SUPREME COURT OF VICTORIA

COURT OF APPEAL

S APCI 2017 0135

SECRETARY TO THE DEPARTMENT OF JUSTICE AND REGULATION — Applicant

v

OUX (a pseudonym)[1] — First Respondent

and

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL — Second Respondent

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JUDGES:	PRIEST, BEACH and WEINBERG JJA
WHERE HELD:	MELBOURNE
DATE OF HEARING:	24 July 2018
DATE OF ORDERS:	24 July 2018
DATE OF REASONS:	27 July 2018
MEDIUM NEUTRAL CITATION:	[2018] VSCA 178
JUDGMENT APPEALED FROM:	[2017] VCAT 1809 (Judge Millane, Vice President)

ADMINISTRATIVE LAW — *Working with Children Act 2005* — Application for assessment notice — 'Category A application' owing to conviction for sexual penetration of a child aged between 10 and 16 years — Secretary required to refuse category A applications — Secretary issued a 'negative notice' — VCAT empowered to decide category A applications — Whether Tribunal conflated 'public interest test' — Whether Tribunal subsumed 'unjustifiable risk test' within the 'reasonable person test' — *Working with Children Act 2005* ss 10, 11, 12, 26A(1), 26A(3), 26A(4), 26A(5)— *Victorian Civil and Administrative Tribunal Act 1998* s 148.

APPEARANCES:	Counsel	Solicitors
For the Applicant	Mr P Hanks QC with Mr A J Sim	Working with Children Check Unit, Department of Justice and Regulation
For the First Respondent	Mr E Nekvapil	Victoria Legal Aid

[1] To ensure there is no possibility of identification, this judgment has been anonymised by the adoption of a pseudonym in place of the name of the First Respondent.

PRIEST JA
BEACH JA
WEINBERG JA:

Introduction

1 OUX, who, on 22 February 1994, was convicted of the sexual penetration of a child between 10 and 16, applied to the Secretary to the Department of Justice and Regulation ('the Secretary') for an assessment notice under the *Working with Children Act 2005* ('the Act'), so as to permit him to perform child-related work.[2]

2 On 14 October 2016, the Secretary issued OUX with a negative notice, the practical effect of which was to prevent him from performing child-related work.[3]

3 Following an application by OUX to the Victorian Civil and Administrative Tribunal ('VCAT' or 'the Tribunal') — which was opposed by the Secretary — on 20 November 2017 a Vice President of VCAT made orders that:

> 1. The Negative Notice given on 13 August 2016 is set aside.
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> 2. The Secretary is directed to issue the Applicant with an Assessment Notice pursuant to s 51(2)(c) of the *Victorian Civil and Administrative Tribunal Act 1998* and s 26A(5) of the *Working with Children Act 2005*.

4 Pursuant to s 148 of the *Victorian Civil and Administrative Tribunal Act 1998* ('VCAT Act'), the Secretary seeks leave of this Court to appeal on a question of law. The sole ground of appeal advanced is formulated as follows:[4]

> The Tribunal erred by failing to perform its statutory task under s 26A(4) [of the *Working with Children Act 2005*], in that it did not ~~all, nor separately or correctly~~ consider the 'any type of child-related work test' in s 26A(4)(b) before directing the Secretary to give [OUX] an assessment notice:
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> (a) by conflating that test with the 'reasonable person test' in s 26A(4)(a); or alternatively

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2 The meaning of 'child-related work' is discussed at [9] below.

3 See [12]–[13] below.

4 Leave to amend the ground (as indicated) was granted on the hearing of the application for leave to appeal.

(b) by subsuming the 'any type of child-related work test' within the 'reasonable person test', or alternatively

(c) by failing to consider or apply at all the 'any type of child-related work test' to the facts.

5 In our opinion, the application for leave to appeal should be refused. Our reasons follow.

The statutory regime governing child-related work

6 Before turning to the circumstances of the instant case, it is convenient to discuss the applicable statutory regime.

7 The main purpose of the Act is 'to assist in protecting children from sexual or physical harm by ensuring that people who work with, or care for, them are subject to a screening process'.[5] When the Secretary or VCAT makes a decision under the Act, 'the protection of children from sexual and physical harm must be the paramount consideration'.[6]

8 Part 2 of the Act establishes a process to screen persons engaging or intending to engage in 'child-related work'.[7]

9 Child-related work is work at or for a service, body or place, or that involves an activity, specified in s 9(3), that usually involves 'direct contact'[8] with a child.[9]

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5 Section 1(1).

