NOTE: ANY PUBLICATION OF THE ADDENDUM TO GLAZEBROOK J'S JUDGMENT IS TO BE IN ACCORDANCE WITH THE RESTRICTIONS SET OUT IN THAT ADDENDUM AT [366] - [369].

IN THE COURT OF APPEAL OF NEW ZEALAND

CA184/06
[2008] NZCA 291

BETWEEN	WILLIE YE, CANDY YE AND TIM YE Appellants
AND	MINISTER OF IMMIGRATION First Respondent
AND	YUEYING DING Second Respondent

CA192/06

AND BETWEEN	ALAN QIU AND STANLEY QIU Appellants
AND	MINISTER OF IMMIGRATION First Respondent
AND	HE QIN QIU Second Respondent
AND	XIAO YUN QIU Third Respondent

CA205/05

AND BETWEEN	MINISTER OF IMMIGRATION Appellant
AND	YUEYING DING Respondent

Hearing: 5, 6 and 7 June 2007

Court: Glazebrook, Hammond, Chambers, Robertson and Wilson JJ

Counsel: R E Harrison QC and M K Macnab for Appellants in CA184/06
A G Mahon for Appellants in CA192/06
I C Carter and M G Coleman for Appellant in CA205/05 and First Respondent in CA184/06 and CA192/06
I C Bassett for Respondent in CA205/05 and Second Respondent in CA184/06
No appearance for Second and Third Respondents in CA192/06

Judgment: 7 August 2008 at 4.00 pm

JUDGMENT OF THE COURT

CA184/06 (The Ye children's appeal)

A The appeal is allowed.

B The matter is remitted to the Immigration Service to be reconsidered, if it sees fit, in light of the reasons for judgment given by Hammond and Wilson JJ.

C The cross-appeal is allowed but only to the extent that the declaration made by the High Court that the appellants cannot be removed from New Zealand without parental consent is set aside.

D Costs of $12,000 plus usual disbursements are to be paid by the Crown to the second respondent.

CA192/06 (The Qiu children's appeal)

E The appeal is dismissed.

F The cross-appeal is allowed but only to the extent that the declaration made by the High Court that the appellants cannot be removed from New Zealand without parental consent is set aside.

G There is no order as to costs.

H The second and third respondents must not be removed from New Zealand within 20 working days after the date of this decision. If, within that time, they or the appellants apply for leave to appeal to the Supreme

Court, the second and third respondents must not be removed from New Zealand before that application is determined, unless the Supreme Court determines otherwise.

CA205/05 (The Minister of Immigration's appeal)

I The appeal is dismissed.

J There is no order as to costs.

REASONS

GLAZEBROOK J

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Introduction

The Ye/Ding Family

[1] Willie, Candy and Tim Ye are New Zealand citizens. They were born in New Zealand on 29 April 1997, 21 September 1998 and 29 May 2000 respectively, of Chinese parents who were, at the time of their birth, lawfully in New Zealand on temporary permits. The last temporary permit of their parents expired on 1 September 2000. Appeals to the Removal Review Authority (RRA) were filed by both parents in October 2000 but were abandoned in March 2001.

[2] The children's father, Mr Wei Guang Ye, was removed from New Zealand on 23 December 2004, having been served with a removal order on 19 November 2004. An application for an interim order to prevent Mr Ye's removal had been refused by the High Court on 21 December 2004 and the Associate Minister of Immigration declined a request for a special direction under s 130 of the Immigration Act 1987 on 22 December 2004. There had been four previous requests on behalf of Mr Ye and Ms Yueying Ding (the mother of the Ye children) for a special direction by the Minister which had all been declined

[3] After Mr Ye had been taken into custody prior to his removal, Ms Ding was allowed to remain with the children. She too was served with a removal order on 23 August 2005. Following a humanitarian interview, Mr Zhou, an immigration officer, refused to cancel that order. On 1 September 2005, the High Court made an interim order preventing Ms Ding's removal from New Zealand. On 15 August 2006, Ms Ding's application for judicial review of the decision to make a removal order and the refusal to cancel it was declined by Baragwanath J, in a decision now reported as *Ding v Minister of Immigration* (2006) 25 FRNZ 568 (HC).

[4] The Ye children were joined as plaintiffs to the judicial review proceedings in the High Court and they now appeal against Baragwanath J's decision. Their main contention is that the Care of Children Act 2004 (CCA) and/or the changing national and international views of children's rights require their welfare and best interests to be the first and paramount consideration in any immigration decision affecting their mother, Ms Ding. If that standard is applied, they submit that the decision to remove Ms Ding cannot stand. They submit further that the Immigration New Zealand Operations Manual's policy provisions dealing with such decisions are unlawful and accordingly invalid.

[5] The Ye children's secondary challenge is that the decision to remove Ms Ding and the decision not to cancel the removal order were not lawfully undertaken, even using the test promulgated in *Puli'uvea v Removal Review Authority* (1996) 2 HRNZ 510 (CA). That test requires the welfare and best interests of any children to be taken into account as a primary consideration in any immigration decision affecting their parents.

[6] It was also argued that this Court should not adopt the alternative test postulated by Baragwanath J in his judgment. He said that, were he free to do so, he would align the *Puli'uvea* test with that encapsulated in s 47(3) of the Immigration Act. Section 47(3) states that appeals against the requirement to leave may only be brought where 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 be contrary to the public interest to allow them to remain.

[7] Whatever the correct test, the Ye children assert that they were wrongly denied their right to be heard and to have their views taken into account, both in relation to the decision to make a removal order with regard to Ms Ding and the decision not to cancel it. The Ye children also maintain that their New Zealand citizenship was not properly taken into account in the decisions, that the decisions were taken on the basis of inadequate information and that a number of relevant matters were not adequately taken into account.

