**IN THE COURT OF APPEAL OF NEW ZEALAND**

**CA262/06**
**[2008] NZCA 377**

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|---|---|---|
| BETWEEN | XIAO QIONG HUANG, YONG MING CUI AND JARVIS CUI<br>Appellants |
| AND | MINISTER OF IMMIGRATION<br>First Respondent |
| AND | THE ATTORNEY-GENERAL<br>Second Respondent |

Hearing: 2 September 2008

Court: William Young P, Hammond and Chambers JJ

Counsel: E Orlov for Appellants
I C Carter and C M Curran-Tietjens for Respondents

Judgment: 19 September 2008 at 10 am

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**JUDGMENT OF THE COURT**

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**A The appeal is dismissed.**

**B We reserve costs.**

**C Ms Huang must not be removed from New Zealand within 20 working days after the date of this decision. If, within that time, she applies for leave to appeal to the Supreme Court, she must not be removed from New Zealand before that application is determined, unless the Supreme Court determines otherwise.**

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**REASONS**

**WILLIAM YOUNG P AND HAMMOND J**

(Given by William Young P)

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## Introduction

[1] This appeal is against a judgment delivered by Asher J on 29 September 2006 in which he dismissed judicial review proceedings challenging the proposed removal from New Zealand of Xiao Qiong Huang ("Ms Huang") and the actual removal of Yong Ming Cui ("Mr Cui"). The hearing of the appeal was deferred pending the delivery of judgment in *Ye v Minister of Immigration* [2008] NZCA 291, a case which involved similar issues.

[2] Mr Cui and Ms Huang have a son, Jarvis, who was born in New Zealand in November 2000 and is a New Zealand citizen. The primary arguments in the case relate to the rights and interests of Jarvis.

[3] Central to the case are treaties to which New Zealand is a party, in particular the International Covenant on Civil and Political Rights 1966 ("ICCPR") and the United Nations Convention on the Rights of the Child 1989 ("CRC") and the way in which they must influence decisions under the Immigration Act 1987 ("the Act"), an issue first addressed by this Court in *Tavita v Minister of Immigration* [1994] 2 NZLR 257. The judgment in *Tavita* resulted in the Immigration Service introducing what is known as "the humanitarian interview". The practical implications of the humanitarian interview process and its consequences were very much at the heart of two further decisions of this Court, *Puli'uvea v Minister of Immigration* (1996) 2 HRNZ 510 and *Ye*. In the latter case, there was a marked divergence of opinion amongst the five judges who heard the case. Complicating our assessment of this line of cases are significant changes (principally in 1991 and 1999) which have occurred to the Act since it was first enacted.

[4] Against that background we propose to address the case under the following headings:

(a) An overview of the facts;

(b) The scheme of the Act;

(c) The international treaties;

(d) The "humanitarian interview" – its provenance and current legal status;

(e) The role of the Court;

(f) The complaints about the processes and outcomes in this case; and

(g) Our evaluation.

**An overview of the facts**

[5] Mr Cui and Ms Huang are Chinese nationals. Ms Huang arrived in New Zealand on 22 April 1996 and Mr Cui arrived on 10 December 1996. They were both granted short-term visitors' permits on arrival.

[6] While living in China, Ms Huang had a child. After the birth of this child she was required, on two occasions, to have abortions; this to ensure compliance with China's "one child" policy. In 2000, while in New Zealand, she became pregnant to Mr Cui. By this stage, Ms Huang was unlawfully in New Zealand (as her last permit had expired). But because of her fear (and indeed the likelihood) that if she were returned to China she would be required to undergo a third abortion, the Removal Review Authority directed that she be granted a further permit, expiring on 28 February 2001. This was to enable her to be in New Zealand when her child was born. As a result, Ms Huang was still in New Zealand in November 2000 when Jarvis was born. She and Mr Cui married each other in the same month.

[7] Mr Cui's last permit expired in July 2001. So from December 1996 until July 2001 he was lawfully in New Zealand.

[8] There has been the usual lengthy and complex sequence of applications and appeals associated with the desire of Ms Huang and Mr Cui to remain in New Zealand. This involved unsuccessful refugee status applications and appeals

(which, in Mr Cui's case, was in the end not prosecuted), appeals to the Removal Review Authority and applications to the Minister of Immigration for special directions. Eventually removal orders were served on Mr Cui on 12 September 2005 and Ms Huang on 19 September 2005.

[9] Mr Cui was taken into custody on 12 September (when he was found hiding in a wardrobe in the house he was living in) and the humanitarian interview was conducted on 14 September which resulted in a decision that the removal should proceed. He subsequently (on 12 October 2005) was removed from New Zealand to China. This followed an unsuccessful attempt by him to obtain interim relief from the High Court preventing such removal. That application was dismissed by Venning J on 22 September 2005.

[10] The immigration officer involved (Mr Craig Fennell) was not able to make direct contact with Ms Huang on 12 September. By the time that Mr Fennell was able to serve a removal order on her (on 19 September 2005), the High Court proceedings referred to in the preceding paragraph had been commenced. In these proceedings, Mr Cui sought (unsuccessfully as it turned out) to prevent his removal and Ms Huang applied to review immigration decisions affecting her which were upstream of her then proposed removal, most relevantly a decision of the Refugee Status Branch of 18 February 2002, declining her application for refugee status. This application was out of time (by reason of s 146A of the Act) and in the judgment of Venning J delivered on 22 September 2005, he declined to grant an extension of time for the review of the 18 February 2002 decision.

[11] Mr Fennell had proposed to conduct a humanitarian interview of Ms Huang on 19 September 2005 but because she turned up late for the appointment, the Mandarin interpreter who had been arranged for the interview had left. So the humanitarian interview was not able to be completed on that day. The result was that when Venning J delivered his judgment on 22 September, there had been no humanitarian interview with Ms Huang. This interview took place eventually on 3 October 2005 and resulted in a decision that removal should proceed. Ms Huang was told this on 7 October and asked to complete Chinese travel documentation. This was eventually completed and supplied to the Immigration Service on

20 October 2005 but the Immigration Service was subsequently unable to locate Ms Huang for removal. How long this state of affairs continued is unclear but it appears that there was a general loss of momentum in relation to Ms Huang's proposed removal as her claim was prosecuted in the High Court.

[12] An amended statement of claim challenging the decision to remove Ms Huang was not filed until 4 April 2006, some three months after the time limit for such a claim expired. In a judgment delivered on 18 July 2006, Asher J granted Ms Huang leave to proceed with a review of the decision, made after the humanitarian interview, that she be removed.

**The scheme of the Act**

[13] As we have noted, the Act was extensively amended in 1991 and 1999. The relevant legislative history is set out in the joint judgment of Chambers and Robertson JJ in *Ye*. Importantly, the legislation, as it now stands, is appreciably different from what was in issue in *Tavita* and *Puli'uvea*. But, for present purposes, it is the Act as amended in 1999 which is relevant.

