QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL

CITATION:	*Vaeau v Director-General, Department of Justice and Attorney-General* [2021] QCATA 142
PARTIES:	**KURAMEA AKAHOTU VAEAU** (applicant) **v** **DIRECTOR-GENERAL, DEPARTMENT OF JUSTICE AND ATTORNEY-GENERAL** (respondent)
APPLICATION NO:	APL068-20
ORIGINATING APPLICATION NO:	CML108-19
MATTER TYPE:	Appeals
DELIVERED ON:	19 November 2021
HEARING DATE:	7 December 2020
HEARD AT:	Brisbane
DECISION OF:	Senior Member Howard, Presiding Member Member Fitzpatrick
ORDERS:	**1. The application for leave to appeal is dismissed.** **2. The appeal is dismissed.**
CATCHWORDS:	FAMILY LAW AND CHILD WELFARE – CHILD WELFARE UNDER STATE TERRITORY – OTHER MATTERS – where an application for a blue card was made – where the application was rejected – where the applicant sought a review of the decision – where the review was unsuccessful – where the applicant filed an application for leave to appeal or appeal in the Tribunal – where it was considered whether the granting of a positive notice was in the best interests of children – where it was considered whether the matter was an exceptional case – circumstances of domestic violence – where leave to appeal was refused ADMINISTRATIVE LAW – ADMINISTRATIVE TRIBUNALS – QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL – where the applicant sought leave to appeal a decision in which an application

for a blue card was refused – where leave to appeal was refused

APPEAL AND NEW TRIAL – APPEAL – GENERAL PRINCIPLES – RIGHT OF APPEAL – WHEN APPEAL LIES – ERROR OF LAW – WHAT IS – GENERALLY – where it was considered whether the Tribunal below erred in law – whether the Tribunal below made errors of mixed law and fact and errors of fact

Queensland Civil and Administrative Tribunal Act 2009 (Qld) s 142(3)(b), s 142(3)(b), s 147
Domestic and Family Violence Protection Act 2012 (Qld) s 10, s 53
Working with Children (Risk Management and Screening) Act 2000 (Qld) s 221(2), s 226, s 226(2), s 226(2)(a)(iii), s 226(2)(a)(v), s 226(2)(e)

Allen Allen & Hemsley v Australian Securities Commission (1992) 27 ALD 296
Associated Provincial Picture Houses Ltd v Wednesbury Corporation [1948] 1 KB 223
Commissioner for Children and Young People and Child Guardian v Lister (No2) [2011] QCATA 87
Commissioner for Children & Young People and Child Guardian v Maher [2004] QCA 492
Department of Justice and Attorney-General [2020] QCAT 244
Director-General, Department of Justice and Attorney-General v *FRW* [2020] QCATA 13
Flegg v Crime and Misconduct Commission & Anor [2014] QCA 42
Kuramea Akahotu Vaeau v Director-General,
House v The King (1936) 55 CLR 499
Minister for Aboriginal Affairs v Peko-Wallsend Ltd (1986) 162 CLR 24
Minister for Immigration and Citizenship v Li [2013] HCA 18

APPEARANCES & REPRESENTATION:

Applicant:	Rae, A counsel instructed by Murray, PM of Townsville Community Law Inc
Respondent:	Rajapakse, N of Blue Card Services

REASONS FOR DECISION

[1] Ms Vaeau first applied for a Blue Card under the *Working with Children (Risk Management and Screening) Act* 2000 (Qld) ('WWC Act') in 2015. The Chief Executive, DJAG ('DJAG') refused the application and issued a negative notice in

2016. In 2018, Ms Vaeau applied to have her negative notice cancelled and a positive notice issued. However, that application was unsuccessful.

[2] Ms Vaeau sought review of DJAG's 2018 decision in the Tribunal. The Tribunal confirmed the decision of DJAG. In doing so, it decided that Ms Vaeau's case was an exceptional case within the meaning of s 221(2) of the WWC Act, in which it would not be in the best interests of children for a positive notice to issue.

[3] Subsequently, Ms Vaeau filed an application for leave to appeal or appeal the Tribunal's decision.

[4] For the reasons explained later, we dismiss the applications for leave to appeal and the appeal.

[5] This appeal raises important issues about the application of the WWC Act in circumstances where an applicant has a relationship history marked by domestic violence.

The grounds of appeal

[6] Three grounds of appeal are advanced. In particular, it is alleged that the Tribunal erred as follows:

(i) in stating and applying the test for establishing that there was an exceptional case;

(ii) by failing to place adequate weight upon the psychological report of Cheryl Rushton; and

(iii) by failing to place adequate weight on Ms Vaeau's protective factors.

[7] In essence, the grounds allege an error of law, errors of mixed law and fact and errors of fact, in the exercise of the Tribunal's discretion, such that the exercise of discretion miscarried. With respect to the alleged error of law, the Appeal Tribunal's leave to appeal is not required. With respect to the remaining alleged errors, leave to appeal is required.[1]

[8] The Applicant seeks that the appeal be allowed, the decision of the Member below be set aside and the Appeal Tribunal substitute its own decision that the Applicant's case is not "exceptional", or in the alternative the matter be remitted for re-hearing.