The Qiu family

[8] Alan and Stanley Qiu are also New Zealand citizens, born in New Zealand of Chinese parents. Alan Qiu was born on 12 June 2000. Some two months before his birth, Alan's mother, Mrs Xiao Yun Qiu, had been served with a removal order but his father, Mr He Qin Qiu, was lawfully in New Zealand when Alan was born. Mr Qiu's work permit expired on 22 September 2000 and Stanley Qiu was born on 8 April 2005 when both parents were unlawfully in New Zealand.

[9] Mrs Qiu had appealed to the RRA against an earlier removal order. Her appeal was declined on 11 June 2001 and her application for judicial review of that decision was dismissed on 21 December 2001. On 16 July 2002, the Minister of Immigration refused to grant a special direction in relation to Mrs Qiu. A special direction regarding Mr Qiu had likewise been refused on 26 April 2001. Mr and Mrs Qiu were served with further removal orders on 14 June 2005 and a humanitarian interview of Mr Qiu took place on 15 June 2005. There has not yet been a humanitarian interview of Mrs Qiu.

[10] Mr and Mrs Qiu's application for judicial review relating to the 2005 removal orders was heard with that of Ms Ding. Their application was also declined by Baragwanath J in the judgment referred to at [3] above. Like the Ye children, Alan and Stanley Qiu were joined as plaintiffs to their parents' judicial review application. They now appeal against Baragwanath J's decision. Their grounds essentially mirror those of the Ye children. Where the issues raised on their behalf are the same, the Ye children and the Qiu children are referred to generically as "the appellants" in this judgment.

Issues

[11] There are a number of general issues raised by the appeals. I propose to deal with these in the following order:

(a) Should the welfare and best interests of any child be the first and paramount consideration in any immigration decision affecting the child or his or her parents?

(b) What is the proper application of the *Puli'uvea* test?

(c) What is the relevance of the New Zealand citizenship of any children of a person liable for removal when considering whether to make a removal order or whether to cancel a removal order?

(d) What are the factors to be weighed against the New Zealand citizenship and the welfare and best interests of any child of a person subject to removal?

(e) How should the various factors be balanced?

(f) Do children have the right to be heard and have their views taken into account in any immigration decision affecting their parents?

(g) How should information as to the best interests of any child (including any assessment of their current and likely future situation) be acquired?

(h) When should the welfare and best interests of any children and their citizenship be taken into account?

(i) Does the current process adequately fulfil the legal requirements?

(j) Summary of factors

(k) Summary of process

(l) What is the effect of the 1999 amendments to the Immigration Act?

[12] I then deal with the specific matters raised with regard to each family, followed by a discussion of remedy. Issues common to both families are whether the children's right to be heard was breached, the level of the children's language skills, the status of the Ye and the Qiu children as "hei haizi" or "black children" in China and the alleged failure to take this and the children's New Zealand citizenship into account in the decision-making. With regard to the Ye children, their mother's depression, their father's alleged violence and the likelihood that they will remain in New Zealand even if their mother is removed, have been raised as issues not properly taken into account.

[13] The Crown has appealed and cross-appealed against Baragwanath J's judgment on a number of largely procedural issues. I deal with these from [318]. The results of the various appeals and cross-appeals and costs are discussed from [358].

Should the welfare and best interests of any child be the first and paramount consideration in any immigration decision affecting the child or his or her parents?

[14] The appellants base their argument that the "first and paramount" consideration applies to the decision-making powers under the Immigration Act on two alternative grounds. Their first argument is based on the CCA and their second on the premise that the standard both in New Zealand and at international law has changed.

[15] If the appellants are correct this will have far-reaching consequences in the immigration context. The first and paramount principle was said, in *J v C* [1970] AC 668 at 710 – 111 (HL) (per Lord MacDermott), to mean more than that the child's welfare is to be treated as the top item in a list of items relevant to the matter in question. It connotes a process whereby, when all the relevant matters are taken into account and weighed, the course to be followed will be that which is most in the interests of the child's welfare. It is the first consideration "because it is of first

importance" and the paramount consideration "because it rules upon or determines the course to be followed".

[16] Lord MacDermott's formulation was quoted with approval and applied in *Re G (Children) (Residence: Same-sex Partner)* [2006] 1 WLR 2305 at [30] (HL). The principle has also been applied in New Zealand in *D v S* [2002] NZFLR 116 at [30] (CA), and *D v S* [2003] NZFLR 81 at [17] (CA). See also Henaghan and Atkin (eds) *Family Law Policy in New Zealand* (3ed 2007) at 302 and Webb and others (eds) *Family Law Service* (looseleaf last updated June 2008) at [6.112] for a discussion of *J v C*.

[17] If the first and paramount standard is applied in the immigration context, therefore, the welfare and best interests of any children will likely directly dictate the result of the decision-making. I note, however, that in interpreting a constitutional provision (in the criminal justice context) which states that "a child's best interests are of paramount importance in every matter concerning a child", the majority of the Constitutional Court of South Africa suggested a more nuanced child-centred approach – see *M v The State* [2007] ZACC 18 at [24] – [26]. The majority said that the best interests of the child standard must be flexible as individual circumstances will determine which factors secure the best interests of the child. While the word "paramount" is emphatic, the provision cannot mean that the direct or indirect impact of a measure or action on children must in all cases oust or override all other considerations. It cannot act as an absolute and unrealistic trump of other rights and was subject to reasonable and justifiable limits.

CARE OF CHILDREN ACT (CCA)

[18] The appellants argue that the principle in s 4 of the CCA – that the welfare and best interests of the child must be the first and paramount consideration (see at [25] below) – must be applied in the immigration context. They base this submission both on the policy underlying the CCA and on a textual analysis of the Act.