[14] Part 1 of the Act provides for the circumstances in which people are entitled to be in New Zealand and the associated issuing of permits and visas. This Part envisages that the Government will have an immigration policy (s 13A) and a residence policy (s 13B). There are detailed provisions as to permits, which, inter alia, confer on the Minister an overarching discretion to grant a "permit of any type":

> **35A Grant of permit in special case**
>
> (1) The Minister may at any time, of the Minister's own volition, grant a permit of any type to a person who—
>
> (a) is in New Zealand; and
>
> (b) is required under this Act to hold a permit to be in New Zealand; and
>
> (ba) does not hold a permit to be in New Zealand; and
>
> (c) is not a person in respect of whom a deportation order is in force; and

> (d) is not a person in respect of whom a removal order is in force.
>
> (2) Nothing in subsection (1) of this section confers on any person the right to apply to the Minister for a permit, and where any person purports to apply for a permit under this section,—
>
> (a) the Minister is under no obligation to consider the application; and
>
> (b) whether the Minister considers the application or not,—
>
> (i) the Minister is not obliged to give reasons for any decision relating to the application, other than the reason that this subsection applies; and
>
> …

[15] Part 2 of the Act deals with those who are in New Zealand unlawfully.

[16] Under s 45(1) a person who is in New Zealand unlawfully has an obligation to leave New Zealand unless subsequently granted a permit.

[17] Section 47(1) provides that such a person may appeal to the Removal Review Authority against the requirement for that person to leave New Zealand. This right of appeal is subject to some restrictions under s 47(5) and there are time constraints and fee requirements provided for by s 48. Section 47(3) provides:

> An appeal may be brought only on the grounds that there are exceptional circumstances of a humanitarian nature that would make it unjust or unduly harsh for the person to be removed from New Zealand, and that it would not in all the circumstances be contrary to the public interest to allow the person to remain in New Zealand.

When an appeal is allowed, the Authority is empowered to direct an immigration officer to take such consequential steps as may be necessary to give effect to the decision, including the granting of residence or temporary permits, see s 52.

[18] Section 115A provides for an appeal against decisions of the Removal Review Authority to the High Court on a question of law and there is an entitlement to a further right of appeal under s 116 to this Court with leave.

[19] Section 53 provides for the circumstances in which those unlawfully in New Zealand may be the subject of a removal order (and thus to removal). Section 54 relevantly provides:

> **54 Making of removal orders**
>
> (1) The chief executive, or any immigration officer designated by the chief executive for the purposes of this section who is not disqualified under subsection (2), may make a removal order in the prescribed form in respect of any person if the chief executive or immigration officer is satisfied that section 53(1) or section 70(3) applies to that person.
>
> (2) An immigration officer may not make a removal order in respect of a person if the officer has at any previous time been involved in determining an application by that person for a permit.
>
> …

[20] Also relevant is s 58 which provides:

> **58 Cancellation of removal order**
>
> (1) An immigration officer who has been designated by the chief executive for the purpose of making removal orders under section 54 may, at any time while the person named in the removal order is still in New Zealand, cancel a removal order that has been served by endorsing a copy of the order accordingly, and personally serving that copy on the person named in the order.
>
> …
>
> (5) Nothing in this section gives any person a right to apply to an immigration officer for the cancellation of a removal order, and where any person purports to so apply—
>
> (a) the immigration officer is under no obligation to consider the application; and
>
> (b) whether the application is considered or not,—
>
> (i) the immigration officer is under no obligation to give reasons for any decision relating to the application, other than the reason that this subsection applies; and
>
> …

[21] Of some potential significance is s 130 which provides:

**130 Special directions**

(1) The Minister may from time to time give to the chief executive of the Department of Labour, or to any other immigration officer or to any visa officer, either in writing or orally, a special direction in respect of—

(a) any person, permit, visa, or document; or

(b) any 2 or more persons, permits, visas, or documents where by reason of any specific event, occurrence, or unusual circumstances there is a common link between those persons, permits, visas, or documents,—

in relation to any matter for which such a direction is contemplated by any of the provisions of this Act or of any regulations made under this Act.

…

(6) Nothing in this section, or in any other provision of this Act that refers to or confers a power to make any special direction, gives any person a right to apply for a special direction, or for any visa or permit in circumstances where the issue or grant of the visa or permit would be dependent on the giving of a special direction, and where any person purports to make any such application—

(a) The Minister or appropriate visa officer or immigration officer is under no obligation to consider the application; and

(b) Whether the application is considered or not,—

(i) The Minister or appropriate officer is not obliged to give reasons for any decision relating to the application, other than the reason that this subsection applies; and

…

[22] Finally, it is necessary to refer to s 146A which provides:

**146A Special provisions relating to judicial review of decisions under this Act**

(1) Any review proceedings in respect of a statutory power of decision arising out of or under this Act must be commenced within 3 months after the date of the decision, unless the High Court decides that, by reason of special circumstances, further time should be allowed.

(2) Where a person has both—

(a) appealed against a decision of the Board or an Authority or the Tribunal under any of sections 115, 115A, and 117; and

(b) brought review proceedings in respect of that same decision,—

> the High Court is to endeavour to hear both matters together unless it considers it impracticable in the particular circumstances of the case to do so.
>
> (3) In this section, **statutory power of decision** has the same meaning as in section 3 of the Judicature Amendment Act 1972. (Emphasis in original.)
>
> …

**The international treaties**

[23] The relevant provisions of the ICCPR begin with art 2(3) requiring State Parties to ensure that effective remedies are available to those whose rights or freedoms under the Covenant are violated.

[24] Article 17 on privacy provides:

> 1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence...
>
> 2. Everyone has the right to the protection of the law against such interference."

[25] Articles 23 and 24 of the Covenant concern the family and the child. Article 23 reads as follows:

> 1. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

And art 24 provides:

> 24. Every child shall have, without any discrimination as to race, colour ... national or social origin ... the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State."

[26] Article 3(1) of the CRC is in these terms:

> In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

[27] Article 8 states:

> 1. States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference...

[28] Article 9 provides:

> 1. States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child's place of residence.
>
> 2. In any proceedings pursuant to paragraph 1 of the present article, all interested parties shall be given an opportunity to participate in the proceedings and make their views known.
>
> 3. States Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests.
>
> 4. Where such separation results from any action initiated by a State Party, such as the detention, imprisonment, exile, deportation or death (including death arising from any cause while the person is in the custody of the State) of one or both parents or of the child, that State Party shall, upon request, provide the parents, the child or, if appropriate, another member of the family with the essential information concerning the whereabouts of the absent member(s) of the family unless the provision of the information would be detrimental to the well-being of the child. States Parties shall further ensure that the submission of such request shall of itself entail no adverse consequences for the person(s) concerned.

[29] Although all the provisions of the two instruments which we have set out are relevant, it is sufficient for us to focus primarily on art 3(1) of the CRC.

**The "humanitarian interview" – its provenance and current legal status**

Tavita

[30] *Tavita* primarily concerned the Act as first enacted, and before the 1991 amendments, in that the critical decision was taken by the Minister . Under s 63, a person who was unlawfully in New Zealand could appeal to the Minister against a

removal warrant. The Minister's function in relation in relation to such an appeal was similar to that now exercised by the Removal Review Authority and the test was identical to that now provided for in s 47(3).