[9] The High Court of Australia said in *House v The King*:[2]

> The manner in which an appeal against an exercise of discretion should be determined is governed by established principles. It is not enough that the judges composing the appellate court consider that, if they had been in the position of the primary judge, they would have taken a different course. It must appear that some error has been made in exercising the discretion. If the judge acts upon a wrong principle, if he allows extraneous or irrelevant matters to guide or affect him, if he mistakes the facts, if he does not take into account some material consideration, then his determination should be reviewed and the appellate court may exercise its own discretion in substitution for his if it has the materials for doing so. It may not appear how the primary judge has reached the result embodied in his order, but, if upon

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1 *Queensland Civil and Administrative Tribunal Act* 2009 (Qld) s 142(3)(b) ('QCAT Act').

2 (1936) 55 CLR 499 ('*House v The King*').

> the facts it is unreasonable or plainly unjust, the appellate court may infer that in some way there has been a failure properly to exercise the discretion which the law reposes in the court of first instance. In such a case, although the nature of the error may not be discoverable, the exercise of the discretion is reviewed on the ground that a substantial wrong has in fact occurred.[3]

[10] *House v The King*, and subsequent decisions,[4] were discussed by Gotterson JA in *Flegg v Crime and Misconduct Commission & Anor* ('*Flegg*').[5] *Flegg* concerned an appeal from the exercise of a statutory discretion in deciding a disciplinary review. In discussing a ground of appeal to the effect that the Queensland Civil and Administrative Tribunal ('QCAT') could not reasonably have made a particular decision on the facts it had found, Gotterson JA, quoting from the judgment of Hayne, Kiefel and Bell JJ in *Minister for Immigration and Citizenship v Li,*[6] said:

> The legal standard of unreasonableness should not be considered as limited to what is in effect an irrational, if not bizarre, decision − which is to say one that is so unreasonable that no reasonable person could have arrived at it – nor should Lord Greene MR be taken to have limited unreasonableness in this way in his judgment in *Wednesbury*. This aspect of his Lordship's judgment may more sensibly be taken to recognise that an inference of unreasonableness may in some cases be objectively drawn even where a particular error in reasoning cannot be identified. This is recognised by the principles governing the review of a judicial discretion, which, it may be observed, were settled in Australia by *House v The King*, before *Wednesbury* was decided… In *Wednesbury*, Lord Greene MR discussed the various grounds upon which an exercise of statutory power may be abused. His Lordship foreshadowed defining those grounds under a single head of unreasonableness, stating that it was 'perhaps a little bit confusing to find a series of grounds set out. Bad faith, dishonesty... unreasonableness, attention given to extraneous circumstances, disregard of public policy' were all relevant to the question of whether a statutory discretion was exercised reasonably.[7]

[11] In his discussion of *Li,* Gotterson JA continued:

> After referring to the close analogy between judicial review of administrative action and appellate review of a judicial discretion identified by Mason J in *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* in the context of unreasonableness and to the principles governing the review of judicial discretion articulated in *House v The King* concerning inference of unreasonableness, their Honours said:
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> > "…The same reasoning might apply to the review of the exercise of a statutory discretion, where unreasonableness is an inference drawn from the facts and from the matters falling for consideration in the exercise of the statutory power. Even where some reasons have been provided, as is the case here, it may nevertheless not be possible for a court to comprehend how the decision was arrived at**.** Unreasonableness is a conclusion which may be applied to a decision which lacks an evident and intelligible justification."

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3 Ibid, 504–505.

4 *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223 ('*Wednesbury*'); *Minister for Immigration and Citizenship v Li* [2013] HCA 18 ('*Li*'); and *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24.

5 [2014] QCA 42, [14]–[16] ('*Flegg*').

6 [2013] HCA 18.

7 Ibid, footnotes omitted.

> In separate reasons in *Li*, French CJ reminded that the ground was not a vehicle for challenging a decision on the basis that the decision-maker has given insufficient or excessive consideration to some matters or has made an evaluative judgment with which the Court disagrees even though that judgment is rationally open to the decision-maker. Gageler J described the test for unreasonableness as stringent, noting that judicial determination of *Wednesbury* unreasonableness in Australia has in practice been rare.[8]

[12] Proceeding from that basis, each of the grounds are discussed in the paragraphs that follow.

[13] We address the appeal on the question of law raised by the first ground of appeal. We address the balance of the grounds of appeal in determining whether leave to appeal should be granted.

The Tribunal's decision

[14] The Tribunal below concluded that Ms Vaeau's case is, in the terms of s221(2) of the WWC Act, 'an exceptional case in which it would not be in the best interest of children for the chief executive to issue a positive notice.'

[15] In the following paragraphs, we set out the reasons for the decision ('RFD') of the Tribunal which were published.[9]

[16] The Member said that whether the applicant's case is an exceptional case is for the Tribunal to determine, weighing the evidence presented by the parties and reaching a decision on the balance of probabilities.