6 Section 1A.

7 Section 8(1).

8 Section 3(1) provides a definition:

> ***direct contact*** means any contact between a person and a child that involves—
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> (a) physical contact; or
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> (b) face to face contact; or
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> (c) contact by post or other written communication; or
>
> (d) contact by telephone or other oral communication; or
>
> (e) contact by email or other electronic communication; …

9 By s 3(1) a 'child' is a person under 18 years of age.

Section 9(3) sets a number of relevant services, bodies and places, including 'providing, on a publicly-funded or commercial basis, a transport service *specifically for children*'.[10] Work is not child-related work, however, by reason only of occasional direct contact with children that is incidental to the work.[11]

10 Section 10(1) of the Act provides that a person may apply to the Secretary for a working with children check to be carried out on him or her and an assessment notice to be given to him or her on completion of that check. By virtue of s 11(1), when considering an application under s 10, the Secretary must arrange for the conduct of a police record check on the applicant and may make certain specified enquiries.

11 For the purposes of the Act, a 'category A' application includes an application with respect to a person who, as an adult, is charged with or has at any time been convicted or found guilty of a 'category A offence',[12] a category A offence being 'an offence specified in Schedule 1'.[13] In turn, clause 1 of Schedule 1 of the Act provides that a category A offence includes an offence 'specified in clause 1 of Schedule 1 to the *Sentencing Act 1991* (sexual offences) in circumstances where the person against whom the offence is committed is a child'. Relevantly, sexual penetration of a child aged between 10 and 16, contrary to s 46(1) of the *Crimes Act 1958*, is such an offence.[14]

12 Section 12(2) of the Act provides that the Secretary must refuse to give an assessment notice on a category A application. Exceptions are, however, provided by s 12(3). Hence, the Secretary may give an assessment notice on a category A application if 'the application is in respect of a person who has at any time been

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10 Section 9(3)(l).

11 Section 9(1A).

12 Section 12(1)(d).

13 Section 3(1).

14 *Sentencing Act 1991*, Schedule 1, cl (1)(ac).

given an assessment notice because of an order made by VCAT under section 26A(5)'.[15]

13 Under s 26A(1), a person given a 'negative notice'[16] on a category A application[17] may apply to VCAT for an assessment notice to be given to him or her. The effect of ss (3), (4) and (5) of s 26A is that VCAT must not order that such an assessment notice be given unless satisfied, first, that giving the notice would not pose an unjustifiable risk to the safety of children, and, secondly, that in all the circumstances it is the public interest to do so.[18] Thus, ss (3), (4) and (5) provide:[19]

> (3) VCAT must not make an order for the giving of an assessment notice on an application under subsection (1) unless it is satisfied that giving the notice *would not pose an unjustifiable risk to the safety of children*, having regard to—
>
> (a) the nature and gravity of the offence and its relevance to child-related work; and
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> (b) the period of time since the applicant committed the offence; and
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> (c) whether a finding of guilt or a conviction was recorded for the offence or a charge for the offence is still pending; and
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> (d) the sentence imposed for the offence; and
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> (e) the ages of the applicant and of any victim at the time the applicant committed the offence; and
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> (f) whether or not the conduct that constituted the offence has been decriminalised since the applicant engaged in it; and
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> (g) the applicant's behaviour since he or she committed the offence; and
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> (h) the likelihood of future threat to a child caused by the applicant; and
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> (i) any information given by the applicant in, or in relation to, the application; and
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> (j) any other matter that VCAT considers relevant to the application.
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> (4) For the purposes of subsection (3), in satisfying itself that giving an assessment notice *would not pose an unjustifiable risk to the safety of children*,

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15 Section 12(3)(a).

16 Section 17(3) provides that a negative notice must be given by the Secretary on an application that is a category A application.

17 Other than a person specified in s 12(1)(a), (b) or (c).

18 See *PQR v Secretary, Department of Justice and Regulation (No 2)* [2017] VSC 514, [31] (Bell J).

19 Emphasis added.

VCAT must be satisfied that—

(a) a reasonable person would allow his or her child to have direct contact with the applicant while the applicant was engaged in any type of child-related work; and

(b) the applicant's engagement in any type of child-related work would not pose an unjustifiable risk to the safety of children.