[31] In *Tavita*, the Minister had declined the s 63 appeal prior to the overstayer's marriage and the birth of his child. The judicial review proceedings sought the setting aside of the removal warrant and the reconsideration of his appeal. By the time these proceedings reached the Court, the 1991 amendments had come into effect. Under these amendments removal warrants made by the District Court (as provided for in the Act as first enacted) were replaced by removal orders made by officials and the appeal (now against removal orders) went not to the Minister but rather to the Removal Review Authority.

[32] The context for the litigation was an attempt (in September 1993) by the Immigration Service to execute the removal warrant. This was challenged by the overstayer on the basis of the ICCPR and CRC and the contention that the family dimension to the case and interests of his daughter had not been appropriately taken into account. When the Minister made his s 63 decision, these issues had not been addressed (given that the child had not been born and the appellant had not married the child's mother). In his affidavit in response to the judicial review proceedings, the Minister explained this but went on to say that these circumstances would not warrant the allowing of an appeal because they were not "exceptional". He did not mention the ICCPR or CRC.

[33] In the Court of Appeal, the Crown argued was that there was no requirement for the Minister (or other decision-makers within the Department) to take into account the relevant international instruments. It was in response to that argument that the Court, in its interim judgment, said at 266:

> [The Crown's contention] is an unattractive argument, apparently implying that New Zealand's adherence to the international instruments has been at least partly window-dressing. Although, for the reasons to be mentioned shortly, a final decision on the argument is neither necessary nor desirable, there must at least be hesitation about accepting it. The law as to the bearing on domestic law of international human rights and instruments declaring them is undergoing evolution.
>
> …

> It is not now appropriate to discuss how far [*R v Secretary of State for the Home Department, ex parte Brind* [1991] 1 AC 696], in some respects a controversial decision, might be followed in New Zealand on the question whether, when an Act is silent as to relevant considerations, international obligations are required to be taken into account as such.
>
> If and when the matter does fall for decision, an aspect to be borne in mind may be one urged by counsel for the appellant: that since New Zealand's accession to the Optional Protocol the United Nations Human Rights Committee is in a sense part of this country's judicial structure, in that individuals subject to New Zealand jurisdiction have direct rights of recourse to it. A failure to give practical effect to international instruments to which New Zealand is a party may attract criticism. Legitimate criticism could extend to the New Zealand Courts if they were to accept the argument that, because a domestic statute giving discretionary powers in general terms does not mention international human rights norms or obligations, the executive is necessarily free to ignore them.

The case concluded with what was effectively an invitation to the Minister and the Immigration Service to reconsider the overstayer's situation. The hearing was adjourned and the case did not return to the Court of Appeal.

[34] *Tavita* proceeded on the orthodox basis that as far as possible statutes should be read in a way which is consistent with New Zealand's international law obligations and the corollary that statutory discretions should be exercised on a basis which accords with those obligations.

*The humanitarian interview*

[35] It was in response to *Tavita* that the Immigration Service adopted the current procedure whereby "humanitarian interviews" are conducted, before removal actually takes place.

[36] These interviews are conducted under the guidance of the departmental manual, which refers to New Zealand's obligations under international law, including ICCPR, the Optional Protocol to that Covenant, and the CRC, and New Zealand's reservations to that Convention. The guidance notes that the family is the natural and fundamental unit of society in the State, and that each child shall have the right to such measures of protection as are required. It also notes:

> In all actions concerning children the best interests of the child shall be a primary consideration.

This process requires the immigration officer to balance on the one hand,

> (a) New Zealand's interests in controlling access to its borders and associated public policy considerations involving the Government's residence policy, and the statutory policies aimed at ensuring a high level of compliance with immigration laws and not advantaging those who do not comply with the Act over those who do;
>
> with
>
> (b) Humanitarian considerations affecting the overstayer including the interests of any affected children.

Puli'uvea

[37] *Puli'uvea* concerned the legislation as it was following the 1991 amendments (under which the appeal, at that time under s 63B, was to the Removal Review Authority and not the Minister). Mr and Mrs Puli'uvea were Tongan and they had a number of children, some of whom were born in Tonga and others in New Zealand. Mr Puli'uvea was returned to the Tonga and the litigation concerned Mrs Puli'uvea who resisted removal and, in doing so, relied on the interests of her children. The decision of the Removal Review Authority in issue was given on the same day as the judgment of *Tavita* was delivered and although it squarely addressed humanitarian considerations associated with the overstayer's family and children, it did not make express reference to the international obligations of New Zealand under the ICCPR and CRC. Subsequent to that decision there had been a humanitarian interview, following the process introduced after *Tavita*, in which those obligations were addressed but which resulted in a decision that the removal should proceed.

[38] In the course of the judgment this Court said (at 516 – 517):

> We assume for the purposes of this argument that s 63B can be read consistently with the relevant provisions of the Covenant and Convention.

> That assumption would be supported by two considerations. The first is a general one: that the Court should strive to interpret legislation consistently with the treaty obligations of New Zealand. The second is more particular and relates to the Covenant and to the origins of s 63B. The predecessor provision, enacted in 1977 as s 20A of the Immigration Act 1964, was introduced to help implement relevant provisions of the Covenant which the government was about to ratify.

Implicit in this passage is an assumption that an appropriate application (ie one which was informed by the ICCPR and CRC) of the statutory test (corresponding to what is now provided for in s 47(3)) would meet New Zealand's international obligations. The Court later returned to discuss this point (at 518):

> The Authority did of course refer to the main contention of the appellant and her husband: if deportation were to take place their children born in New Zealand would lose a valued future, assuming, that is, that they returned with their parents. It was said that if they had to return to Tonga then that would have a serious impact on the family as the appellant's husband would be unable to provide sufficient financial assistance for them. The whole focus of the appellant's case before the Authority was on her children and her family life. As Mr Woolford for the Crown put it, there were in fact no other grounds of appeal. In that sense the appellant's children and family life was the starting point in the Authority's consideration. But that matter had to be put against the background of the order which had been made against the parents on the basis that by mid-1992 they had been unlawfully in New Zealand for almost 4 years. The interests of the family and in particular of the New Zealand born children were not seen as meeting the standard set in s 63B. Nor, in our view and bearing in mind the limits of judicial review, does the decision of the Authority appear obviously to involve a violation of the obligations of New Zealand as set out in the two international texts.

[39] The Court did not regard it as necessary to reach a final conclusion on whether the appeal (in which the ICCPR and CRC were not specifically addressed) meant that the relevant international obligations had been met. This was for three reasons, the most of important of which was that that in February 1995 (ie just before the proposed removal) an immigration officer had carried out a humanitarian interview, a point explained at 522:

> Throughout the process in February 1995, the Immigration Service, as required by the directives given in November of the previous year in response to the *Tavita* judgment, did address those issues which the Convention and Covenant require to be addressed. No doubt, as the argument in this case and the affidavit from the psychologist show, different views will be held about the balance to be struck between the various considerations. That is not however a matter for us. The question which we have to address is whether there is any reviewable error of law in the

> decisions that have been taken or one of the decisions is so unreasonable that no reasonable immigration officer could have come to it.
>
> The record does not demonstrate any error of law in the sense of failure to give consideration to the relevant requirements of the international texts. In particular the immigration officers did have regard to the position of the children, especially the New Zealand born children, as a primary consideration. Once again, as in 1993, it is the position of the children that is the primary matter supporting action which would favour the Puli'uveas. As well, the officers had regard to the impact of their removal on the family and they did it on either hypothesis, that is to say whether the New Zealand-born children remained in New Zealand or returned to Tonga with their parents.
>
> The close and careful consideration of the position of the children and of the family (defined narrowly or widely) also leads us to reject any possible argument of unreasonableness.