[17] Ms Vaeau was convicted of an offence which occurred on 4 February 2013, involving Ms Vaeau wielding kitchen knives at SD, her partner and father of three of her four children. That conduct was found to be in contravention of a domestic violence order, made on 4 November 2011, as a result of Ms Vaeau taking a steak knife from the kitchen, holding it in a stabbing position and forcing SD out of the house.

[18] The Tribunal considered that it is the elements of the applicant's offence and other factors disclosed by her offence, that pose a significant risk to children in child-related employment.

[19] Key findings made by the Tribunal are:

(a) Ms Vaeau was a victim of domestic violence, but also a perpetrator of domestic violence, who regularly resorted to verbal and physical violence in her arguments with her partner and who did so in the presence of the children, while the children were in the same house or within hearing distance;

(b) Many domestic violence disturbances between Mrs Vaeau and her partner required police or family intervention and involved verbal and physical violence from both parties;[10]

(c) Ms Vaeau conceded in evidence that her children were not only exposed to witnessing domestic violence but were themselves subject to reprisals and

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8 Ibid. Footnotes omitted.

9 *Kuramea Akahotu Vaeau v Director-General, Department of Justice and Attorney-General* [2020] QCAT 244.

10 Queensland Police Service, Solicitors Office Reports, 23 July 2007, 19 December 2010

mistreatment by their father. Ms Vaeau conceded that she did not stop maltreatment of her eldest son by her partner because of, what the learned Member described as, 'wrong choices'[11] she made. This raises the concern that Ms Vaeau's preparedness to permit this to happen may translate into risks to children she may work with;

(d) Ms Vaeau was herself a perpetrator of violence and other behaviours and she conceded that the children's exposure to domestic disturbance was a matter of, what the learned Member described as, her 'choices' to remain with her partner, rather than keep him away with the aid of a domestic violence order.[12] It was also a reflection of the attitudes to children, violence and relationships that Ms Vaeau grew up with and that appeared to become her reality as an adult;

(e) Ms Vaeau acquired knowledge and insight into the effect of domestic violence on her children[13] but 'chose' to remain or return to the relationship that fuelled it.[14] Consequently, current evidence as to Ms Vaeau's insight and awareness of the impact of domestic violence on her children needs to be contrasted with her insight and awareness at the time she chose to stay in the abusive relationship; and

(f) Other matters relevant to the offence include:

(i) Ms Vaeau's childhood marked by domestic violence, estrangement, neglect and abuse, noting that the explanation of Ms Vaeau's background does not in itself reduce the risks to children;

(ii) Ms Vaeau's 'seemingly instinctive resort to violence,'[15] which if it still exists would suggest issuing a positive notice would not be in the best interests of children; and

(iii) Ms Vaeau's mental health history including an Emergency Examination Order, noting that there is insufficient evidence as to whether serious mental health issues have been adequately addressed.[16]

[20] The Tribunal considered that there is a need for clear evidence that these broader issues have been addressed so that they no longer pose a real and appreciable risk to children.[17]

[21] The Tribunal considered Ms Vaeau's evidence of protective factors, being:

(a) Completion of studies, noting that is a clear and important protective factor;

(b) Current employment and lifestyle, enabling her to spend more time with her children and ensure more of their needs are met;

(c) Undertaking counselling and completion of a course to enable women to make positive and lasting changes, noting that this engagement is an indication of a

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11 RFD [69].
12 RFD [68], [74].
13 Department of Child Safety Youth and Women, Assessment of harm and risk of harm 8 May 2013 NTP 38.
14 RFD [71].
15 RFD [95].
16 RFD [105].
17 RFD [106].

desire to address the significant issues that have had a negative impact on her life and made her a risk to children. The Tribunal observed that between 2010 and 2013, the period of the most intense domestic violence, Ms Vaeau did not persevere with counselling nor did she make necessary changes to protect her children. The Tribunal further observed that if current and future counselling is to help Ms Vaeau achieve what she could not in the past it cannot be based on incomplete or censored information – acquired insights and understanding will need to be demonstrated and not merely asserted;

(d) Separation from SD in September 2014, noting that a violent relationship in fact continued until April 2016. The Tribunal noted that despite the partner now having moved to Darwin and re-married, there will be ongoing contact between them as a result of access to the children. Ms Vaeau's evidence as to how she will manage these interactions appears to have been unsatisfactory;[18]

(e) Strong support network: the Tribunal did not think the protective benefits of Ms Vaeau's support network was substantiated by evidence and supportive materials or witnesses called to give evidence. The Tribunal expressed doubts as to Ms Vaeau's present capacity to not slip back into being the person she was without the help of significant supports;[19] and

(f) Three character references: the Tribunal noted that with the exception of Ms Vaeau's cousin, the referees were not fully aware of her role in the domestic violence and other details required to determine what support is appropriate and required.[20] It was also noted that Ms Vaeau's evidence when questioned about this issue was unsatisfactory, even so far as stating that she did not have any supports.[21]

[22] The Tribunal considered the following risk factors:

(a) One conviction for contravention of a domestic violence order in 2013 for which a six-month probation order was made. The Tribunal noted that no further offence has been committed. However, it stressed that there was a repeated pattern of engaging in violent behaviour towards her partner in the presence of the children or while the children were in the vicinity. Knives were wielded on two occasions. On one occasion Ms Vaeau told police she felt like killing her partner;

(b) The Tribunal found it was a conceded fact that Ms Vaeau engaged in repeated violence towards her partner between at least 2010 and 2013. The Tribunal considered this a basis for concluding that she may not, as yet, have the appropriate skills and strategies to manage conflict in her relationships. Further to this, the evidence is unclear whether those assisting Ms Vaeau know of her contribution, instigation and provocation of violence. The Tribunal noted that only full disclosure can enable Ms Vaeau to gain the insight and strategies to understand and prevent such behaviour in the future;

(c) Lack of adequate insight into her violent behaviour and remorse. The Tribunal expressed surprise that Ms Vaeau's submissions make little reference to the

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18 RFD [135]–[136].
19 RFD [147].
20 RFD [163].
21 RFD [164].

effect of her violence on her children. The Tribunal said that on being examined Ms Vaeau appeared reluctant to take responsibility, denied her own aggression and continues to present herself as a victim;

(d) Concerns about Ms Vaeau's ability to act in the best interests of children. The Tribunal's principal concern was that there has been inadequate disclosure of her history of resorting to violence, abuse of alcohol and mental health issues. As a result, the Tribunal was not satisfied Ms Vaeau has acquired the skills to identify and address triggers for these behaviours. The Tribunal required clear and specific evidence based on all available information. The Tribunal was not satisfied with the evidence;

(e) Psychologist's report. A draft psychologist's report was the only evidence from a medical or behavioural professional tendered in the matter. It was evident the psychologist had not been made aware of Ms Vaeau's history of psychiatric illness or her own history of violence. The psychologist was not available for cross-examination. As a result, the report was of limited assistance to the Tribunal;

(f) A blue card is transferable across all areas of regulated employment and business, despite Ms Vaeau requiring a blue card for work in church or school employment in Townsville; and

(g) Ms Vaeau did not acknowledge that her own behaviour contributed to domestic violence and her offending. The Tribunal considered that there was insufficient evidence as to Ms Vaeau's fuller insight into risks and practical measures to address triggers.

[23] The Tribunal weighed up the risks and protective factors and concluded:

(a) Ms Vaeau openly resorted to violence in a volatile relationship, even while engaged in counselling and subject to a domestic violence order. Ms Vaeau's evidence in relation to the welfare of her children suggested she has not fully processed or understands the issues. At best, she offered generalisations or a little more detail when prompted;

(b) Brief generalised and unsupported assurances are largely insufficient. In particular, what is required is evidence from professionals assisting Ms Vaeau to gain insight and strategies on how to deal with future contact with her partner and with new partners and relationships;

(c) Ms Vaeau did not provide any evidence showing that her mental health issues are under control and that she understands and accepts the need for treatment and understands triggers and strategies for addressing any diagnosed condition. It would appear that the limited assistance Ms Vaeau has received from medical and behavioural professionals was either not persevered with or was provided without complete knowledge of Ms Vaeau's history;

(d) Importantly, there was no supporting evidence of formal and comprehensive treatment of anger and resort to violence; and

(e) Ms Vaeau's evidence suggests her remorse relates to the impact of her actions on her life, rather than remorse for the impact of her actions on her children and not just her partner.[22]

Did the Tribunal err with respect to the test for deciding whether there was an exceptional case and its application?

[24] Broadly, Ms Vaeau submits that the Tribunal misstated the meaning of 'exceptional case', failed to apply the test correctly, and considered matters that were not relevant.

Did the Tribunal misstate the meaning of 'exceptional case'

[25] Ms Vaeau argues that the Tribunal erred in placing reliance upon dictionary meanings of 'exceptional', by stating that they were of assistance.[23] She submits that none of the jurisprudence requires a consideration of the dictionary definitions. She also says that the Tribunal does not say how it was assisted by the definitions, nor why the definitions assisted. She contends that in any event, even if the definitions could properly be considered, they tend to suggest that her case was not exceptional.

[26] In considering what constitutes an 'exceptional case', the Tribunal first observed that the meaning was to be determined by giving the words their ordinary meaning, in the context of the WWC Act, having regard to the intention of the legislature.[24] It then had regard to dictionary definitions of 'exceptional'; and key principles of statutory interpretation, including interpreting words in the WWC Act consistently with the express purpose of the legislation.[25] It also considered the principles for administering the WWC Act and the paramountcy of the welfare and best interests of children. Relying on previous Tribunal decisions and other authority, it said essentially that whether a case is exceptional must be decided on the balance of probabilities having regard to the legislation and the facts of the case, weighing the evidence presented, in the exercise of the Tribunal's discretion.[26] It then went on to identify that s 226 of the WWC Act sets out mandatory factors to be considered in deciding whether it is an exceptional case if there is a conviction or charge for the person.[27]

