting to a reason to discipline him or remove the children, the Department conducted interviews with the Applicant. On several occasions the Department indicated that it would continue to *monitor* the situation even though harm was not substantiated.
- [55] The Respondent submits that the Applicant has failed to adequately supervise or care for the children in his care resulting in disciplinary action which caused him to have his kinship carer approval to be cancelled.
- [56] The Respondent states that the Applicant notified the Department of the sexualised behaviours of the adult males in December 2018. The Respondent submits that the Applicant was therefore aware of the potential risk and failed to make appropriate arrangements to remove the risk. The Applicant chose to leave the other carer alone for the first time on 10 March 2019 with both children and the males on the date of the alleged rape.
- [57] The Respondent disputes that the Applicant's strategies for managing the behaviours of the males was effective. Measures were put in place to safeguard the girls who

were regularly *grabbed* by the males. From this it appears that the girls were subject to on-going assaults which could not be prevented by the Applicant.

- [58] The Respondent submits that the Applicant prioritised his wishes over the risk of harm to the children in his care; a risk which was present daily and ineffectively managed by the protocols and living arrangements designed to keep the males and females separate.
- [59] The Respondent submits that the child victim was harmed physically and psychologically. The Applicant appears dismissive of this fact when he says it happened, “*quickly*” in 10-15 minutes. The Respondent considers this to be of concern as it represents continuing conduct of the Applicant in minimising the harm caused. This belief of the Applicant breached his duty to keep the child victim safe from the predatory males in a high-risk environment.
- [60] The Applicant does not demonstrate appropriate understanding of the effect of the sexual assault and the ongoing trauma to the victim. This impacts his ability to assess risk and the degree of risk and to implement appropriate strategies for managing risk.
- [61] The Respondent submits that the Applicant’s conduct shows a willingness to prioritise the welfare of adults (adult males), over the welfare and protection of children in his care.
- [62] The Respondent also submits that there are several allegations about excessive and inappropriate discipline towards several children in his care. Though the children were not removed in respect of these notifications, the Department did continue to monitor standards of care. The Department acted to continue additional scrutiny of the household.
- [63] The Respondent submits that despite the Applicant undertaking numerous training courses and producing certificates to this effect, he was not able to put the training strategies into place to prevent serious harm to the child in his care. The Respondent notes that the intensive training and support did not produce a change in behaviour and more appropriate strategies for managing a complex situation.
- [64] The Respondent also submits that the Applicant demonstrates a continuing lack of insight into how he and the other carer are responsible for the harm caused to the victim child. He believes that he could not have prevented the harm and that he is wrongly blamed and punished for an unforeseeable consequence.

Applicant’s Life story

- [65] The Applicant provided written submissions including a life story dated 14 July 2020. The Applicant was born in a Queensland regional town and completed his education at another regional town to year 12. He worked in a bank then for O Department in the Queensland Government. for 10 years. He travelled overseas for five years then returned to a security role at a regional hospital in Queensland. Between 2001-2011 he managed swimming pools in regional centres. From 2011 he was a Carer with his partner and worked for V Department in the Queensland Government.
- [66] In his life story, the Applicant discusses the event following the alleged rape of a child in his care in 2019. He states that the girls were removed by the Department and visitation was supervised whilst an independent investigation was undertaken.

Following this investigation, the girls were not returned. He appealed this decision. He decided, based on his legal advice, that he should discontinue this appeal and hope for more contact with the girls. A new arrangement for contact was arranged and the Applicant states that he and the other carer have unlimited unsupervised access with the girls.