Ye

[40] *Ye* was decided by reference to the Act as amended in 1999. For present purposes, the primary difference between the Act as it was at the time of *Puli'uvea* and as it now stands is that the appeal right (to the Removal Review Authority) now comes earlier in the process. Whereas the appeal to the Minister under s 63 of the Act as initially enacted was against the "removal warrant" and the appeal under s 63B of the Act (as amended in 1991) was against the "removal order", the present right of appeal is expressed to be against the statutory requirement to leave and thus occurs upstream of the making of a removal order. It is, however, worth noting that the long title of the Immigration Amendment Act 1999 recorded that its purpose was to:

> Improve the effectiveness of the removal regime for persons unlawfully in New Zealand by streamlining the procedures involved, so ensuring –
>
> (i) A higher level of compliance with immigration law; and
>
> (ii) That persons who do not comply with immigration procedures and rules are not advantaged in comparison with persons who do comply …

[41] In *Ye* three different approaches, none of which commanded a majority, were taken to the legislative scheme and the role of the humanitarian interview:

(a) Glazebrook J concluded that a humanitarian interview is an essential part of the process; that it should occur, where practical, prior to the decision made under s 54 to make a removal order but, in circumstances where that is not practicable (for instance because there may be a flight risk) it must occur under s 58. On her approach, this is required even though the humanitarian (and associated human rights considerations associated with the ICCPR and CRC) have previously been addressed (albeit that she recognised that it was not the function of the immigration officer to review earlier decisions, see for instance [161] and [200]). A significant part of her reasoning was that there will be cases where either because there is no right of appeal to the Removal Review Authority or because time constraints have not been met, there will not necessarily be a humanitarian review as part of the process prior to a s 54 decision being made. She was also of the view that the availability of special consideration by the Minister under s 130 provided no guarantee that New Zealand's international obligations would be met.

(b) Hammond and Wilson JJ expressed the view that s 58 provided a legislative framework within which there was scope for a humanitarian interview which could legitimately address the congruency between a proposed removal and New Zealand's international obligations. They held that once an immigration officer embarked upon a humanitarian interview, his or her decision was reviewable albeit that any subsequent order of the Court would have to be consistent with s 58(5). They, however, were of the view that resort to s 58 "is of a very limited character". And they went onto say:

> [412] Under s 58 the officer is not reviewing, as it were, all the considerations (including Ministerial reviews) which have gone before. He or she is concerned with the present: time will have elapsed, new events may have intruded, and so on, since the earlier considerations. It is entirely sensible and appropriate to ask whether anything new has occurred, or anything has been over-looked, which should presently occasion concern. The exercise at this stage – as the section seems to us to convey in the scheme of the Act – is very much a "last ditch" and limited review, to see that something has not been overlooked, or that

some new consideration has arisen which ought to be taken into account.

(c) Chambers and Robertson JJ concluded that there was no requirement for specific humanitarian review prior to the making of a removal order under s 54. Further, they did not see s 58 as providing a mechanism for checking or reviewing the s 54 decision (or any prior decisions). They saw the function of s 58 as simply to empower immigration officers to cancel or remove orders if, independently, the Minister or Chief Executive or Immigration Service were to decide that the overstayer should be granted residency. Broadly, they were of the opinion that the humanitarian interview process had been rendered redundant by the 1999 amendments.

[42] Underlying the differences of approach was a major difference of opinion between Glazebrook J on the one hand and the other four judges on the other as to the practical requirements which the ICCPR, and particularly art 3 of the CRC, impose on decision-makers under the Immigration Act.

[43] Glazebrook J took the view that the weight a decision-maker gave to the assessment of the best interests of the child was itself subject to review (thus warranting a more exacting intensity of review than would be postulated by a requirement to give genuine and not merely token or superficial regard to that consideration). She proceeded on the basis that art 3(1) standard meant that weight was "built in", see for instance [306]. She saw the New Zealand citizenship of a dependant child as extremely important. She also envisaged a thorough and child-centred examination of what was in the child's best interests involving a comparison of the life the child would live in the other country as compared to his or her life in New Zealand. Associated with this, she considered that there was an obligation on the decision-maker to fill in the gaps in the information supplied by the parents as to the interests of the child. Although not suggesting that immigration officers were required to "embark on a major research exercise" (at [152]) she was plainly of the view that a thorough exercise at least was required. She was critical of the Immigration Service's manual as to how the humanitarian interviews should be

conducted and expressed firm opinions as to the weighing of conflicting considerations.

[44] The other four Judges saw the humanitarian interview process in a very different way: as a clip-on to the statutory processes specifically provided for in the Act. The primary difference between Hammond and Wilson JJ on the one hand and Chambers and Robertson JJ on the other was whether this clip-on was legitimately consistent with the scheme of the Act. The practical difference between Hammond and Wilson JJ and Chambers and Robertson JJ, however, was comparatively limited. At [412] of the judgment, Hammond and Wilson JJ put it this way:

> [412] At least at the stage an immigration officer is considering the final step of "removal", we think the Immigration Service has got it about right. Under s 58 the officer is not reviewing, as it were, all the considerations (including Ministerial reviews) which have gone before. He or she is concerned with the present: time will have elapsed, new events may have intruded, and so on, since the earlier considerations. It is entirely sensible and appropriate to ask whether anything new has occurred, or anything has been over-looked, which should presently occasion concern. The exercise at this stage – as the section seems to us to convey in the scheme of the Act – is very much a "last ditch" and limited review, to see that something has not been overlooked, or that some new consideration has arisen which ought to be taken into account.

*Our opinion*

[45] The discretions under ss 54 and 58(5) can only sensibly be exercised in the context of the scheme of the Act as a whole – a scheme which contemplates that those in New Zealand illegally must either leave or obtain a permit. Immigration officers cannot exercise discretionary authority so as to leave an overstayer in legal limbo (ie in New Zealand unlawfully but not required to leave). The end result of the process should be that the overstayer either leaves New Zealand (compulsorily if necessary) or has his or her immigration status regularised, perhaps under ss 35A or 130. On this basis we see the humanitarian interview as addressed not only to ss 54 and 58(5) but more importantly to ss 35A and 130. In this context we think that it does not matter whether the humanitarian interview occurs as part of the s 54 process or at a time when execution of a removal order is imminent, a point to which we revert later, see [55] - [59]

[46] How relevant is the right of appeal to the Removal Review Authority?

[47] The leading decision of this Court on to the test under what was then s 63B and is now s 47 is *Patel v Removal Review Authority* [2000] NZAR 200 where the Court said:

> Section 63B appeals start from the premise that the appellants are in New Zealand unlawfully and are seeking an exemption. The stringent statutory wording, "exceptional circumstances of a humanitarian nature ...unjust or unduly harsh", using strong words imposes a stern test. In its natural usage, "exceptional circumstances" sets a high threshold necessarily involving questions of fact and degree. Associated in the test under the paragraph is that it be "unjust or unduly harsh" to remove on that account. It is a composite test and the whole picture is to be viewed, both circumstances and effects; and as part of that whole picture, the effects on others as well as the person removed may require consideration … .