[27] The term 'exceptional case' is not defined. However, it is settled law that the determination of whether a case is exceptional involves the exercise of a broad discretion that should be 'unhampered by any general rule and is to be construed in the particular context of the legislation'.[28]

[28] Although the Tribunal referred to dictionary definitions, as Ms Vaeau suggests, it is apparent that the Member understood the broad discretionary nature of the Tribunal's task and had appropriate regard to the context of the legislation. He states that dictionary meanings are of assistance, on a fair reading, in defining exceptional as 'being beyond what is ordinary' and '…unusual, or not typical'.[29] Although we

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22 RFD [22]
23 RFD [23].
24 RFD [22].
25 RFD [24]–[25]
26 RFD [29]–[31].
27 RFD [32]–[33].
28 *Commissioner for Children & Young People and Child Guardian v Maher* [2004] QCA 492.
29 RFD [23].

do not consider it was necessary to resort to dictionary definitions, we do not consider that his consideration of them led him into error.

[29] Ms Vaeau submits that, in any event, the definitions support a finding that her offending behaviour arose in a relationship involving domestic violence and that her experience bore the 'usual hallmarks of domestic violence' and that therefore her case is not exceptional.[30] Implicit in this submission seems to be a contention that in the consideration, only (other) relationships involving domestic violence are relevant. Further, that violence or behaviours that were not protective of children perpetrated by an applicant for a blue card related application, or occurring during the course of such a relationship, are to be treated differently or in a quarantined manner, because of that context. There is no such provision in the WWC Act. The WWC Act provides that the best interests of children are paramount. There are no exceptions to that statutory position.

[30] The arguments are misplaced that Ms Vaeau's circumstances are not exceptional because there was nothing unusual about the relationship between Ms Vaeau and her former partner in comparison to other relationships involving domestic violence, and because it bore the hallmarks of such relationships. Ms Vaeau's circumstances are to be considered against the relevant statutory framework. That is, is there an exceptional case in which it would not be in the best interests of children for a positive notice to issue. The nature of the exercise to be performed by the Tribunal is not different in the case where an applicant was in a relationship involving domestic violence and which may have some common and accepted hallmarks of a relationship characterised by domestic violence. The best interests of children are the paramount consideration.

[31] We do not consider that the Tribunal misstated the meaning of "exceptional case" so as to lead it into an error of law.

[32] The appeal must fail in relation to this part of the ground of appeal.

Did the Tribunal fail to apply the test correctly?

[33] Ms Vaeau's submissions are to the effect that the Tribunal failed to properly consider the matters which s 226(2)(a) (iii) and (v) specify as mandatory considerations.

[34] Section 226(2) provides as follows:

> The chief executive must have regard to the following –
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> (a) in relation to the commission, or alleged commission, of an offence by the person –
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> (i) whether it is a conviction or a charge; and
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> (ii) whether the offence is a serious offence and, if it is, whether it is a disqualifying offence; and
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> (iii) when the offence was committed or is alleged to have been committed; and

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30 Ms Vaeau's submissions filed 12 August 2020, [27].

(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;

(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;

(e) 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.

[35] Ms Vaeau submits that the Tribunal is required to have regard to when the offence was committed and the court's reasons for its decision not to impose an imprisonment order for the offence. It is said that in the absence of any proper indication that the matters were actually taken into consideration, the Appeal Tribunal must conclude that the Tribunal failed to take into account a mandatory consideration.[31] Ms Vaeau says that what is missing from the Tribunal's reasoning is any explanation of how the matters were considered.[32] Ms Vaeau submits that any proper consideration of these matters would have shown they were of such significance and relevance that the Tribunal would have reached a different conclusion.

[36] In our view, the Tribunal's decision does demonstrate consideration of the length of time since the offending behaviour and the court's reasons for not imposing an imprisonment order.

[37] The Tribunal acknowledged the time since the offence occurred and observed that it could be said Ms Vaeau appears unlikely to reoffend, and that any risks she may have posed to children have since dissipated. The Member went on to give consideration to the significance of the time since the offence in terms of a risk of reoffending. The Tribunal posited that it is not the prospect of Ms Vaeau reoffending in a domestic violence setting that is of primary concern. Instead, it is the elements of the offence and other factors disclosed by her offence that pose a significant risk to children in child related employment.[33]

[38] As to the Tribunal's consideration of the penalty imposed by the court and reasons for not imposing an imprisonment order, we note that the Magistrate's reasons are set out at [77]–[82] of the decision. Plainly, the Magistrate's reasons were acknowledged and understood by the Tribunal. Looking at the whole of the Tribunal's decision, the Magistrate's reasons do not directly bear on the issues which concerned the Tribunal on the evidence. The Tribunal did not consider the

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31 Cf *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24.

32 *Allen Allen & Hemsley v Australian Securities Commission* (1992) 27 ALD 296 at 304.

33 RFD, [37]–[41].

risk of reoffending in the context of domestic violence to be the critical issue in this case. The Tribunal also took issue with some of the Magistrate's reasons, including that the conduct was out of character for Ms Vaeau and that it was not the case that the relationship with SD had ended in 2013, dissipating the risk of reoffending and the risk of harm to the children.