Policy analysis of the CCA

[19] In the appellants' submission, the legislative history of the CCA shows that it was passed in recognition of the all-pervading nature of the first and paramount standard embodied in it, reflecting the fact that the first and paramount standard has now become the New Zealand domestic law standard for determining issues relating to the welfare and best interests of New Zealand's children.

[20] It is true that the first and paramount standard is the standard embodied in all modern legislation and policies directly dealing with issues relating to children and their families. The appellants' argument goes further, however. They suggest that the CCA was intended to apply to all other legislation where the interests of children may be affected, whether directly or indirectly. Potentially, if interpreted as broadly as the appellants submit should be the case, then most legislation would be affected. Legislation regulating tenancy matters, bail and sentencing are examples that immediately come to mind. Dr Harrison QC, for the appellants, does accept that the standard in s 4 of the CCA will not mandate the result in all situations. In his submission, whether it does or not will depend on the legislative context. He accepts that the legislative context in criminal matters will likely override the CCA but does not accept that this is the case in the immigration context.

[21] I reject the appellants' submissions. If the CCA was to permeate all legislation in the manner contended by the appellants, then one would have expected it to have said so explicitly (which it does not). One would also have expected, as is the case with the New Zealand Bill of Rights Act 1990 (BORA), that the means of resolving any conflict with other provisions in other legislation would have been included in the CCA. It would not have been left to the courts to determine, with no legislative guidance, which other Acts were subject to the CCA standard and which were not.

[22] Furthermore, in the Parliamentary debates on the CCA there was no mention of the allegedly all-encompassing nature of the new Act. It is unlikely that a significant change of the kind contended for by the appellants would have been made without full Parliamentary discussion. There is nothing in the legislative history to

suggest that the "first and paramount" standard was to extend beyond the CCA itself and closely-related legislation where the interests of children are directly at issue – see the then Associate Minister of Justice, the Hon Lianne Dalziel's introductory speech in the House at (24 June 2003) 609 NZPD 6539.

[23] The explanatory note to the Care of Children Bill, no. 54-1 states that the CCA replaces the Guardianship Act 1968 (GA) with the view of modernising the law about guardianship and care of children. The Bill was said to amend two other Acts that deal with "closely-related matters", being the procedures of the Family Court (Family Proceedings Act 1980) and parental status (Status of Children Act 1969). The Immigration Act is not listed in those "closely-related matters" and there was no attempt to amend the Immigration Act to accommodate the new standard and to deal with any practical implications that may have had on removal decisions (and possibly entry decisions as well).

[24] Indeed, there was no mention of immigration matters in the course of the Parliamentary debates in the three readings of the Care of Children Bill. Considering the wide-ranging effect any change in standard would have on immigration matters (in effect perhaps dictating the decision where children are involved – see at [17] above) and the lively interest always generated by immigration policy, this lack of discussion would be most surprising if indeed the CCA was intended to apply in the immigration context. If the CCA does permeate into the immigration context, then it would have to be assumed that Parliament did so inadvertently. I would not make this assumption lightly and certainly not in the absence of very clear words in the statute itself. I now turn to a textual analysis of the CCA.

Textual analysis of CCA

APPELLANTS' SUBMISSIONS

[25] The appellants' argument is based on s 4(1) of the CCA which states:

> **4. Child's welfare and best interests to be paramount**
>
> (1) The welfare and best interests of the child must be the first and paramount consideration–
>
> (a) in the administration and application of this Act, for example, in proceedings under this Act; and
>
> (b) in any other proceedings involving the guardianship of, or role of providing day-to-day care for, or contact with, a child.

[26] The appellants acknowledge that the words "first and paramount" are not new and that the paramountcy principle has its origins in s 23(1) of the GA. That provided:

> In any proceedings where any matter relating to the custody or guardianship of or access to a child, or the administration of any property belonging to or held in trust for a child, or the application of the income thereof, is in question, the Court shall regard the welfare of the child as the first and paramount consideration. The Court shall have regard to the conduct of any parent to the extent only that such conduct is relevant to the welfare of the child.

[27] The appellants submit, however, that there have been vital changes in the wording of the CCA which mean that the paramountcy principle and the ambit of s 4 extends well beyond court proceedings to determine custody, guardianship and access and that it applies outside the family law context. They submit that the "compendious" wording of s 4 is much wider than the wording in s 23(1) of the GA.

[28] The first change in wording pointed to by the appellants is the use of the word "proceedings" in s 4 of the CCA but without the GA's reference to "the Court". They submit that the word "proceedings" in s 4 by implication encompasses administrative decisions. In their submission this means that the removal processes under the Immigration Act are, where children are involved, proceedings involving "the guardianship of, or role of providing day-to-day care for, or contact with, a child" within the meaning of s 4(1)(b) of the CCA.

[29] The appellants point out that guardianship is very broadly defined in s 15 of the CCA. Under s 15(a) the term guardianship of a child means having all "duties, powers, rights, and responsibilities" of a guardian of a child. This phrase is in turn defined in s 16 as including "determining for or with the child, or helping the child to

determine, questions about important matters affecting the child". The "important matters" include, under s 16(2) of the CCA, changes to the child's place of residence (including changes arising from travel by the child) that may affect the child's relationship with his or her parents or guardians; medical treatment; where and how the child is to be educated; and the child's culture, language and religion. As the appellants' submit, all of these matters can potentially be affected by immigration decisions.

[30] The second wording change in s 4 of the CCA which the appellants suggest has significance is the change from the phrase "relating to" in s 23(1) of the GA to "involving" in s 4(1)(b). The appellants argue that "involving" is a much broader formulation and that it encompasses not just the immediate subject matter of the decision but also the indirect material consequences of that decision-making insofar as it impacts on the guardianship of, the role of providing day-to-day care for, or the contact with, a child.

[31] Thirdly, the appellants refer to the change in wording from "shall regard" in s 23(1) of the GA to "must be" in s 4 of the CCA as demonstrating that a higher standard has been imposed under the CCA.