The Applicant's opening submissions at the hearing

- [67] He met his partner the other carer, T in 2011. He understood the role of carer would be challenging as T had care of her brother's children through the Department as they had been removed from their parents. After six months they sought appropriate checks and clearances and the Applicant moved in with T and the children. He states that he undertook all training to be a kinship carer. He stated that the children were positive towards him and that he cared for them and wanted to remain involved with them.
- [68] The Applicant's partner is T who is the paternal aunt of four children, who have been in care having been removed from T's brother (the father of the children) and the children's grandmother in 2013. In 2015, the children's father and grandmother commenced court proceedings against the Department to have the children returned to their care. They were unsuccessful and children stayed in the care of T and the Applicant. The girls were removed in 2019 from the Applicant and T following an investigation by the Department.
- [69] The Applicant states that prior to the rape in March 2019, he requested that the male P the perpetrator of the rape be transitioned and moved from the property where the Applicant lived with the girls. This request was declined.
- [70] The Applicant regards the other allegations against him as unsubstantiated allegations and that these should not count against him.
- [71] The Applicant claims all allegations have been investigated by the Department and Police. He stated that he was monitored consistently whilst a kinship carer and had not been removed from the role until 2019, despite numerous concerns being brought to the Department. He claims that the allegations were made against the background of the court case by the disgruntled extended family of his partner, T and so should be disregarded. He claims the other allegations against him have been fully investigated and that he has never received matter a of concern.
- [72] Regarding the 2008 police investigation, he states he was previously advised by Blue Card services that on the evidence, "*it would not impact his blue card status*". He objects to blue card services failing to raise a concern about this in the eleven years he held his blue card and that now it was included as a consideration for removing his card.
- [73] The Applicant describes the rape on 10 March 2019 as being preventable, that it was an opportunistic act by B. He states that he is proud of his partner's actions. He states that T went beyond her training to ensure everyone was cared for and to de-escalate the situation and protect evidence. His position is that he and T did their best to keep the girls safe, despite the fact of the rape occurring.
- [74] The girls were removed from the Applicant's care after the alleged rape and were not returned. He states that he thinks the investigator had preconceived ideas and

that it was not an independent assessment. He stated his belief that the intention of the assessor and child safety was that they should not pass the assessment.

- [75] The Applicant states his dissatisfaction with the arrangements for the care of the girls after they were removed. He stated that that one girl had attempted suicide and had an eating disorder. He commenced, then discontinued an appeal against the removal decision in but decided to discontinue the Appeal based on legal advice.
- [76] The Applicant states that after their removal, he and T were allowed unlimited contact with the girls in presence of their carer. The Applicant regarded this as unsupervised contact. The Applicant reports good outcomes for the girls when contact with himself and T was resumed attributing this to his and T's contact with them.
- [77] The Applicant states that losing his blue card has had major repercussions for him. He states that he does not think the removal of his Bluecard was justified. He states that he is unable to recommence his work at the school or to avoid further reputational damage.
- [78] The Applicant remains critical of the Department at R town. He reports that he understands the girls have been returned to their father and are struggling. He states he does not see the girls. He states that they do not see their friends and cousins.

Witness A

- [79] This witness is the principal at C school. She stated that she knew the Applicant as a grandparent at the school. She has known the Applicant for four years. He is a family friend and fishing friend of her husband. She sees him weekly or daily. He is still employed but not working at the school. She was aware that he lost his blue card. He was a groundsman at another school. He was the best candidate when a job came up. She said he did property maintenance and machinery maintenance. She was aware that he was involved with a lot of children and that he was a good carer. He picked the kids up and they were fed and looked after. She said that there were no problems with his interaction with the children. She recalls her statement dated 11 December 2019. She stated that she was aware that a child in the Applicant's care had been assaulted by her brother. She had not seen the Reasons document and had not discussed the negative notice and reasons with the Applicant.

Witness B

- [80] She has known the applicant for ten years and had close interaction with the children in he and T's care. She said he was a great worker and did good grounds maintenance. She stated that his interaction with the children was professional. She said that after he moved in with T there was a big change for the children. The children were clean and tidy, had lunches, neat uniforms and their hair was tidy. They lived around five kilometres from the school.
- [81] In cross-examination she stated that she did not know why she was providing a reference, or the reason for the issue of a negative notice. She stated that she is not aware of reasons for the issue of a negative notice or any police or disciplinary action regarding the Applicant. She says her interaction with the Applicant was just professional. She stated her view that his interactions with the children was

professional, safe and he worked well with the children though his role did not require him to interact with the children. For example, he recently supervised the children to plant seedlings.