In *Puli'uvea*, this Court inclined to the view that the corresponding appeal under the Act as amended in 1991 was the legislature's attempt to ensure compliance with the ICCPR and CRC. The weighing implicit in the *Patel* approach (and of course in the language of the section) is not inconsistent with art 3 of the CRC which merely requires that the best interests of the child are taken into account as a primary consideration. Article 3 complied with by a process which takes the child's interests into account as a primary consideration, even if greater weight is accorded to the group of opposing considerations associated with the orderly operation of the Act and the government's immigration policy.

[48] In saying this, we recognise that the facts of *Patel* did not significantly engage interests protected under the ICCPR and CRC as the third party interests involved were those of a brother, his wife and their child. On the other hand, *Puli'uvea* was primarily concerned with the ICCPR and CRC. The passages from the judgment (which we have set out at [38] above) suggest that a s 63B appeal under the Act (as amended in 1991) which squarely addressed the relevant treaty obligations would meet New Zealand's obligations under those treaties.

[49] This seems to us to be right. Article 3 of the CRC mandates the taking into account of the best interests of the child as a primary consideration. The word "primary" implies that the weight to be given to the child's best interests must be

substantial. But beyond that, there is necessarily scope for a margin of appreciation on the part of the state which must be entitled to specify other considerations and the weight to be given to them. It is also important to recognise that art 3 is of general application and not just confined to the immigration context – a particular context which necessarily invokes the state's rights to control its borders. On the basis that art 3 leaves some margin of appreciation to states, it was open to Parliament to stipulate as to the weight to be given to countervailing factors, and in particular, its entitlement to control its borders. We consider that this is what the legislature did in enacting s 47(3) and its precursors.

[50] So we conclude that a properly carried out s 47(3) assessment which is reasonably proximate to removal will satisfy New Zealand's obligations under the ICCPR and CRC. If an overstayer takes the view that Removal Review Authority has got it wrong, he or she should appeal or initiate judicial review proceedings and if this is to happen it should occur within the time limits provided for in the Act.

[51] What then is the purpose of the humanitarian interview?

[52] If Ms Huang had acted in accordance with her legal obligations, she would have left New Zealand after the expiry of the temporary permit granted on the direction of the Removal Review Authority. Had she done so, she would, no doubt, have taken Jarvis with her. Art 3(1) of the CRC notwithstanding, there would have been no further review by the Removal Review Authority or humanitarian interview process. In the context of statute, which was amended in 1999 for the purposes referred to in [40], it seems rather odd that it was her deliberate breach of legal obligation which triggers possible advantages to her associated with further processes. Resolution of this apparent illogicality is beyond the scope of the present proceedings, particularly as no party has sought to argue that the humanitarian interview procedure is inconsistent with the Act.

[53] What is clear is that the humanitarian interview must be assessed in the context of the legislative scheme as a whole. And, given that scheme, it would be unreal to treat the immigration officer as required to engage in a full scale review of everything which has gone before. If there has been an up to date assessment in

which the best interests of the child have been taken into account as a primary consideration, we do not see art 3 of the CRC, or ss 54 and 58(5), as requiring an elaborate re-appraisal. On the other hand, where for some reason there has not been such an assessment (perhaps because there was no appeal) or the relevant circumstances have changed, the humanitarian interview stage of the process is likely to assume greater significance. In our view, however, an immigration officer who, in such a situation, approaches the case by reference to the s 47(3) criteria will be acting consistently with art 3 of the CRC.

[54] This, of course, is not to say that an immigration officer at the humanitarian interview stage of the process can only act in favour of the overstayer if satisfied that the s 47(3) test is satisfied. If the immigration officer considers for instance that a permit under s 35A is appropriate and is prepared to issue one, obviously there will be no occasion to make a removal order under s 54 and if an order has been made, it will obviously be able to be cancelled under s 58(5).

**The role of the Court**

*What is being reviewed?*

[55] In cases of this sort, it is not always easy to identify with precision the particular decision which is subject to review. In this case, however, Venning J's refusal of leave for Ms Huang to proceed with judicial review of the decision of the Refugee Status Branch, the failure to seek leave to review the 2003 decision of the Removal Review Authority and the grant of leave by Asher J in relation to the decision made in October 2005 means that the focus of the claim by Ms Huang must be on the decision made following the humanitarian interview. Similar considerations apply in the case of Mr Cui.

[56] Where the humanitarian interview process is resolved adversely to the overstayer, the decision will not necessarily be obviously related to any particular provision of the Act. If the decision precedes the making of a removal order and is followed by the making of such an order, it may appear as though the decision is

made under s 54. If it is made later, the decision might be thought to be referable to s 58.

[57] As the diversity of opinion in *Ye* suggests, there are some difficulties with attempts to locate the humanitarian interview process firmly within either or both of ss 54 and 58(5). In the first place, s 54(1) is drafted in a way which suggests that if the s 53 criteria are met, an order may be made. Secondly, the language of s 58 which empowers, but does not mandate, review of removal orders poses some judicial review problems, as *Ye* illustrates.

[58] These difficulties are reduced (although not entirely eliminated) once it is recognised that if the process is successful (from the point of view of the overstayer), the status of that overstayer will be regularised, probably under s 35A. In this sense the humanitarian interview can perhaps be more logically related to whether the humanitarian considerations justify the regularisation of the overstayer's presence in New Zealand rather than just to the discretions under ss 54 and 58. Even so, s 35A(2) (and s 130(6) for that matter), corresponding as they do to s 58(5), pose judicial review difficulties.

[59] In the end a pragmatic approach is required. The possible outcomes of the humanitarian interview process are sufficiently related to statutory powers under the Act for the decision made by the immigration officer to be fairly regarded as involving a "statutory power of decision" for the purposes of the Judicature Amendment Act and thus to be reviewable. And the judicial review problems posed by ss 35A(2), 58(5) and 130(6) can be to some extent overcome by treating execution of a removal warrant as a the exercise of a "statutory power" under the Judicature Amendment Act 1972 and thus subject of review and, if necessary, an order in the nature of prohibition under s 4(1) of that Act if there has not been a preceding treaty-compliant process. Nonetheless, an order made by the Court must be consistent with ss 35A(2), 58(5) and 130(6) and the Court should not set out to assume for itself a jurisdiction to over-ride specific statutory provisions.

*What is the role of the Court where there has been an appeal to the Removal Review Authority?*

[60] In this case, there were appeals to the Removal Review Authority in which the New Zealand's treaty obligations were addressed. In the present proceedings Mr Orlov challenges the approach taken. But neither of the appellants appealed against those decisions. Nor were review proceedings taken. Given the time which has elapsed, it is almost inconceivable that they could expect to obtain leave to bring review proceedings under s 146A(1).

[61] Given the refusal of leave by Venning J to challenge the decision of the Refugee Status Branch of February 2002, the absence of formal challenge to the decisions of the Removal Review Authority and the time limit specified in s 146A, it would be contrary to the scheme of the Act for the appellants in this case to seek to impeach decisions made up-stream of the humanitarian interview procedures, see for instance comments in *Puli'uvea* (at 518).