[32] As well as the wording changes between the GA and the CCA, the appellants rely on s 148 of the CCA. They submit that, had Parliament intended to exclude the Immigration Act from the ambit of s 4 of the CCA, the Immigration Act would have been added to the list in s 148. Section 148 states:

> **148 Other Acts not affected**
>
> (1) Nothing in this Act affects the following Acts:
>
> (a) Children, Young Persons, and Their Families Act 1989:
>
> (b) Family Proceedings Act 1980.

[33] The last argument put forward by the appellants is made by reference to s 12 of the CCA, which states that the CCA binds the Crown.

[34] The first change in wording the appellants rely on between the CCA and the GA is an alleged use of the term "proceedings" in the CCA in a wider sense than in the GA – see at [28] above. I do not accept this submission.

[35] The word "proceedings" habitually denotes pure court matters and does not include administrative decisions – see for example r 3 of the High Court Rules which defines proceeding as "any application to the Court for the exercise of the civil jurisdiction of the Court other than an interlocutory application". In my view, there is nothing to suggest that the word "proceedings" in the CCA should be accorded other than its ordinary and natural meaning.

[36] The appellants' argument has been rendered possible by the fact that, unlike in the GA, there is no reference to the courts in s 4(1) of the CCA. This is explained by the structure of the provision. It is clear from s 4(1)(a) that the first and paramount standard applies to the administration and application of the CCA generally. In this regard it is not to be limited to court proceedings. Section 4, therefore, could not limit its ambit to decisions by courts.

[37] Section 4(1)(a), however, provides the prime indication that the word "proceedings" in s 4(1)(b) is used in its traditional sense. Section 4(1)(a) states that the paramountcy provision applies in "the administration and application of this Act, *for example*, in proceedings under this Act" [emphasis added]. This makes it clear that not all the varied actions or mechanisms in administering or applying the CCA are considered to be "proceedings".

[38] A further contextual indication that the word "proceedings" has its ordinary and natural meaning is, as pointed out by the Crown, found in s 7 of the CCA. This provides:

> **7. Lawyer to act for child**
>
> (1) A Court may appoint a lawyer to act for a child who is the subject of, or who is a party to, proceedings (other than criminal proceedings) under this Act.

…

> (4) The lawyer may call any person as a witness in the proceedings, and may cross-examine witnesses called by a party to the proceedings or by the Court.

[39] Here "proceedings" is mentioned in terms of court proceedings and not administrative decision-making. I accept the Crown submission that the reference to the fact that a "Court may appoint a lawyer to act for a child who is the subject of, or who is a party to, "proceedings" shows that "proceedings" is used in the traditional sense, at least in s 7(1). Court is defined in s 8 as "a Court having jurisdiction in the proceedings". Section 7(4) also uses the term "proceedings" in its traditional sense. Section 139(2) of the CCA relating to the publication of reports also makes reference to "proceedings" as matters dealt with in Court.

[40] The appellants rely on ss 30, 44, 45, 46, 48, 53, 54, 65, 68, 69, 73, 77, 118 and 125 of the CCA as evidence of a wide range of "proceedings" in the CCA which go beyond Court proceedings in the traditional sense. Many of these provisions, however, do not mention the word "proceedings" at all. See for example the sections on dispute resolution (s 44); review of decisions made by parents on important matters (s 46); parenting orders and contravention of such orders (ss 48 and 68); warrants to enforce orders for contact with a child (s 73); counselling (ss 65 and 69); circumstances where a lawyer must act for applicant (s 116); and the Court's power to prevent removal of a child from New Zealand in order to defeat an application under the Act (s 118).

[41] A number of the other sections of the CCA referred to by the appellants, such as ss 30, 45, 53, 54, 77 and 125, do use the word "proceedings". The term is, however, used in reference to pure court proceedings – for example the issue of jurisdiction when "proceedings" have been filed in both the High Court and Family Court and are removed from the High Court to a Family Court and vice versa (s 30); proceedings to obtain separation orders (s 53); orders declaring a marriage or civil union void *ab initio* or dissolving it (s 53); proceedings used to get a protection order (s 54); contempt of court proceedings (s 77); and provisions regarding the Court's jurisdiction relating to certain types of hearings (s 125). Section 45 provides that dispute resolution is to be utilised where a spouse or partner is applying for certain

orders under the CCA. It does not state that the "dispute resolution" itself, as opposed to the applications for the orders, falls within the definition of "proceedings".

[42] There is only one indication that the CCA may extend the word "proceedings" in s 4(1)(b) beyond quasi-judicial bodies. Under ss 22 and 23(2)(b) of the CCA, reference is made to "proceedings" under Part 2 of the Children, Young Persons and Their Families Act 1989 (CYPFA). Sections 22, 25(4), 33, 37 and 38 of Part 2 of the CYPFA refer to a Family Group Conference (FGC) as a proceeding. Sections 22 and 23 of the CCA which refer to Part 2 of the CYPFA are provisions which govern the appointment of an additional guardian. One criterion for appointment is that the proposed additional guardian must never have been "involved in proceedings concerning a child under this Act, a former Act corresponding to this Act, or Part 2 of the Children, Young Persons, and Their Families Act 1989".

[43] It is unlikely that these provisions intended an FGC to fall within "proceedings" as this would mean that anyone involved in an FGC would be automatically excluded from becoming a guardian. This cannot be so as involvement in an FGC may be a necessary part of being a caregiver of a child and is seen as an innocuous and conciliatory endeavour. It is more likely that s 23 of the CCA is referring to court proceedings covered by ss 67 – 73 (also within Part 2 of the CYPFA) which establish care and protection declarations. It seems that reference to a FGC as a "proceeding" was merely an unintentional and lax use of the word which should not alter the interpretation of the word in s 4 of the CCA.