Final submissions of the Respondent

- [82] The Respondent contends that the Applicant was fully aware of the risks to the girls of sexual assault. He refers to the girls being told to *yell out* if the boys *grabbed them*, they were not allowed to *go outside*. Bedroom and bathrooms were off private areas, and the girls were not allowed to be alone with the males.
- [83] The Applicant relied upon his protocols. He stated that he kept the girls and men separate by these arrangements. He also stated that the victim child could *stand up for herself*, and that this was a protective feature. The Respondent submits that the Applicant's protocols were problematic and ineffective and were destined to fail. The Respondent submits that in blaming the victim or expecting the victim to ensure her safety, fails to appreciate his obligation towards the children in his care and his duty to be vigilant and to act protectively towards the children in his care.
- [84] The Respondent submits that a strategy where the Applicant identified the need for constant vigilance such as staying up late or getting up early was a strategy which would and did fail eventually. It placed too much reliance on an unattainable level of supervision by the Applicant and T of known and identified risk.
- [85] The Respondent contends that the harm caused was the most extreme and that the rape surrounding circumstances and aftermath was horrific for everyone. The Respondent contends that the Applicant fails to appreciate this in that his response to the situation is focussed on praising his partner; not on protecting the victim and others who were witness to these events and their aftermath.
- [86] The Respondent cites the decision in *CEB*¹² where the Tribunal considered that the carer must be attuned to the surroundings to avoid risk of harm to children in their care. The Applicant failed to fully comprehend the level of risk to the children in his care.
- [87] The Respondent cites the decision in *RA and RJ*¹³ where the Tribunal considered that children who had already been exposed to trauma had an entitlement to be protected from further trauma as they were especially vulnerable.
- [88] The Respondent contends that limited weight should be given to the witness's statements as they do not know the full details of the Reasons for the issue of a negative notice.

Consideration of the Evidence

- [89] The Tribunal considers the protective factors to be that the Applicant is a mature person who had been a certified kinship carer for a considerable period and who held a respected position in the school community as testified to by his witnesses. The Tribunal accepts that the Applicant is well-intentioned.

¹² *CEB v Director General, Department of Justice and Attorney-General* [2018] QCAT 26.

¹³ *RA and RJ General, Department of Justice and Attorney-General* [2018] QCAT 95, page 98.

- [90] The Applicant is described by one witness as having a positive effect on the children's well-being when he first became involved with them.
- [91] The Applicant's household was the subject of the usual legislative oversight by the Department over a long period due to numerous notifications. The Department found no reason to remove the children from his care, despite numerous notifications but continued to record that they were *monitoring* the household.
- [92] The Children were removed after the rape of a child in their care in 2019.
- [93] The Applicant's training and supervision by agencies as a carer are also protective factors to a limited extent. This must be balanced with a consideration of whether the training was ultimately successful in altering attitudes and behaviour and ensuring a protective environment for children in the Applicant's care.
- [94] There are several concerns the Tribunal holds concerning the Applicant's conduct, which show a serious lack of understanding and implementation of appropriate behaviour towards a child in his care. One incident is the incident where the Applicant agreed he had held a child down and pulled out two teeth. It was apparent in the hearing that the Applicant showed no insight into how a child might perceive this act by an adult. There was a disturbing lack of empathy. The Applicant also speaks dismissively of placing a child under a tree to sit for a period to teach them how to, "*behave on the bus*". A further example of concerning attitudes is his response that a child threatening self-harm was, "*just joking*".
- [95] It is a matter of fact that B made allegations about him and T and asked not to be returned to his care. In this instance when interviewed, he dismissed all the B's concerns as being attributable to B and not his disciplinary actions. He did not admit fault on any issue she raised. B did not return to his care.
- [96] These incidents raise concerns about the attitudes and insight of the Applicant into his role and responsibilities as a carer. These examples admitted by the Applicant can reasonably be described as overly harsh responses when viewed through the lens of a child's perspective. Bearing in mind that three of the children in his care were intellectually impaired it makes his behaviour seem out of touch with his responsibilities. The Applicant does not demonstrate any insight into how he managed these events but dismisses them as unimportant.
- [97] The Applicant identified risks in his household due to the repetitive conduct of the sexually-aware, but intellectually-impaired males who resided there. He took measures to manage those risks. This would be a protective factor if the measures were appropriate and did in fact bring about a change in the behaviour they were designed to remedy.
- [98] The Applicant's measures relied upon the children bringing concerns to his attention. For example, the girls should, "*call out if the boys grabbed them*". Placing the responsibility onto children with impaired capacity shows a fundamental lack of understanding of his role as a protective adult in the children's lives. It was not the children's but his responsibility to be vigilant and to manage and deter risk of harm.
- [99] The Applicant stated in evidence that he tried unsuccessfully to remove the males from the property but was unsuccessful. He stated in evidence that he did not ask for the girl's removal as he preferred to have them at the property. He chose not to remove girls from the potential harm despite the evidence of an on-going environment of risk to them. This decision displays a self-focus on his preferences,

not upon the wellbeing of the children in his care. This is a significant risk factor for the Tribunal as he places his preferences over the wellbeing of the children in his care.