(5) If, in accordance with this section, VCAT is satisfied that giving an assessment notice would not pose an unjustifiable risk to the safety of children, VCAT may by order direct the Secretary to give the assessment notice to the applicant if it is satisfied that, in all the circumstances, *it is in the public interest to do so*.

Relevant circumstances

14 OUX is aged in his late forties. He separated from his wife, whom he married in 1999, in 2016.

15 On 22 February 1994, having been found guilty by a jury in the County Court on one count of sexual penetration of a child between 10 and 16 years — the child being a 13 year old female whose vagina he digitally penetrated — the trial judge sentenced OUX to twelve months' imprisonment, wholly suspended for a period of two years. At the time of the offence, OUX was 22 years of age. Notwithstanding the jury's verdict, OUX has continued to maintain that, at the relevant time, he believed the victim was aged 16 years.

16 OUX also has two findings of guilt in the Magistrates' Court. First, in March 1990, for offences of burglary and theft, a magistrate without conviction sentenced him to a 12 month community based order, with a condition that he perform 100 hours of unpaid community work. Secondly, on 12 March 2004, for recklessly causing injury to his seven year old son, he was placed on an adjourned bond until 11 March 2005, with a condition that he undergo counselling.

17 On 12 August 2010, OUX made an application to the Department of Justice for a working with children check under a previous manifestation of the Act. At that time, the application was classified as a 'category 1' application by reason of the

finding of guilt for the sexual penetration offence. OUX was issued with a negative notice on 5 November 2010; and, after his employer, Moreland Bus, was notified, his employment was terminated.

18 Subject to there being a relevant change in circumstances, a person who has been given a negative notice is not entitled to make a further application for an assessment until five years have elapsed.[20]

19 In the years since receiving the negative notice in November 2010, OUX has held regular employment under contracts obtained through various recruitment agencies, albeit that the negative notice has prevented him from taking up employment opportunities where the available work involved contact with children.

20 On 9 September 2016, OUX applied to the Department of Justice and Regulation for a further assessment notice, the requisite five-year period since the first negative notice having elapsed. OUX now wants to obtain a Certificate III in Non-Emergency Patient Transport, with the aim of obtaining future permanent employment in patient transport. He believes that non-emergency patient transport would largely involve him, for example, transporting elderly patients between their aged care facility or home and hospital. Whilst OUX expressed uncertainty about whether the work would also involve working with children, his evidence to VCAT was that he had been advised by the college offering the Certificate III TAFE course that a pre-requisite to enrolment was a working with children check under the Act.

21 On 23 September 2016, a delegate to the Secretary issued an interim negative notice.[21] OUX was invited to make a submission responding to information concerning his criminal history and eligibility to be given an assessment notice. No submission was, however, provided within the time specified, and, on 14 October 2016, the Secretary issued OUX with a negative notice.

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20 See s 25(1) of the Act.

21 See s 16(1)(b) of the Act.

22 Thereafter, on 16 November 2016, OUX applied to VCAT for a review of that decision, seeking an order for an assessment notice under s 26A of the Act.

23 As indicated, the Secretary opposed the application, but, on 20 November 2017, VCAT set aside the negative notice, and ordered the Secretary to issue OUX with an assessment notice.

24 Dr Aleksandra Belofastov, a clinical and forensic psychologist, was among the witnesses who gave evidence before the Tribunal. In her reasons, the Vice President said that the evidence of Dr Belofastov 'provided a sound basis from which to determine various matters, as required by section 26A'.[22] She summarised of Dr Belofastov's evidence in point form as follows:[23]

- There is no evidence that OUX suffers from a mental disorder, save that he does meet the criteria for a mild intellectual disability.
- The neuropsychological assessment findings suggest that OUX's adaptive functioning skills overshadow the nature and degree of his actual cognitive impairments.
- The sexual offending behaviour should be considered within the context of OUX's cognitive functioning. I agree, subject to the rider that this application does not provide an occasion for second guessing the finding of guilt by a jury, or the psychologist's assessment of OUX in 1994. Immaturity and OUX's susceptibility to being led by others were clearly factors considered at the time of sentencing.
- Due to his cognitive deficits, OUX, who gave answers to police consistent with a belief that he viewed the victim as being older than 13, may have been more similar in mental age to a 13 year old at the time of the commission of the penetration offence, and may have only had partial insight into the wrongfulness of the conduct. The Secretary submitted that the evidence as to OUX's mental age at the time of the offence was speculative. I disagree. Immaturity and susceptibility to being led by others, matters to which the psychologist referred in 1994, lend weight to Dr Belofastov's opinion in this regard.
- OUX appears to have learned that his behaviour was inappropriate and illegal. He has expressed empathy with the victim and regret for his past

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22 *OUX v Secretary to the Department of Justice and Regulation (Review and Regulation)* [2017] VCAT 1809, [81] ('Reasons').