[39] Ms Vaeau complains that insufficient weight was given to the fact that there is no evidence of her having used violence in any other setting and that if there is a residual risk it must be extremely small. Further absence of offending behaviour in the seven years since the offence ought to show that the passage of time is a highly relevant consideration to which proper weight should have been given. Finally, no weight was given to the risk of Ms Vaeau reoffending having dissipated with the ending of her relationship with SD.

[40] We reject these submissions. The weight accorded to these factors falls within the proper exercise of the broad discretion vested in the Member, particularly where the Member has discerned issues arising out of the offence which were not satisfactorily dealt with on the evidence, and which formed a rational basis for his conclusion in the matter. Further, as the Appeal Tribunal said in *Lister*,[34] the effluxion of time is not of itself an answer to the question of risk, a critical consideration is whether an applicant has genuine insight into their behaviour.

[41] Ms Vaeau submits that the Tribunal does not identify 'the elements of the … offence' and 'certain other factors' that it says in paragraph [38] appear to pose a risk to children in child-related employment. She says that this is important because the offence of breaching the domestic violence protection order occurred in circumstances that she feared for the safety of her children.

[42] In discussing the circumstances of the charge, the Tribunal considered the circumstances of the making of the domestic violence order that was breached,[35] but also the events that led to the domestic violence order being made.

[43] The Tribunal refers to Ms Vaeau's statements to police on 1 November 2011 after a violent incident which precipitated the application for a domestic violence order, that she had tried to hang herself a week earlier and was 'feeling really depressed' and had 'thoughts of hurting herself';[36] and further that the domestic violence order was made in circumstances when SD refused to sign the paperwork she had completed to obtain a passport for one of the children, whereupon she poked SD with a pen and then took a steak knife from the kitchen and held it 'towards SD in a stabbing position'.[37] The records also include that Ms Vaeau had picked up a scanner and struck it against a wall and a TV.[38] Police were sufficiently concerned that there was 'an imminent risk of harm' to either Ms Vaeau or SD that they sought an emergency examination order and transported her to hospital. The police noted that the couple reported multiple physical fights during their relationship.

[44] Further, on 4 February 2013, Police records reveal that police officers attended a disturbance at the house where Ms Vaeau and SD lived with the three children.

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34 *Commissioner for Children and Young People and Child Guardian v Lister (No2)* [2011] QCATA 87, [51]–[53].
35 RFD [44]–[49].
36 RFD [46]–[47].
37 RFD [46].
38 RFD [47].

Relevantly, SD told police that he had refused to drive Ms Vaeau and the children to a friend's house, telling her to walk and leave the kids at home. Subsequently, SD and Ms Vaeau had pushed each other. According to SD, Ms Vaeau had picked up two knives and had waved them at him. He tried to take the knives from her and in the process had sustained a minor cut to his thumb and forefinger. Ms Vaeau's account differed in that she said she had picked up the knives only because she was afraid that SD would carry out his threat to take the children from her and not allow her to see them. She told police that the cut to SD's hand was caused by him attempting to take the knives away from her while she was backing away from him. Ms Vaeau was charged with contravention of a domestic violence order.

[45] This evidence gives rise to the elements and other factors relied upon by the Tribunal, as relevant to the question of whether Ms Vaeau's circumstances are exceptional. In summary, those elements and other factors are:

(a) Ms Vaeau's own perpetration of domestic violence and her 'seemingly instinctive resort to violence,';

(b) what the Tribunal described as Ms Vaeau's questionable insight into the effect of exposing her children to domestic violence and her absence of evident remorse about the exposure; and

(c) the impact of Ms Vaeau's own exposure to domestic violence as a child and her mental health.

[46] In the end, the Tribunal was not satisfied on the evidence that these issues had been addressed by Ms Vaeau such that it could be satisfied that she did not pose a risk of harm to children in child related employment.

[47] Underlying Ms Vaeau's submissions is the premise that only those matters referred to in s 226(2) may be considered by the Tribunal in the review. That is not so. Although the Tribunal must consider the s 226(2) factors where the person has been the subject of a conviction or charge, the WWC Act does not provide that those matters are exclusively to be considered in determining under s 221 whether it is an exceptional case in which it would not be in the best interests of children for a positive notice to issue. Again, the Tribunal exercises a broad general discretion in deciding whether an exceptional case exists, which is not confined by a general rule.[39]

[48] Ms Vaeau frames her submissions in relation to the first ground of appeal not only on the basis of failure to give weight to certain factors, but also on the basis of considering matters which could not reasonably have been considered relevant to the assessment of Ms Vaeau, contrary to section 226(2)(e) of the WWC Act.

[49] In particular, Ms Vaeau submits that the following matters are not a relevant consideration and are contrary to a proper understanding of domestic violence:

(a) The Tribunal's consideration of the actions of SD, apparently placing responsibility on Ms Vaeau for SD's behaviour, without any evidence that his behaviour was within her ability to control. It is said that SD's behaviour is only relevant insofar as the Tribunal might need to assess how Ms Vaeau dealt with his behaviour and that by this approach the Member was led to an incorrect conclusion;

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39 *Director-General, Department of Justice and Attorney-General* v *FRW* [2020] QCATA 13, [42].