- [100] In making these judgments, the Applicant permitted the constant threat posed to the girls to be normalised expecting them to adjust to this circumstance, rather than taking steps to change the circumstance. Limitations were placed on them because of the predatory actions of the males towards them. This poor judgement on his part is a clear risk factor. He holds the view that the continuing threat caused by the males was outside his control and that he wished to preserve the household with the girls. The Applicant's evidence shows a consistently normalising attitude to the use of harsh rules and restrictive measures to control behaviour which ultimately failed to protect the children in his care.
- [101] The Applicant states in his submission that unproved allegations have *been used against him*. However, this indicates an unwillingness to accept responsibility regarding the eventual harm caused to a child in his care. The Tribunal considers that the Department continued close monitoring of the household in light of the matters raised against the Applicant and T.
- [102] The Tribunal notes the transferability of a Blue Card. The issue of a blue card is unconditional. It gives the holder unsupervised access to children. So that the capacity of the Applicant to understand and manage risk without complacency, is vital to a person approved to care for, or work with children.
- [103] The second witness indicated that there was an improvement in the children when the Applicant became involved and moved into the household with T. The Tribunal notes however that the witnesses observed the Applicant in a public setting and not in the home environment which appears to have been controlled to a different standard.
- [104] The Applicant does not demonstrate any reflection on his choices regarding discipline and risk management. The Tribunal takes the view that the serious assault of a child in his care was not just foreseeable but preventable.
- [105] The decision of the discipline proceeding was that the Applicant was *"responsible for the emotional harm and physical harm (due to sexual abuse) of a child in his care"*.
- [106] The Tribunal accepts the view that it is not required to balance risk and protective factors in determining if an exceptional case exists and should apply additional weight to any risk factors that are established.¹⁴
- [107] Also relevant are the standards expected of the carer for children removed from their parents. In *CEB*, the Tribunal has found that the obligations to children in out of home care are higher because they are already vulnerable having been removed from their biological parent and relatives and being subject to the intervention of the department of child safety. The decision in *CEB* summarises the standard of care as follows:

A child in care is particularly vulnerable [due to] having been through considerable trauma...A person working with children must be vigilant and

¹⁴ *Commissioner for Children and Young People and Child Guardian v Eales* [2013] QCATA 303, [6]-[7].

attuned to their immediate surrounds. Children must be protected from potentially hazardous environments, and situations and people.¹⁵

- [108] The Tribunal accepts the proposition in *CEB* that the children in care of the Applicant, who already had compromised capacity due to their multiple disabilities were even more vulnerable as they had been placed in care after removal from immediate family. In this case the standard of vigilance expected of the carer was higher.
- [109] The Applicant has not demonstrated an appreciation of how these factors impact the choices he made.
- [110] The Tribunal finds that the Applicant has not developed sufficient or appropriate insight into the effects on others of the inadequacy of his decision-making process. He speaks dismissively of the incident of sexual assault stating that it was over quickly and goes on to focus on the actions of his partner in gathering evidence as being commendable. This aspect of his statement demonstrates his lack of insight as his focus is not on the child victim of sexual assault.
- [111] The decision in *Peri*¹⁶ restates the importance of the possession of insight into the harm that has been caused. Children are entitled to the security of being able to rely upon the adults caring for them to have the insight they lack because they are children.
- [112] The Tribunal notes the following remarks in the decision cited by the Respondent of *Re TAA*¹⁷ which describes the value of insight into the harm caused by the offending as being evidence of a protective factor, as follows:

The issue of insight into the harm caused by these incidents is a critical matter for the Tribunal. The Tribunal is of the view that good insight into the harm that has been caused is a protective factor. A person aware of the consequences of his actions or other harm is less likely to reoffend than a person who has no insight into the effect of his actions on others. This is particularly important with children because they are entirely dependent on the adults around them having insight into their actions and the likely effect on children.

- [113] The Applicant states that he is seeking obtain a BlueCard as it is required for a kinship carer role and other employment he wishes to pursue. However, the effect of issuing the Applicant's BlueCard is that the Applicant can work in any child related employment or conduct any child-related business regulated by the Act, not just for the purpose for which the Applicant states he seek the card. There is no power to issue a conditional card and once issued, it is fully transferable across all areas of regulated employment and business.
- [114] The Tribunal is entitled to ignore both hardship to the individual and any skills the Applicant is asserted to have in the determination of whether an exceptional case exists.¹⁸

The Tribunal findings and decision

¹⁵ *CEB v Director-General, Department of Justice and Attorney-General* [2018] QCAT 26.