[44] The appellants referred to the use of the word "proceedings" in a wider sense in other legislation, for example in BORA and in the Immigration Act itself. The issue is not, however, whether the word can be used in a wider sense in a different context or in other legislation. It is whether it is used in a wider sense in the CCA. In any event, while s 3(b) of BORA makes it clear that BORA is applicable to administrative decision-making, s 3(b) does not use the word "proceedings" and therefore is irrelevant to the argument as to whether the term "proceedings" in the CCA covers administrative actions.

[45] It is true that the term "proceeding" appears in the Immigration Act in different contexts and senses. In some instances it refers to one or more types of court proceedings. In other cases, it expressly refers to "proceedings" before the various administrative appeal bodies which the Immigration Act creates. At most, therefore, the Immigration Act extends the term "proceedings" to cover proceedings before quasi-judicial bodies.

[46] The only provisions where the term "proceeding" is used in a wider sense are those relating to the appointment of responsible adults – see Immigration Act ss 141B - D. In s 141B(6) it is stated that "the role of a responsible adult relates to those *matters or proceedings* in relation to which the nomination was made … " [emphasis added]. Section 141B(2) which describes the matters for which a minor must be represented by a responsible adult which includes the "making, serving, and execution of a removal order or a deportation order in the minor's name". Since these have been specifically defined in s 141B(6) as "matters or proceedings", this does not aid me greatly in the interpretation of "proceedings" in either the CCA or the Immigration Act.

[47] The appellants submit that it is clear from the Immigration Act as a whole that the removal process considered in its entirety, as embodied in ss 53 – 62 of the Immigration Act, is a proceeding. I do not accept this submission, in particular in light of the 1999 amendments to the Immigration Act.

[48] Under the 1999 amendments, the obligation to leave New Zealand exists from the moment that a person is in New Zealand unlawfully. There is no need for any prior administrative or quasi-judicial proceeding before this obligation arises. Appeals to the RRA must be brought within 42 days after the later of: the day the person becomes unlawfully in New Zealand, or the day when the individual receives notification of confirmation of refusal to issue a permit – see s 47(2).

CHANGE FROM "RELATING TO" TO "INVOLVING"

[49] The next change relied on by the appellants is from "relating to" in the GA to the use of the word "involving" in the CCA – see at [30] above.

[50] I see the two phrases as broadly analogous. The proposition that such a subtle change (replacing the very general words "relating to" with the equally general term "involving") has created a whole new sphere of application for the paramountcy standard right across the statute book is not convincing.

[51] The appellants criticise Baragwanath J in the judgment under appeal and Asher J, in *Qiong v Minister of Immigration* [2007] NZAR 163 (HC), for interpreting "involving" as meaning "directly involving". I would phrase this in a different way. I would say that Baragwanath and Asher JJ refused to interpret the word "involving" as meaning "directly or indirectly involving". They were correct not to do so in the absence of explicit wording to that effect.

CHANGE FROM "SHALL REGARD" TO "MUST BE"

[52] The third change relied on by the appellants is from "shall regard" in the GA to "must be" in the CCA – see at [31] above. This is, however, a function of the change in the structure of the sentence and the more modern wording of the CCA rather than a change in substance.

SECTION 148 OF THE CCA

[53] I turn now to the appellants' reliance on s 148 of the CCA – see at [32] above. The Acts listed in s 148 are ones that directly relate to children and their families. They are thus "closely-related" Acts – see at [23] above. It is unremarkable that it was considered necessary to make it clear that these closely-related Acts were not impliedly overruled. Merely because other Acts, such as the Immigration Act and the Sentencing Act 2002, are not listed in s 148 does not preclude a determination that they are not subject to s 4 of the CCA. As indicated above, had it been intended that the CCA permeate all other Acts (and the Immigration Act in particular), one would have expected it to have said so – see above at [24].

[54] The appellants cite the example of s 55 of the Human Rights Amendment Act 2001 (which inserted two new sections, ss 149C and 149D, into the Immigration Act

acknowledging that immigration matters involve different treatment on the basis of personal characteristics) as evidence that, had Parliament wished to exclude the Immigration Act from the ambit of s 4 of the CCA, it would have done so. There is no doubt that the Immigration Act could have been excluded explicitly from the operation of the CCA. There was, however, no need to do so as the CCA, for the reasons outlined, does not extend across the statute book. It has no wider ambit than the GA, which, as accepted by the appellants, did not extend into immigration matters.

CCA BINDING THE CROWN

[55] The appellants' final argument is that the provision binding the Crown in the CCA shows that it was intended to have the wide ambit they suggest. Given the role the State may take in the administration of the CCA and in children's lives, the need for the CCA to bind the Crown is not surprising. Indeed, provisions binding the Crown are now usual unless there is a particular reason for the Crown not to be bound – see Cabinet Office Circular of 13 March 2002 (CO (02) 4).

Conclusion on effect of CCA

[56] This Court has already, in another context, concluded that s 4 of the CCA was not designed to create a significant change from the position under the GA – see *White v Northumberland* [2006] NZFLR 1105 at [51]. In that case the Court said that it did not accept that s 4(1) of the CCA constitutes a significant shift in the law and expressed the view that s 4 is essentially to the same effect as s 23(1) of the GA. See also *Qiong* at [73].

[57] I see no reason to depart from that conclusion. If a significant change had been intended I would have expected it to have been heralded in the course of the legislative history and achieved by something more than the very subtle wording changes pointed to by the appellants. This conclusion is supported by the comment made in reference to the s 4 paramountcy provision in the explanatory note to the Care of Children Bill that the "clause re-enacts, with minor modifications, the

principle stated in section 23(1) of the Guardianship Act" – see Care of Children Bill, no. 54-1, Commentary, p 5. Sections 12 and 148 of the CCA do not affect this conclusion.