23 Reasons, [80].

actions. This finding was reflected in the evidence of both OUX and his wife. I was satisfied that OUX demonstrated appropriate insight into the impact on the victim, in part informed by his own experience of having a teenage daughter.

- There is no evidence that OUX holds problematic cognitions or arousal patterns.

- Whilst neither OUX nor [his wife] could offer an explanation for the outburst [leading to the prior finding of guilt on 12 March 2004, for recklessly causing injury], as Dr Belofastov opined the offence involving injury to OUX's son likely occurred in the context of dysregulated emotional arousal with contribution from psychosocial stressors and poor coping strategies. As mentioned, both OUX and his wife said he continued to employ the same strategy to cope with stress as used before the incident. However, Dr Belofastov's evidence that OUX has since learnt some skills for managing stressful situations, not to mention the evidence that he underwent counselling as directed by the Magistrate, must be afforded some weight in this regard. Moreover, there is no evidence of any disposition toward violent behaviour, either before or since this incident more than 10 years ago. The isolated nature of the incident suggested to me that the behaviour was, as [his wife] said, out of character.

- Assessment of risk and protective factors indicated that OUX's risk of future violent and sexual reoffending is low, with no indication that OUX presents a specific and current risk to the safety of children. Furthermore, assessment of internal and external protective factors indicated that OUX's current circumstances afforded a moderate degree of protection against future general and sexual violence.

Analysis

25 Reduced to their essence, the Secretary's complaints in this Court were threefold. First, it was contended that the Tribunal failed to consider, or to apply, the statutory task in s 26A(4)(b) of the Act (which requires the Tribunal to be satisfied that 'the applicant's engagement in any type of child-related work would not pose an unjustifiable risk to the safety of children'). Secondly, it was contended that the Tribunal conflated the 'public interest test'. Thirdly, and alternatively, it was contended that the Tribunal subsumed the test in s 26A(4)(b) within the 'reasonable person test'.

26 In her reasons for granting relief to OUX, the Vice President of the Tribunal, having set out the key provisions of the Act, discussed the issue of 'unjustifiable

risk':[24]

> It was common ground that the Act does not impose any formal onus of proof on OUX, although as His Honour Justice Kyrou observed in *Maleckas v Secretary, Department of Justice*:[25]
>
> > … as a matter of practical reality, it is difficult to see how an applicant could succeed in satisfying the VCAT that the giving of an assessment notice would not pose an unjustifiable risk to the safety of children, unless the applicant introduces probative evidence going to that issue.
> >
> > As a matter of common sense, the more objective, direct and unequivocal is the evidence before the VCAT on the question of risk to the safety of children, the greater the prospects of the VCAT being satisfied that the giving of an assessment notice would not pose an unjustifiable risk to the safety of children.
>
> The Tribunal, however, need not be satisfied that there is no risk. Indeed, an Assessment Notice may be given to OUX even if the Tribunal is satisfied that doing so poses a risk to the safety of children, provided that the Tribunal is satisfied that such risk is not an unjustifiable risk.[26]
>
> As is apparent from the matters to which section 26A(3) refers, a chance of future threat, irrespective of its magnitude must also be considered. The greater the chance, the less favourable is the consideration from OUX's perspective.[27]

27 The Vice President then turned to the 'reasonable person' test, and observed:[28]

> The Tribunal *must also be satisfied of the additional matters in subsection 26A(4)* (the 'Reasonable Person Test'), where giving an Assessment Notice to OUX would not pose an unjustifiable risk to the safety of children, namely that:
>
> (a) a reasonable person would allow his or her child to have direct contact with OUX while OUX was engaged in any type of child-related work; and
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> (b) *OUX's engagement in any type of child-related work would not pose an unjustifiable risk to the safety of children*.
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> The Reasonable Person Test requires the application of an objective standard based upon the views of a reasonable person. …

28 We pause to note that, as is apparent from the passage from the Tribunal's reasons extracted immediately above, the Vice President plainly made reference to

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24 Reasons, [34]–[36].