(b) The Tribunal criticised Ms Vaeau for not leaving sooner or for failing to take out a domestic violence order against SD;[40]

(c) The evidence is that staying in the relationship was a risk to the children because of the violence, but she could not readily leave the relationship. This is the kind of dilemma regularly faced by women in domestic violence situations and it may take many attempts before successfully leaving as Ms Vaeau experienced; and

(d) There was no de-identification of Ms Vaeau's name in the decision, but SD was de-identified, creating the impression that SD is to be shielded from Ms Vaeau.

[50] We do not agree with Ms Vaeau that the tenor of the decision is that she is responsible for SD's behaviour or that she allowed him to be violent. The Tribunal did however explore the extent to which Ms Vaeau demonstrated insight into the consequences of her own behaviour which led to the offence.

[51] As to Ms Vaeau remaining in the relationship or not obtaining the protection of a domestic violence order, the Member purported to rely on Ms Vaeau's own evidence as to "wrong choices" she had made. We cannot see in the evidence that Ms Vaeau used those words, however she did acknowledge that she carried a lot of guilt as to what her children went through and had to see, and that she is really trying to make better choices in life today so the children have better memories.[41] At the hearing, the Member referred Ms Vaeau to one of the Child Services reports which recorded that she was aware her oldest son has suffered as a result of her choices,[42] more so than the younger boys. In these parts of the hearing the Member was focussed on the best interests of the children. We do not think he was in error in doing so. That said, we do not consider the Member's characterisations of Ms Vaeau's 'wrong choices' or 'choice' to stay in the relationship to be appropriate. Such descriptions fail to acknowledge the complex dynamics at play in relationships involving domestic violence.

[52] Domestic violence is undoubtedly a scourge on society. Recent years have seen raised awareness of the prevalence and diverse forms of domestic violence resulting in vehement condemnation of acts of domestic violence of all types by the community at large, as well as an attitude of 'zero tolerance'. It is also now accepted and understood that a child exposed to domestic violence can experience serious physical, psychological and emotional harm.[43] It is commonly the case that one party in a relationship, very often a woman, is substantially the victim of violence, although she may defend herself from physical violence from time to time. We are conscious of the undesirability of re-victimisation and the real difficulties faced by Ms Vaeau. However, the paramount consideration is the welfare and best interests of children. It is clear from the authorities that any hardship or prejudice to an applicant such as Ms Vaeau is irrelevant in deciding the proceeding.

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40 RFD [69], [70], [73], [74], [76], [133], [172], [185], [202].

41 Transcript, p 10, lines 5–11.

42 Transcript, p 22.

43 *Domestic and Family Violence Protection Act* 2012 (Qld), Preamble. See also s 10 (which sets out the broad meaning of '*exposed to domestic violence'* to include, for example, overhearing threats of physical abuse; overhearing repeated derogatory taunts; and seeing or hearing an assault); s 53 (which empowers a court to name a child in an order if necessary or desirable to protect the child from *inter alia* being exposed to domestic violence).

[53] In relation to the final matter Ms Vaeau raised, we do not consider that referring to Ms Vaeau's ex-partner in a de-identified way is suggestive of an error in the way the Tribunal considered the matter. SD was not a party to the proceedings and able to put his version of events. It was appropriate that he be de-identified.

[54] For these reasons we do not consider the Tribunal took into account irrelevant considerations.

[55] Ms Vaeau also submits that the Tribunal gave inappropriate weight to Ms Vaeau's mental health under section 226(2)(e) of the WWC Act. Ms Vaeau concedes that her mental health is a relevant consideration, but that the evidence established she has taken no medication since 2015, her psychologist did not express an opinion that she is in poor mental health and no agency has expressed a concern in the context of her ability to look after children.

[56] The Tribunal correctly identified Ms Vaeau's mental health as a relevant factor for consideration. The Tribunal was not satisfied that her depression has been treated and is under control, that Ms Vaeau understands and accepts the need for treatment and understands her triggers and has strategies for addressing them. The Tribunal considered that the limited assistance Ms Vaeau has received from medical and behavioural professionals was either not persevered with or was provided without complete knowledge of Ms Vaeau's history. Those conclusions were open to the Tribunal on the evidence.

[57] Ms Vaeau is concerned by the reference at [103] of the decision to "diagnosed dementia". In the context of the reasons as a whole, we are of the view that is a typographical error, and it is sufficiently clear that the intended reference was to "depression".

[58] We do not consider that undue weight was placed on Ms Vaeau's mental health. The Tribunal was not satisfied on the evidence that mental health issues were no longer an issue for Ms Vaeau. The Tribunal was entitled to find that the evidence in this regard was not sufficient for it to be satisfied that Ms Vaeau's mental health issues had been addressed.

[59] The Tribunal did not misstate the relevant test, nor did it misapply the test by giving insufficient weight or too much weight to the relevant issues so that one could say the Tribunal arrived at an unreasonable result with no rational basis for that result. We do not consider that there has been an error of law in the exercise of the Tribunal's discretion, nor has there been an error of mixed fact and law.