*The intensity of review*

[62] In *Ye*, Glazebrook J proceeded on the basis that the standard set by art 3(1) of the CRC ("a primary consideration") means "that weight is built in" (at [305]). She also considered that meeting the international standard required a far more elaborate inquiry than is contemplated by the relevant departmental manual and the form of the humanitarian interview and she expressed firm views as to the nature of the balancing process including as to the weight to be given to various considerations (see for instance [123] – [133]). Of course, the more elaborate the task of the immigration officer at the humanitarian interview stage, the greater the scope for review. And the more the weighting exercise is constrained by the Court, the closer judicial review comes to being a full merits assessment. Glazebrook J was of the view that "anxious scrutiny was required" as the human rights of children were involved. She expressed some support for the argument that "full proportionality review" should replace standard administrative law review (at [303] – [304]).

[63] In England, immigration decisions are subject to a proportionality analysis, see for instance, *Beoku-Betts (FC) v Secretary of State for the Home Department* [2008] UKHL 39. But we do not see this approach as applicable in this case.

[64] In the first place, the English proportionality approach is applied in a legislative and human rights environment which is very much influenced by s 6 of the Human Rights Act 1998 and the European Convention on Human Rights, see the discussion of this by Wild J in *Wolf v Minister of Immigration* [2004] NZAR 414 at [25] – [36] (HC). We operate in a different legislative and human rights environment.

[65] It is in any event difficult to see how an undiluted proportionality approach could be adopted at the s 47 stage of the process, given the weighting which is implicit in the language of the s 47(3) test. Further, the whole point of a proportionality analysis is to permit the Court to review the balance struck by the primary decision-maker between the conflicting considerations and thus to specify the weight to be attached to the different interests. But this Court expressly held in *Puli'uvea* that it did not have the right to engage in such an exercise in relation to the humanitarian interview, see the passages cited in [39] above. Instead the Court in that case simply adopted the orthodox administrative law approach.

[66] Further, it is important to recognise what has gone before the impugned decisions. Where the interests of the family and child have been the subject of an appeal process involving the Removal Review Authority whose decision was not challenged on appeal or by way of timely review, the humanitarian interview process can only be seen as a final check. As such, it is a far from obvious candidate for an intense proportionality review exercise.

[67] As to intensity of review, we therefore propose to follow the approach adopted in *Puli'uvea*. The Court should ensure that the best interests of an affected child were genuinely taken into account as a primary consideration but beyond that, how conflicting considerations are weighed is for the decision-maker and not the Court unless unreasonableness considerations can be successfully invoked.

**The approach of Asher J**

[68] In dismissing the application for judicial review, Asher J concluded that the primary challenge was to the humanitarian interview process.

[69] He rejected the argument that the Care of Children Act 2004 had the consequence that the welfare of Jarvis was the "paramount consideration" in terms of the relevant decisions (as to the removal of Mr Cui and Ms Huang). He took the view that the *Puli'uvea* approach was still controlling.

[70] Asher J noted that Mr Fennell, the immigration officer who was primarily responsible for the humanitarian interview process in relation to Mr Cui and Ms Huang had given oral evidence. As a result of that evidence Asher J concluded that the immigration officer had specifically considered:

(a) Jarvis' asthma;

(b) His access to social, medical and schooling services in China;

(c) His relationship and attachment to his parents;

(d) The fact that he is a New Zealand citizen.

[71] The Judge also held that the immigration officer treated Mr Cui and Ms Huang as two separate people, to whom separate considerations applied and approached each interview with an open mind.

[72] There has been no challenge to the decision to require Mr Fennell to give evidence, but it is right for us to note that this requirement does not sit particularly easily with ss 35A(6) and 58(5) as the practical effect was to require the immigration officer to give reasons, something which is specifically not required under those subsections.

**The submissions advanced on behalf of the appellants**

[73] Mr Orlov's submissions were mainly addressed to the position of Jarvis, albeit that he placed some emphasis on certain aspects of the process and the substance of the decisions as they affect Mr Cui and Ms Huang. To some extent Mr Orlov sought to argue that by reason of the Care of Children Act, the immigration decision-makers involved in the case had been required to take into account the welfare of Jarvis as a paramount consideration. But this was pressed only weakly given that this argument was rejected in *Ye*.

[74] Mr Orlov maintained that the actual removal of Mr Cui, and the proposed removal of Ms Huang, will affect the citizenship rights of Jarvis, not only in the tangible sense that he will practically be required to leave New Zealand but also in other ways. There is the possibility that Chinese nationality and social welfare laws and practices may require him to abandon his New Zealand nationality. Because Ms Huang has a child in China from an earlier relationship, his birth was a breach of the Chinese government's one child per family policy. Children born in breach of that policy are referred to sometimes as "black children". So Mr Orlov contended that there was a real prospect that Jarvis would be subject to prejudice associated with his status as a black child. There were also general welfare arguments associated with his health (particularly as he has asthma) and education, and the disruptive effect of removing him from the country which he has known all his life.

[75] Mr Orlov was critical of the decision to remove Mr Cui because it had the practical effect of disrupting the family unit which at that stage consisted of Mr Cui, Ms Huang and Jarvis.

[76] In relation to Ms Huang, he relied on the adverse consequences to her of returning to China in circumstances where she had breached the one child policy (noting the she had previously been forced to have abortions to comply with this policy).

**Evaluation**

*The applicability of the paramountcy provision in the Care of Children Act*

[77] In *Ye* this Court held unanimously that decision-makers under the Immigration Act were required to treat the welfare of children in the position of Jarvis as a primary but not a paramount consideration in any decision affecting their parents. The Court therefore upheld the continuing application of *Puli'uvea* and rejected the argument that the case was controlled by the paramountcy provision of the Care of Children Act.

[78] On this point we follow *Ye*.

*The extent to which the interests of Jarvis have been taken into account – in relation to Ms Huang*

[79] At this point it is necessary to refer in some detail to the immigration history of Ms Huang.

[80] She arrived in New Zealand on 22 April 1996 and was granted a visitor's permit to 22 July 1996. Almost immediately she applied for refugee status. This application was declined by a decision notified to her on 25 November 1997. She then appealed against that decision to the Refugee Status Appeals Authority. This appeal was dismissed in a decision delivered on 17 June 1999. In this decision, the Appeals Authority discussed the possibility that the Ms Huang might later wish to have a child and the impact of China's one child policy and held that consequences for her associated with implementation of that policy did not engage the Refugee Convention.

[81] The position of Jarvis, then *en ventre sa mère*, was first specifically addressed in a decision of the Removal Review Authority delivered in August 2000. The Authority accepted Ms Huang's evidence about the abortions she was required to undergo in China and allowed her appeal to the limited extent necessary to permit

her to deliver Jarvis while in New Zealand. It thus directed that she be granted a visitor's permit to remain in New Zealand until 28 February 2001. However, the Removal Review Authority rejected broader argument to the effect that the status of Jarvis as a "black child" and the associated risks of detriments which he and Ms Huang would suffer justified Ms Huang being granted permanent residency rights.