25 [2011] VSC 227, [43] and [56].

26 Ibid [43].

27 Ibid [72].

28 Reasons, [37]–[38] (emphasis added).

the statutory criterion set out in s 26A(4)(b) (albeit that the reference apparently was made under the rubric of the 'reasonable person' test).

29 Having referred to the 'reasonable person' test, the Vice President adverted to the 'public interest' test:[29]

> Lastly, even if satisfied under subsections 26A(3) and (4) that giving an Assessment Notice would not pose an unjustifiable risk to the safety of children, the Tribunal must determine that it is appropriate under subsection 26A(5) to refuse to give the Assessment Notice, unless satisfied it is in the public interest to do so (the 'Public Interest Test').
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> In *Maleckas* His Honour Justice Kyrou viewed the following factors as potentially relevant to consideration of the Public Interest Test:[30]
>
> a) whether OUX's current or proposed activities constituted child-related work;
>
> b) whether there was evidence that OUX was dishonest, or had problems with drugs or alcohol, or that he was suffering from a serious mental illness;
>
> c) whether there was evidence that OUX had skills that could benefit children;
>
> d) whether there was evidence that OUX was a positive role model for children.

30 Ultimately, under the sub-headings 'Reasonable Person Test' and 'Public Interest Test' — themselves falling under the general heading, 'Section 26A(4) and (5) – Reasonable Person and Public Interest Tests', the Vice President observed:[31]

> Reasonable Person Test
>
> The Secretary submitted that a reasonable person would not allow a person found guilty of a serious sexual offence and convicted of a violence offence against children, to have access to children.
>
> It was conceded on OUX's behalf that OUX's history would likely cause some level of concern for the so called reasonable person in allowing direct contact with their child while OUX was engaged in child-related work. *Counsel submitted, correctly in my view, that it was open to the Tribunal to find that, whilst there was some level of risk to the safety of children should OUX engage in any type*

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29 Reasons, [41]–[42].

30 *Maleckas* [89] to [90].

31 Reasons, [106]–[114] (emphasis added).

of child-related work, such risk was not unjustifiable.

Having considered whether a reasonable person properly appraised of the information before the Tribunal would allow OUX to have direct access to children, I was satisfied that they would.

Public Interest Test

The Secretary submitted that it was not in the public interest for OUX to be issued with an Assessment Notice.

In this regard, it was submitted that OUX had not provided compelling evidence that he requires an Assessment Notice to continue working. I disagree.

OUX proposes to train for and seek permanent employment in Non-Emergency Patient Transport. I had no reason to doubt that this is the course OUX intends to follow. If granted an Assessment Notice OUX may, or may not, succeed in obtaining the required certification or, indeed, succeed in obtaining permanent employment in this field. OUX is, however, required to first obtain an order from the Tribunal directing the Secretary to issue the Assessment Notice. Moreover, allowing for his wife's evidence, OUX also requires an Assessment Notice to extend his casual employment opportunities, whether that is to engage in agency work in general, or to engage in employment in the security industry that involves direct contact with children.

Despite his longstanding cognitive deficits OUX has shown a commitment to supporting his family financially, and to enhancing his job skills and opportunities by obtaining employment-related certificates that enable him to work: in security; as a spotter supervising workers working under power lines; and to work in employment requiring a Forklift licence, or competency in operating certain machinery in the construction industry.

I was satisfied of the following matters, that:

- OUX's current activity in security work and his proposed activity could constitute child-related work. The latter, Non-Emergency Patient Transport could involve OUX in, for example, the transporting of child patients.
- There was no evidence of substance abuse issues or serious mental illness. Other than the very early dishonesty offences and my concern that OUX had not been frank with the Tribunal and his wife about various matters, I did not form the view that OUX was, as a general rule, a dishonest individual.
- OUX's work ethic and his commitment to parenting and supporting his children suggest that he is a positive role model for at least his own children.

These are matters that indicate against public interest considerations justifying rejection of this application.