[60] The first appeal ground must fail with respect to the alleged error of law. Leave to appeal is not granted with respect to the balance of the ground of appeal.

Did the Tribunal fail to give adequate weight to the psychological report?

[61] The Tribunal accepted the respondent's submission that 'lesser' weight should be given to the report of Cheryl Ruston, Psychologist, dated 22 August 2019.[44]

[62] The Tribunal gave reasons for attributing limited weight to Ms Ruston's conclusions. These included that the report was in draft form. We note that, although signed, the report refers to another unknown person on each page, presumably another patient. Paragraphs in relation to family history and educational and

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44 RFD [199].

occupational history are both marked with notes to "extend". We do not accept the submission that the report was not in draft form.

[63] The Tribunal noted and we agree that although a conclusion was proffered that Ms Vaeau is not a threat to children or young people, no basis for that conclusion is given. Further, some of the information in the report appears to be incorrect such as Ms Vaeau's only involvement in violence was attempting to defend herself on one occasion, and the statement that there is no evidence of psychiatric history.

[64] Ms Vaeau submits that it goes beyond the evidence for the Member to refer to "the Applicant's mental health issues previously found to pose a risk to children". It is said that there has been no finding to that effect. The Member made that reference in the context of a discussion about a lack of awareness on the part of the psychologist as to Ms Vaeau's mental health history. Ms Vaeau has a history of mental health issues, including depression, threats of self-harm and suicidal ideation.

[65] We agree that there has been no formal "finding" of those mental health issues posing a risk to children. Nevertheless, those issues are on any objective basis serious. The Tribunal cites those areas of concern in the decision.[45] The Tribunal has not gone beyond the evidence in referring to those concerns, although its language could have been clearer.

[66] In seeking to establish that the Tribunal should have accorded greater weight to Ms Ruston's report, Ms Vaeau attempts to demonstrate error on the part of the Tribunal in concluding that there was an apparent failure to disclose her mental health history to her psychologist. She points out the lack of evidence as to what Ms Ruston in fact knew. We think that is the point. In a better prepared report or with the benefit of Ms Ruston giving evidence, the extent of her knowledge about Ms Vaeau's relevant history and the current relevance of Ms Vaeau's mental health history could have been determined. Ms Ruston was not called to give evidence and was not available for cross-examination.

[67] The Tribunal was left without that evidence, however that may have come to pass.

[68] Finally, we do not accept that the severity of Ms Vaeau's mental health issues is not borne out by the evidence. The history of an emergency examination order, diagnosed depression, threats of self-harm and suicidal ideation are, in our view, serious and relevant matters.

[69] A psychologist's report is an important piece of evidence in a matter such as this. The Tribunal relies on the professional opinion of medical witnesses to assist in reaching a decision. The Tribunal wanted to be satisfied as to some key factors including that any mental health issues had been treated and were no longer a problem, that Ms Vaeau recognised her triggers for anger and violence and that she is able to manage her behaviours, and importantly that she has insight into the effect of violence and abusive behaviours on children. These are properly matters for expert opinion. The report was unsatisfactory in each of these areas.

[70] The Member did not fall into error by placing little weight on Ms Ruston's report.

[71] Leave to appeal is not granted with respect to the second ground of appeal.

Did the Tribunal fail to give adequate weight to the protective factors?

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45 RFD [96].

[72] Ms Vaeau submits in essence that the Tribunal should have given a different weight to the factors considered and should have reached a different conclusion.

[73] We consider that the approach taken by the Tribunal was open on the evidence and that his conclusion was rational, even allowing for the fact that another Tribunal differently constituted might have reached a different conclusion.

[74] Ms Vaeau's submissions return to the matters dealt with in the first ground of appeal; namely, that there is no evidence of concerning behaviour outside the context of her violent relationship. That may be the case, but when considered with the entirety of the evidence which raised broader issues going to Ms Vaeau's history of violence, her mental health issues and her childhood experiences, the Tribunal was entitled to conclude that these issues did not cease to exist when Ms Vaeau's relationship with SD ended and that there is a need for clear evidence that Ms Vaeau has taken all necessary steps to ensure that these factors no longer pose a real and appreciable risk to children. That evidence was not present before the Tribunal and as a result it was open for the Member to conclude that the case was exceptional.

[75] Ms Vaeau's submits that it is wrong to characterise as a risk factor a lack of acknowledgement that her own behaviour contributed to domestic violence and her offending, because that fails to recognise the violence she experienced and the difficulty of leaving SD with her children. We consider that in this regard the Tribunal was properly considering the question of Ms Vaeau's insight into the role her own behaviour had on her children. The Tribunal had regard to the evidence on the point and was not satisfied.

[76] We are not satisfied that the Tribunal erred. Leave to appeal is not granted with respect to the third ground of appeal.

Conclusions and orders

[77] Accordingly, the appeal should be dismissed and the application for leave to appeal should be dismissed. We make orders accordingly.