[58] Although I am interpreting a New Zealand statute, it is salient to note that my interpretation of the CCA is not out of line with cases in comparable jurisdictions, which have held that family law mechanisms and considerations are not directly imported into the immigration context – see *Minister for Immigration and Multicultural and Indigenous Affairs v B* (2004) 219 CLR 365 at [53] – [54] per Gleeson CJ and McHugh J (although a jurisdictional approach was taken by Gummow, Hayne and Heydon JJ); *KN v SD* (2003) 176 FLR 73 at [77] (FC); *In re Mohamed Arif (An infant)* [1968] Ch 643 at 661 and 662 (CA); *Re A (A Minor) (Wardship: Immigration)* [1992] 1 FLR 427 (CA) and *R v Secretary of State for Home Department; Ex parte T* [1995] 3 FCR 1 (CA).

IS THERE OTHERWISE A CHANGED STANDARD?

[59] The appellants' second major argument is that, even if the CCA does not directly apply in the immigration context, the "first and paramount" standard should nevertheless be used as this is the standard which properly reflects the general domestic law standard and New Zealand's obligations under the United Nations Convention on the Rights of the Child (1989) 1577 UNTS 3 (UNCROC).

Appellants' submissions

[60] The appellants' argument under this head has four strands. First, they point out that not only does the first and paramount standard appear in the CCA, it also occurs in other statutes, such as the CYPFA and the Children's Commissioner Act 2003. The Children's Commissioner Act does not exclude immigration matters from the Commissioner's ambit. The appellants also refer to major Governmental public policy statements, including Ministry of Social Development *New Zealand's Agenda for Children: Making life better for children* (June 2002) <http://www.msd.govt.nz> (last accessed 17 July 2008), as well as common law principles embodied in the *parens patriae* jurisdiction. The appellants do not directly invoke the *parens patriae*

jurisdiction. They refer to it merely to demonstrate that the first and paramount standard is not purely statutory in origin but is an important and long standing common law principle.

[61] Secondly, the appellants argue that the *Puli'uvea* test, which requires a child's best interests to be a primary (but not paramount) consideration, is no longer (if it ever was) consistent with an interpretation made in good faith in accordance with the ordinary meaning of the provisions of UNCROC considered in their context and in light of UNCROC's objective purpose, as required by art 31.1 of the Vienna Convention on the Law of Treaties (1969) 1155 UNTS 331 (Vienna Convention). In the appellants' submission, *Puli'uvea* represents a literal (if not legalistic) reading of art 3(1) of UNCROC at odds with the emphasis on the centrality of a child's best interests in UNCROC. Further, the interpretation does not accord with Principle 2 of the Declaration of the Rights of the Child proclaimed by the UN General Assembly Resolution 1386 (XIV) (20 November 1959) which uses the first and paramount standard.

[62] Thirdly, the appellants submit that art 41 of UNCROC, although worded as a "savings" clause, can (and should properly) be interpreted as imposing an obligation on States to accord to children within their jurisdiction all those provisions of the domestic law which are conducive to the realisation of the rights of the child (such as in this case the first and paramount standard).

[63] Finally, the appellants rely on a number of general comments from the United Nations Committee on the Rights of the Child (CRC Committee).

Changed standard in domestic law

[64] It is true, as I have stated above at [20], that the paramountcy standard is now applied to all decisions where children's welfare and interests are directly engaged. There has also, as accepted by the Crown, been a growing recognition of children's autonomy in law and policy. However, Parliament has not seen fit to import those concepts directly into other spheres and more particularly they have not been incorporated into the Immigration Act or into immigration policy. Nor, as I have

discussed at [23] - [24], was the opportunity taken at the time of the introduction of the CCA to provide explicitly that the CCA directly affects legislation in other fields where children's interests may be engaged, either directly or indirectly. This argument therefore cannot aid the appellants.

Alleged misinterpretation of the international standard

[65] The appellants' contend that *Puli'uvea* misinterpreted the applicable international law standard. The starting point for assessing this submission is art 3(1) of UNCROC, which provides that in all actions concerning children, whether undertaken by public or social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a "primary consideration".

[66] Far from being an interpretation which does not accord with international law, the *Puli'uvea* interpretation of art 3(1) accords with the plain words of UNCROC ("a primary consideration"). The context also supports the *Puli'uvea* interpretation. The "paramount consideration" standard appears in another article in the Convention in the context of adoption – art 21. This suggests that the use of the "primary" consideration standard in art 3(1) was deliberate.

[67] This becomes quite clear when the *Travaux Préparatoires* are taken into account. Travaux can be used as an interpretive aid to determine meaning of provisions in Treaties – see art 32 of the Vienna Convention and the discussion in *Zaoui v Attorney-General (No 2)* [2005] 1 NZLR 690 at [130] (CA) per Glazebrook J. The basic working text as adopted by the UNCROC Working Group in 1980 framed the best interests of the child as a "paramount consideration" in accordance with Principle 2 of the Declaration of the Rights of the Child – see Detrick *The United Nations Convention on the Rights of the Child: A Guide to the "Travaux Préparatoires"* (1992) at 131. At the 1981 session of the Working Group the words "a primary" were substituted for the words "the paramount".

[68] In 1989 the UNCROC Working Group considered a proposal to amend the draft article to provide that the children's best interests would be "the primary

consideration" rather than "a primary consideration". This suggestion was not adopted. The Working Group concluded that there were situations where the competing interests of justice and society at large would be of at least equal, if not greater, importance than the interests of the child – see Detrick at 137 and Fortin *Children's Rights and the Developing Law* (2ed 2003) at 38.

[69] The appellants, in support of their argument, refer to art 9 of UNCROC which requires States to 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. However, art 9(4) expressly contemplates separation that may result from "detention, imprisonment, exile, deportation".