¹⁶ *Peri v Chief executive Officer, Public Safety Business Agency* [2015] QCAT 57, 7.

¹⁷ *Re TAA* [2006] QCST 11, [97].

¹⁸ *Chief Executive Officer, Department for Child Protection v Scott [No2]* [2008] WASCA 171, [109] (Buss J).

- [115] The Tribunal finds that the Applicant has been a kinship carer with his partner, T for children in a troubled and challenging home environment. Three of the occupants in the household had intellectual incapacity. The household was divided so that the adult males lived in caravans on the property as a strategy to keep them separate from the girls in care. The Applicant and other carer, T and girls lived in the house on the property. The Tribunal finds that despite good intentions, the Applicant failed to identify that his strategies were not effective to keep the girls safe. One girl sustained serious harm in a sexual assault following a long period of being in fear from being assaulted in the household.
- [116] It was submitted by the Applicant that efforts were made to stop the girls from going outside. The Tribunal finds that the freedom of the girls was restricted to accommodate and manage the undesirable and repetitive male behaviour of harm. The Tribunal finds that the mature males regularly made sexual advances towards the females such as grabbing them or trying to view them when bathing or dressing.
- [117] The Tribunal finds an on-going and unresolved continuing conflict over many years between the Applicant and T with T's extended family including the biological father and grandmother of the children in the care of the Applicant and his partner. The Tribunal finds that this conflict impacted the children's wellbeing creating an additional stress for them.
- [118] The Applicant does not provide any evidence of reflection on his decisions concerning the children in his care. He continued to assert that he had been treated unfairly and that as he had done all he could that he should not have his Blue card withdrawn. The Tribunal is not satisfied that there is evidence to support the view that he has adequate insight such that this is not an exceptional case.
- [119] The Tribunal must apply the paramount principle of the WWC Act and so finds the actions of the Applicant fail to understand and provide a nurturing and protective environment for children generally. His responses to the circumstances show a lack of understanding and insight of children and their needs.
- [120] The Tribunal finds that the remorse he expresses is mainly directed to the impact of the removal of his blue card on himself.
- [121] The Tribunal finds that the case is exceptional as the Applicant did not act protectively by assessing the risk to the children in his care in an appropriate manner. He continued to place his own feelings above the children in his care. The risk of harm was identified, well understood, serious and likely. The girls in care were subjected to restrictions on their liberty for the convenience of the Applicant, to whom other courses of action were available.
- [122] In the Tribunal's view, this is an exceptional case as it has many factors taking it out of the ordinary course of events and circumstances due to the choices of the Applicant but also regarding lack of understanding of the rights of the girls to be respected, safe and protected. The case is exceptional in that their rights and entitlements were completely disregarded by the persons appointed to prioritise these very factors.

Human Rights Act

[123] The Tribunal is a *public entity* in terms of the *Human Rights Act* 2019 (Qld) (“HRA”).¹⁹ Section 58 of the HRA requires the Tribunal to make a decision that is compatible with human rights.

[124] In this instance, as the Respondent notes, there are competing human rights; the human rights of the Applicant²⁰ which are described in the HRA. The rights of the child are also relevant. These are detailed in section 26(2) of the Act as follows:

“Every child has the right without discrimination, to the protection that is needed by the child, and is in the child’s best interests, because of being a child.”

[125] Section 13 of the HRA allows a public entity to make a decision that is incompatible with human rights if the decision is reasonable and justifiable in the circumstances.
²¹

[126] On the facts of this case, any limitation on the Applicant’s human rights is consistent with the object, purpose and paramount principle of the WWC Act, which is that the welfare and best interests of children is paramount. The consequence of this is that it is permissible to restrict the human rights of the Applicant as described, in order to prioritise the wellbeing, safety and interests of children.

[127] The Tribunal, having regard to the paramount principle considers it unsafe to issue a BlueCard, fully transferable in these circumstances and so confirms the decision of the Director-General, Department of Justice and Attorney-General.

Orders

[128] 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 confirmed.

[129] The Tribunal prohibits the publication of any information in these proceedings that could identify the Applicant or any children in any way pursuant to section 66(1) of the *Queensland Civil and Administrative Tribunal Act (Qld)* 2009.

¹⁹ *SSJ v Director General, Department of Justice and Attorney-General* [2020] QCAT 252.

²⁰ ss 21, 23, 25 HRA.

²¹ s 13(2) HRA.