> [22] Mr Sullivan has also made the submission that, should the appellant give birth to a second child, in contravention of the one child policy, this child will not be able to obtain an education in China. The Authority has drawn Mr Sullivan's attention to previous decisions of this Authority which have rejected this submission (see for instance AB41115 and AB41340 (24 February 2000), AB40939/44 (27 May 1999) and AB41165 (20 July 1999)). Mr Sullivan's attention was also drawn to a recent article: "China loses battle in its "war" on birth", *Guardian Weekly*, May 18-24 2000, page 29. This article quotes a figure from a senior official at the State Family Planning Commission to the affect that only 60 million of the 300 million children under 14 in China today are from single child families. Such a figure is testimony to the difficulties in achieving compliance with the one child policy and the uneven application of the regulations. The only evidence submitted by Mr Sullivan to support the claim that a second child born to the appellant would not be able to obtain an education in China, is that he has been advised by a large number of individuals from China that in the event of a child being born which exceeds the allowed number of children in the family's local region, local officials will not allow the children to be registered. Without registration the child will not be entitled to receive an education. However, he also acknowledges that he has succeeded in obtaining advice from a Chinese lawyer practising in Guangzhou that there is no law which prohibits children in this type of circumstance from receiving an education.
>
> [23] Mr Sullivan does not address the role that fines play in the family planning regulations and the fact that registration of an unauthorised child can be achieved on payment of the appropriate fine. Refer "China: profile of asylum claims and country conditions", US Bureau of Democracy, Human Rights and Labour, April 14 1998, page 29-30.

[82] Ms Huang did not comply with the terms of the permit which was issued to her. Instead she remained in New Zealand and sought ministerial intervention (which was declined on 29 May 2001) and made a further application for refugee status, which was declined on 18 February 2002 by the Refugee Status Branch of the Immigration Service.

[83] In this decision there is a lengthy discussion of the fact that Ms Huang was by then the mother of a New Zealand born child. The refugee status claim very much focused on the risk of adverse consequences for her and Jarvis associated with implementation of China's one child policy. The decision proceeds on the basis that discrimination associated with implementation of the one child policy could engage the Convention. In dismissing the claim to refugee status, the decision-makers referred at length to the way in which the one child policy was implemented in China and made extensive reference to a then recent UK Home Office report (Home Office Country Information and Policy Unit, *China Country Assessment* (October 2001)) which addressed this topic. They concluded:

> … it is not accepted that Ms Huang faces a real chance of persecution for reason of Jarvis's status as a black child.

This decision was of course primarily (and legally) addressed to the situation of Ms Huang (who was seeking refugee status) but, of necessity, it also addressed the position of Jarvis. In his judgment of 22 September 2005, Venning J refused Ms Huang leave to challenge out of time by way of judicial review this decision.

[84] She subsequently lodged a further appeal to the Refugee Status Appeals Authority but this appeal was later withdrawn.

[85] There then followed another appeal to the Removal Review Authority which was dismissed in the judgment delivered in June 2003. In this decision the Authority observed this:

> [16] New Zealand has obligations under international law, particularly under the *International Covenant on Civil and Political Rights* 1966, the Optional Protocol to that Covenant, the *Convention of the Rights of the Child* 1989 and New Zealand's reservations to that Convention. The Court of Appeal in *Tavita v Minister of Immigration* [1994] 2 NZLR 257 has identified these obligations as being relevant considerations in immigration decision making. This Authority notes the observations contained in *Tavita* to the effect that a balancing exercise is required. That exercise involves the International Conventions, their relationship to the particular case, and other relevant matters. This Authority also has regard to the rights and interests of the members of the appellant's immediate family who are New Zealand residents or citizens. I recognise that the breaking up of a family may cause emotional and financial hardship both for those who must leave and for those who stay. These are matters, to the extent they are likely in any particular case, to which the Authority should give substantial weight when

> considering whether or not there are exceptional circumstances of a humanitarian nature which would make it unduly harsh or unjust to require the appellant to leave New Zealand.

In the course of the decision, the Authority reviewed extensively the decision of 18 February 2002 of the Refugee Status Branch. The Authority took the view that any sanction likely to be imposed for the breach of the one child policy would involve a fine. The Authority went on:

> [32] … The question is whether a fine of any magnitude will so severely impact on the family that the New Zealand-born child and the appellant would suffer unduly within the principles discussed.
>
> [33] In the end, after a careful review of all of the submissions and the findings of the RSB and RSAA noted earlier, I find that there is no evidence before me which suggests that the imposition of a fine will so impact on the family unit (if one is imposed at all) that the parents will be unable to provide basic necessities of life for their child (assuming the child travels to China). Nor do I find that they will be unnecessarily handicapped in their access to health or educational facilities. I do not accept there will be persecution for example in the way that was accented in *Hai* (above).
>
> [34] The imposition of a fine or denial of health and educational facilities in China has been considered by this Authority on a number of occasions. The fact that welfare services such as health and schooling may not be freely accessed by second-born children in China does not mean that such services will be denied to the child. Nor does the imposition of a fine necessarily amount to such a handicap that the exceptional circumstances test is invoked, especially as many fines imposed are part of the domestic law of China and are not peculiar to the appellants ... .
>
> [35] Whether the child will accompany the appellants on leaving New Zealand is a matter for joint decision. As the child is a New Zealand citizen that is a decision ultimately for the parents who have the primary responsibility for the care of the child as set out in Articles 18(1) and 27(2) of the *Convention on the Rights of the Child*. If all elect to travel to China there is no reason that the child could not enjoy a normal family life in that country consistent with the expectations and conditions of others in that country. I note, for example, the fact that China may be considered a poorer country than New Zealand does not of itself amount to exceptional circumstances of a humanitarian nature (see *Ronberg v Chief Executive, Department of Labour* [1995] NZAR 509). There is no suggestion or evidence to suggest that if the appellant's child was to accompany both parents the child would suffer exceptional deprivation such as to jeopardise the child's right to an adequate standard of living (see Article 27(1) of the *Convention on the Rights of the Child*).

[86] Ms Huang again sought ministerial intervention with the Associate Minister, on 15 June 2004, declining to intervene.

[87] At the humanitarian interview there was again consideration of the position as to Jarvis. On the form which the immigration officer completed he noted that Ms Huang had been in New Zealand unlawfully for four years and lawfully for four or five years and had been working unlawfully in New Zealand. Jarvis had not then started school, was only four, and spoke only Chinese. Ms Huang had no other family in New Zealand, had exhausted all avenues to stay in New Zealand and the Associate Minister had declined to intervene. He took the view that medical and educational facilities would be available in China. The immigration officer pointed out accurately that s 129U was applicable. He concluded that Jarvis would adjust to being in China and could come back to New Zealand at any time and that there were no compelling reasons for Ms Huang to stay in New Zealand. So the conclusion was that removal was to proceed.

*The extent to which the interests of Jarvis have been taken into account – in relation to Mr Cui*

[88] Mr Cui arrived in New Zealand in December 1996. He has a daughter who lives in China.