[70] Furthermore, as was set out at [141] of Baragwanath J's judgment, the Chairman of the UNCROC Working Group made it clear that art 9 was intended to apply to domestic disputes and not to immigration matters. Article 10 was intended to apply to separations involving different countries and relating to cases of family reunification. Article 10 does not, however, recognise the rights of parents and children to enter any country they wish and is not intended to affect the general right of States to establish and regulate their respective immigration laws in accordance with their international obligations – see Detrick at 181.

[71] The Vienna Convention also permits supplementary means of interpretation to be used under art 32 such as decisions from other jurisdictions. In this regard, it is relevant that the *Puli'uvea* interpretation of the standard in UNCROC aligns with that in comparable jurisdictions. For example, the Supreme Court of Canada in *Baker v Canada (Minister of Citizenship and Immigration)* [1999] 2 SCR 817 held that the decision-maker must consider children's best interests as an important factor and give them substantial weight. However, the Supreme Court recognised that this did not mean that a child's best interests must always outweigh other considerations or that there will not be other reasons for denying a humanitarian and compassionate claim in the immigration context even when children's interests are given this consideration – see at [75] per L'Heureux-Dubé J for the majority (with Iacobucci

and Cory JJ largely concurring). See also *Canadian Foundation for Children, Youth, and the Law v Canada (Attorney-General)* [2004] 1 SCR 76 at [10].

Significance of art 41 of UNCROC

[72] The appellants' next argument is that art 41 of UNCROC requires States to accord to children within the jurisdiction the benefit of the highest standards of protection provided under domestic law, in this case the paramountcy standard.

[73] Article 41, both in its wording and its policy, merely provides that UNCROC does not dilute domestic law if domestic law is more favourable. It does not mandate any changes to domestic law to incorporate a higher standard of protection in all areas merely because that higher standard is applicable domestically in some situations. It is merely designed to ensure that UNCROC does not result in derogation from *existing* human rights obligations undertaken by the state parties – see Detrick at 522. It does not mandate a uniform standard across all areas of domestic legislation or policy.

CRC Committee's general comments

[74] Finally, the appellants rely on three general comments by the CRC Committee as showing a strengthened commitment and changing standard at international law – see General Comments 5, 6 and 7.

[75] They rely in particular on General Comment No 5 – see CRC Committee "General Comment No 5: General measures of implementation for the Convention on the Rights of the Child (arts 4, 42, and 44(6))" (3 October 2003) CRC/GC/2003/5. At [37] of this General Comment, States are urged to ensure effective implementation and to ensure respect for all the Convention's principles and standards for all children within the State jurisdiction.

[76] In my view, General Comment No 5 does no more than encourage governments to implement UNCROC, and in particular emphasises the art 3

requirement that the welfare and best interests of children should form a primary consideration across all areas of governmental activity. The CRC Committee does, of course, encourage State parties to incorporate higher standards of protection, although there is no such obligation to do so – see at [23] of the General Comment.

[77] The appellants also refer to General Comment No 6 – CRC Committee "General Comment No 6: Treatment of unaccompanied and separated children outside their country of origin" (1 September 2005) CRC/GC/2005/6. This, however, relates to unaccompanied and separated children outside their country of origin. It is not intended to be of general application. General Comment No 7, relating to the implementation of rights in early childhood, is not specifically relevant as it is primarily focused on specific features of early childhood and the impact that has on the realisation of rights – see CRC Committee "General Comment No 7: Implementing child rights in early childhood" (20 September 2006) CRC/C/GC/7Rev.1.

[78] None of these General Comments support the view that there is a changed standard at international law.

Conclusion on changed standard argument

[79] None of the arguments put forward for a changed standard in domestic or international law change the conclusion that the first and paramount standard does not apply in the immigration context.

What is the proper application of the *Puli'uvea* test?

[80] I have rejected the appellants' contention that the paramountcy standard in the CCA applies directly in the immigration context. I have also rejected the submission that the *Puli'uvea* test no longer accords with the proper standard under domestic and international law. How the *Puli'uvea* test should be applied remains at issue.

The contentions of the parties

[81] The Crown, while accepting that the best interests of any children must be taken into account in any immigration decision, submits that this is merely a process requirement and that the weight to be accorded to that factor is a matter for the decision-maker.

[82] The appellants submit that the approach should be a child-centred one, focussed on the effects on the child and the child's best interests. In the appellants' submission, the requirement is a substantive one and not merely a question of process.

[83] The appellants submit further that Baragwanath J's suggestion that the test should be linked to the exceptional circumstances test in s 47(3) of the Immigration Act should be rejected – see at [262] of his judgment. They submit that neither the s 54 discretionary power to make a removal order nor the s 58 power to cancel it are trammelled by reference to the s 47(3) test.

How should the best interests of the child be taken into account?

[84] Although international instruments are not directly incorporated into domestic law it is assumed, as a matter of statutory interpretation, that insofar as their wording allows, statutes should be read in a way which is consistent with New Zealand's international law obligations. See *New Zealand Air Line Pilots' Association Inc v Attorney-General* [1997] 3 NZLR 269 at 289 (CA), Burrows *Statute Law in New Zealand* (3ed 2003) at 341 – 342, and Dunworth "Public International Law" [2000] NZ Law Review 217 at 224 - 225.

[85] Many of the international human rights obligations are in any event enshrined in BORA and all legislation must be read consistently with BORA if possible (s 6) – see Professor Taggart "Proportionality, deference, *Wednesbury*" in *Judicial Review* (New Zealand Law Society Intensive, September 2007) at 35. In addition, BORA did not abrogate existing rights (s 28). Section 2 of BORA also states that the rights in BORA are affirmed which suggests that they must have pre-existed. Statutes

must also be interpreted consistently with common law principles and values – see Burrows at 219.