31 Contending that the Tribunal's reasons betray error, counsel for the Secretary submitted that s 26A(4) of the Act contains two tests: the 'reasonable person test' and the 'any type of child-related work test'. In oral submissions, senior counsel for the Secretary conceded that s 26A(4)(b) 'is a little circular', but submitted that the two tests, despite uncertainty as to their specific content, had to be applied 'cumulatively'. He submitted that 'each requires a value judgment', but 'there is a significant difference between the judgment that is to be evaluated'. It was contended that 'they cover very similar territory, but they are not identical'. Senior counsel submitted that the Tribunal was required to consider and apply each of those tests to the facts and circumstances of OUX's application, and to form a state of satisfaction that, in all the circumstances, he would satisfy both tests, before the Tribunal could then consider the 'public interest test' in s 26A(5). The Tribunal, however, did not separately consider the 'any type of child-related work test', and thus failed to perform the statutory task under s 26A(4)(b) of the Act.

32 Counsel for the Secretary submitted that the failure correctly to take into account the 'any type of child-related work test' before granting an assessment notice was an error of law. In written submissions it was contended that, although the Tribunal properly considered the 'reasonable person test' in s 26A(4)(a), the Tribunal 'did not at all, nor separately or correctly consider' the 'any type of child-related work test' in s 26A(4)(b), in that it conflated that test with the 'public interest test', or alternatively, it subsumed the 'any type of child-related work test' within the 'reasonable person test'. When pressed by the Court to provide an example of a situation in which satisfaction of the matters in subsection (4)(a) would not also comprehend satisfaction of the matters in subsection (4)(b), senior counsel frankly conceded that he could not think of an example (although he also submitted that it might nonetheless be possible to imagine such a case).

33 Finally, it was asserted that the 'any type of child-related work test' was 'in fact not considered or applied at all to the facts'. It was submitted that the Tribunal did

not deal with the arguments advanced on behalf of the Secretary about the test in s 26A(4)(b). The failure to deal with that argument may itself amount to an error of law.[32]

34 On the other hand, counsel for OUX submitted[33] that the Tribunal correctly identified the matters about which it had to be satisfied, made appropriate and relevant observations about them,[34] and provided reasons for having been satisfied of those matters.[35] It was submitted that the only inference that could be drawn from the Tribunal's reasons is that the Tribunal clearly understood that s 26A(4)(a) and (b) were two specific matters about which it was required to be satisfied.[36] Indeed, the Tribunal gave reasons for being satisfied as to each of those matters.[37] There is no basis for inferring from the reasons that the Tribunal's satisfaction was affected by any 'misdirection or misunderstanding as to the applicable law'. Finally, it was submitted that, even if there was an error of law constituted by the Tribunal failing to consider s 26A(4)(b), the error did not vitiate the Tribunal's decision, since the outcome would have been the same absent the error.

35 In our opinion, the submissions of OUX's counsel generally should be accepted.

36 Under s 148 of the VCAT Act, this Court's jurisdiction is, as we have mentioned, limited to the resolution of questions of law. In a not dissimilar legislative context, this limitation has been said to impose a 'significant constraint' upon the role of the

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32 Counsel cited *Dranichnikov v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 77 ALJR 1088, 1092 [24] (Gummow and Callinan JJ), 1102 [95] (Hayne J); and *NABE v Minister for Immigration and Multicultural and Indigenous Affairs (No 2)* (2004) 144 FCR 1, 90 [60].

33 Although named as second respondent, adopting the usual course the Tribunal submitted to such order as the Court might make (save as to costs). See *R v Australian Broadcasting Tribunal; ex parte Hardiman and Ors* (1980) 144 CLR 13, 35.

34 Citing Reasons, [33]–[43].

35 Citing Reasons, [82]–[114].

36 Citing Reasons, [37].

37 Citing Reasons, [107]–[108].

Court in reviewing a Tribunal's decision.[38] This 'practical as well as principled restraint' means that the Court 'will not be concerned with looseness in the language of the Tribunal nor with unhappy phrasing of the Tribunal's thoughts'.[39] Hence, the reasons of the Tribunal for the decision under review 'are not to be construed minutely and finely with an eye keenly attuned to the perception of error'.[40] The reality is 'that the reasons of an administrative decision-maker are meant to inform and not to be scrutinised upon over-zealous judicial review by seeking to discern whether some inadequacy may be gleaned from the way in which the reasons are expressed'.[41] We have endeavoured to take a broad and practical approach to the interpretation of the Tribunal's reasons, bearing the foregoing principles steadily in mind.