[89] His history with the Immigration Service was complicated by the fact that, unbeknown to him, a falsely constructed claim to refugee status was lodged on his behalf. He abandoned this claim once he became aware of the basis upon which it had been advanced. He was lawfully in New Zealand (pursuant to a valid permit) until 1 July 2001. In October 2001 he lodged a claim for refugee status which was dismissed by the refugee status branch on 18 February 2002 (ie the same day as the decision rejecting Ms Huang's application). The decision in respect to Mr Cui focussed on the same arguments which had been advanced on behalf of Ms Huang, and the decision-makers concluded that there was not "a real chance of Mr Cui facing persecution upon return to China now".

[90] His position was addressed by the Removal Review Authority in the same decision as that of Ms Huang and was dismissed on the same basis.

[91] The immigration officer who conducted the humanitarian interview noted that Mr Cui had been in New Zealand lawfully for four and a half years, and four years unlawfully, as he had not held a valid permit since 1 July 2001 and that he had a New Zealand born child who was four and a half years old and not at school. It was also noted that Mr Cui had another child in China who lives with his former wife and that he has no other family in New Zealand but did have three brothers in China. The concluding part of the form was completed in a way which corresponded to the manner in which the corresponding part of the form was completed in the case of Ms Huang.

*Our conclusions*

[92] In the context of what had gone before, the humanitarian interview phases of the processes in relation to both Ms Huang and Mr Cui were adequate.

[93] There are express findings of fact made by the Judge who heard the immigration officer give evidence that the process was genuine and did not involve mere lip-service being paid to art 3(1) of the CRC. Further, we consider that the circumstances of this case are practically indistinguishable from those involving Mr and Mrs Qiu (and their children), who were also considered in *Ye* and whose appeals were unsuccessful, and at least broadly similar to those involved in *Puli'uvea*. We cannot see how, consistently with those cases, we could hold that the processes miscarried here.

[94] In saying that, we recognise that removal orders were implemented in a way which resulted in Mr Cui being removed ahead of Ms Huang with the result that the family was broken up. It is difficult to see, however, what else the immigration officers could have been expected to do. Given the circumstances in which Mr Cui was located on 12 September 2005, he might fairly be thought to have been a flight risk. It was practically inevitable that he would be taken into custody and given the timing constraints which apply once an overstayer is taken into custody, the process in relation to him had to move quickly. By the time he was removed, a removal order had been served on Ms Huang and the decision had been made, following humanitarian interview, that she too was to be removed. It would appear that the

primary reason why she was not removed in October 2005 along with Mr Cui were delays in obtaining travel documentation and then the Immigration Service not being able to locate her.

**Disposition**

[95] The appeal is dismissed and, given the uncertain legal aid status of the appellants, we reserve costs. Given the likelihood of an appeal, we think it right to grant what is in effect a stay. Ms Huang must not be removed from New Zealand within 20 working days after the date of this decision. If, within that time, she applies for leave to appeal to the Supreme Court, she must not be removed from New Zealand before that application is determined, unless the Supreme Court determines otherwise.

**CHAMBERS J**

[96] I agree with the judgment proposed and with the President's reasons for judgment. I am particularly pleased that this court has now reached unanimity on the issues raised by judicial review cases arising from immigration officers' removal decisions, given the diverse views expressed in this court in the recent decision of *Ye*. Immigration New Zealand and individual immigration officers will now know how to conduct humanitarian interviews and the High Court will have a definitive ruling on the limits of judicial review of decisions made following humanitarian interviews. Of course, all may yet be changed by the Supreme Court if that court grants leave to appeal in the *Ye* and *Qiu* cases.

[97] Although the President's reasons are very close to what Robertson J and I held in *Ye*, they are not identical. So that there is no ambiguity about where I now stand and where this court now stands, I set out the differences between this decision and my earlier decision, and why I have changed ground.

[98] In *Ye*, the focus was exclusively on ss 54 and 58 of the Immigration Act. Robertson J and I concluded that those sections did not provide a basis for the humanitarian interview. We also expressed the view that the page in the manual

pursuant to which the humanitarian questionnaire was mandated (D4.45.5) appeared to be completely out of date and had failed to take into account the changes brought about by the Immigration Amendment Act 1999. For instance, the page made no reference to any decision of the Removal Review Authority, which was understandable under what we termed the period 2 regime (effected by the Immigration Amendment Act 1991) but entirely illogical following the substantial change of procedure brought about by the 1999 Act. We formed the view that the page in the manual on which the questionnaire was based was inconsistent with the Act and therefore could not form the basis of an application for judicial review.

[99] In the present case, Mr Carter, for Immigration New Zealand, has made it clear that the humanitarian questionnaire is still part of Immigration New Zealand's processes, even if he was unable to articulate a statutory or other basis for it. The basis for this policy is *not* this court's decision in *Tavita*. In that case, this court did not say that Immigration New Zealand had to develop an extra-statutory humanitarian policy. What this court said, was that the Minister of Immigration, when determining appeals under the period 1 regime, should take into account, as part of his or her humanitarian evaluation, any relevant international treaties to which New Zealand has subscribed.

[100] The policy, such as it is, is, however, a fact. I now accept that, despite what the President terms (at [52]) the "apparent illogicality" of the policy in light of the statutory framework, we have to recognise the fact that no party to the present proceeding has sought to challenge the legality of the procedure. In those circumstances, I now agree with the President that "a pragmatic approach is required": at [59]. Somehow or other, the humanitarian interview process has become part of Immigration New Zealand's procedure and as such it should be reviewable. But the intensity of review will be light, for the reasons the President has given. In so far, therefore, as Robertson J and I thought there could be no review, I recant. This does not mean, however, that I accept Hammond and Wilson JJ's analysis in *Ye*. And, in particular, I do not consider the President's analysis would have led to the success, albeit limited, which Ms Ding achieved in *Ye*.

[101] I make two further observations. First, it is most unsatisfactory that even now none of us can really find a proper statutory authorisation for the interview process. Indeed, the process is in truth at odds with the statutory procedure. That does not mean I approve of the current statutory procedure: there is a strong argument to be made that the 1999 amendments tilted the balance too much in favour of "efficiency" of removal and against individual human rights. But that was Parliament's policy choice at the time. My cursory check of the Immigration Bill currently before Parliament suggests the new framework, if adopted, will strike a better balance and will provide for proper and timely humanitarian evaluation by Immigration New Zealand and the appellate bodies without the need for an extra-statutory procedure.

[102] Secondly, the policy in D4.45.5 needs an urgent review, particularly in view of the fact it now seems highly unlikely the Bill currently before the House will be enacted this year. The wording of the current policy is an appalling example of bureaucratic jargon. The balancing test expected of immigration officers is extremely difficult to apply, as the criteria are not only conflicting but also amorphous and generalised in the extreme. This in turn leads to any genuine judicial review of officers' decisions being close to impossible. Since the policy in D4.45.5 appears to be a misguided response to a decision of this court, we have felt it open to us in this decision to redefine the test so that it conforms with the much more straightforward test set out in s 47(3), as explained in decisions of this court such as *Puli'uvea* and *Patel*: see [53] above. This will necessitate a rewriting of the manual page. The alignment with s 47(3) also means that, if removal is to take place immediately or shortly after a s 47 appeal (or a subsequent humanitarian appeal to the High Court or this court), there will be no need for an immigration officer to repeat the exercise.

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