37 At the risk of repetition, s 26A(4)(b) required the Tribunal to be satisfied that OUX's 'engagement in any type of child-related work would not pose an unjustifiable risk to the safety of children'. In our view, although it might have been more clearly expressed, the emphasised portion of the passage extracted above (at [30]) amounts to such a finding. In effect, the Vice President found that, although there would be 'some level of risk to the safety of children' should OUX 'engage in any type of child-related work', any 'such risk was not unjustifiable'. Thus, we consider that the finding reflects a state of satisfaction of the statutory criterion found in s 26A(4)(b), no matter that it was referred to under the heading of the 'reasonable person' test. Indeed, as is plain from the manner in which she organised her reasons, the Vice President intended to deal with the several criteria set out in ss 26A(4) and (5), notwithstanding that she bundled them together under the descriptors

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38 *Collector of Customs v Pozzolanic* (1993) 43 FCR 280, 286 (Neaves, French and Cooper JJ) ('*Pozzolanic*').

39 *Pozzolanic*, 287; *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259, 272 (Brennan CJ, Toohey, McHugh and Gummow JJ) ('*Wu Shan Liang*').

40 *Pozzolanic*, 287; *Wu Shan Liang*, 272. See also *Politis v Federal Commissioner of Taxation* (1988) 16 ALD 707, 708 (Lockhart J).

41 *Wu Shan Liang*, 272.

'reasonable person' and 'public interest' tests. We note in this regard that, when asked by the Court whether it could still be argued that Vice President had erred if she had provided a separate heading in her reasons before the emphasised portion of the passage extracted above, senior counsel for the Secretary conceded that his argument would be 'weaker'. In our view, that concession, though proper, was something of an understatement.

38 In any event, it is difficult to see that any conflation or subsumption of the criterion in s 26A(4)(b) with or under the 'reasonable person' test in s 26A(4)(a) could realistically have had any influence on the assessment of the central matter of which the Tribunal needed to be satisfied under s 26A(3) — that OUX would not pose an unjustifiable risk to the safety of children. For the purposes of being satisfied that OUX would not pose an unjustifiable risk to the safety of children, the Act provides that the Tribunal had to be satisfied under s 26A(4), that (a) a reasonable person would allow his or her child to have direct contact with OUX while he was engaged in any type of child-related work; and (b) OUX's engagement in any type of child-related work would not pose an unjustifiable risk to the safety of children. At the very least, there is considerable overlap between subsections (3) and (4). But on the assumption that s 26A(4)(b) has some separate work to do, it is difficult to envisage a case where the criterion in s 26A(4)(b) will add anything of substance to the manifold criteria in s 26A(3), or to the 'reasonable person' criterion in s 26A(4)(a).[42]

39 Finally, we note that, when considering the criterion in s 26A(3)(h) — which provides that VCAT must not make an order for the giving of an assessment notice unless it is satisfied 'that giving the notice would not pose an unjustifiable risk to the safety of children, having regard to … the likelihood of future threat to a child caused by the applicant' — the Vice President observed:[43]

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42 Cf *Secretary to the Department of Justice and Regulation v LLF*(*a pseudonym*) [2018] VSCA 155, [64] (and footnote 47) (Beach, McLeish and Niall JJA).

43 Reasons, [103].

> The evidence as a whole, not to mention, the expert assessment of Dr Belofastov has persuaded me of the unlikelihood of OUX posing a future threat to a child. In reaching this conclusion, I made allowance for my reservations concerning OUX's candour as a witness on his own behalf, and my finding that OUX likely misled his wife, and possibly others, about the age of the victim of the sexual offence. However, these matters did not outweigh the strong and compelling evidence that OUX was unlikely to pose a future threat to a child.

40 Paying due regard to the statutory formula in s 26A(4)(b), it is difficult to conceive of a situation in which the Tribunal — having found on strong and compelling evidence that OUX was unlikely to pose a future threat to a child — could nevertheless have failed of satisfaction that his engagement in any type of child-related work would not pose an unjustifiable risk to the safety of children.

41 For these reasons, the proposed appeal has no real prospects of success.[44]

Conclusion

42 Leave to appeal is refused with costs.

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[44] *Metricon Homes Pty Ltd v Softley* (2016) 49 VR 746, 769–70 [68]; *Kennedy v Shire of Campaspe* [2015] VSCA 47, [13]; *Secretary, Dept of Justice and Regulation v Zhong* [2017] VSCA 18, [4].