[86] Geiringer, in her excellent article "*Tavita* and All That: Confronting the Confusion Surrounding Unincorporated Treaties and Administrative Law" (2004) 21 NZULR 66 at 85 – 86, has argued that the courts, in interpreting the Immigration Act, have used the presumption that Parliament did not intend to legislate in a manner that is contrary to international obligations in a different manner from in other contexts. In her view, in the immigration context, the courts have used the approach of requiring New Zealand's obligations under UNCROC to be a mandatory relevant consideration in decision-making under the Immigration Act. They have not used the more usual outcome-focused model where consistency with the international obligation must be achieved.

[87] It seems to me, however, that the distinction drawn by Geiringer is not, despite the terminology used, in fact what the courts have generally done. Article 3(1) of UNCROC requires the best interests of the child to be taken into account as a primary consideration. This means that the courts, in using the approach of requiring the best interests of the child to be taken into account in immigration decision-making along with other relevant factors, have in fact been directly applying UNCROC. This is not to say, however, that the normal administrative law concept of mandatory relevant consideration (where weight will be a matter for the decision-maker) is the same as the art 3(1) requirement that, in all actions concerning children, the best interests of the child shall be a primary consideration.

[88] Under the UNCROC standard, weight is built in (a *primary* consideration). Using the normal presumption of consistency with international law, weight is therefore not a matter left to the decision-maker's discretion. This means that I reject the Crown submission that art 3(1) is process-oriented and that weight is a matter for the decision-maker. As a matter of law, the statute must be interpreted consistently with the substantive requirement to take the best interests of the child into account as a *primary* consideration.

[89] Direct application may be justified as it is possible that the UNCROC standard constitutes customary international law – see Alston "A Guide to Some Legal Aspects Connected to the Ratification and Implementation of the Convention on the Rights of the Child" (1994) 20 Commw L Bull 1110 at 1115 and Hathaway *The Rights of Refugees Under International Law* (2005) at 33 footnote 60. UNCROC is the most universally ratified of all human rights charters, ratified by all but two countries in the world (United States and Somalia) within the first ten years of its existence – see Office of the High Commissioner for Human Rights <http://www.unhchr.ch> (last accessed 17 July 2008) for the status of ratification. If the UNCROC standard does constitute customary international law, then it is directly applicable in New Zealand, unless abrogated by statute – see Joseph *Constitutional and Administrative Law in New Zealand* (3ed 2007) at [1.6.4] and Dunworth "Hidden Anxieties: Customary International Law in New Zealand" (2004) 2 NZJPIL 67.

[90] Even if I am wrong in my conclusion that weight is built into the standard, however, it is clear that a decision-maker must give genuine, and not merely token or superficial regard, to mandatory considerations – see *New Zealand Fishing Industry Association Inc v Minister of Agriculture and Fisheries* [1988] 1 NZLR 544 at 552 (CA) per Cooke P, applied in the immigration context by Randerson J in *Kumar v Minister of Immigration* HC AK M184/99 25 March 1999.

Should the test be linked to s 47(3) of the Immigration Act?

[91] The next issue is whether the revision of the *Puli'uvea* test suggested by Baragwanath J should be adopted. Section 47(3) provides that an appeal may be brought to the RRA on 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 it would not be contrary to the public interest to allow the person to remain in New Zealand. The requirements of this test have been considered in *Patel v Removal Review Authority* [2000] NZAR 200 (CA), *Ronberg v Chief Executive of Department of Labour* [1995] NZAR 509 (HC) and *Sale v Removal Review Authority* HC AK M1471/93 26 October 1993.

[92] The question is whether powers under s 54, which allow for the making of removal orders, and s 58, which confers a power on an immigration officer to cancel a removal order, must comply with the above test.

[93] I accept the appellants' submission that Parliament has made neither s 54 nor s 58 subject to the s 47(3) test. This means that immigration officers have the power to cancel removal orders and/or give residence permits in circumstances that fall outside s 47(3). This is understandable. For example, there may be other factors that can be legitimately taken into account such as the fact that a person in fact meets residence criteria. It would place an inappropriate restriction on the powers of immigration officers should Baragwanath J's proposed test be adopted.

What is the relevance of the New Zealand citizenship of any children of a person liable for removal when considering whether to make a removal order or whether to cancel a removal order?

Submissions of the parties

[94] The appellants submit that, as New Zealand citizens, they have to date enjoyed, and have for the future a legal right to enjoy, the overall package of rights, benefits, opportunities and expectations available to them in this country. In their submission, the undoubted benefit to them of continuing to receive the care and protection of their mother (in the case of the Ye children) and their parents (in the case of the Qiu children) in this country is critical to their enjoyment in practice of their birthright as citizens. To assume a child can return later to enjoy residence rights will often be unrealistic. In the appellants' submission, the fact that ensuring their rights and needs as New Zealand citizens indirectly benefits their overstayer parents is not a reason for denying them the law's full measure of protection.

[95] The Crown argues that, to the extent that Baragwanath J suggests that the State's duty to protect its citizens is a legal right that can be applied by a court to any decision affecting a citizen, he is mistaken. The Crown argues that the modern state exercises its duty of protection of citizens through the enactment and enforcement of national laws, through its adherence to international law and through the operation of

diplomatic relations. There is no scope for a stand-alone legal right of citizenship of the kind contemplated. The Crown also submits that preferential treatment for citizen children would amount to discrimination against alien children which breaches the non-discrimination provision in UNCROC (art 2).

[96] The Crown submits further that, even if there is a right to remain in New Zealand, this is not affected by the decision to remove a child's parents from New Zealand. The decision whether a child accompanies his or her parents or remains in New Zealand is one rightly taken by the parents. It is not a function of State action. The children, as New Zealand citizens, are free to remain and certainly free to return later.

Citizenship rights

[97] It has long been recognised that the right of the State to demand allegiance from its subjects is subject to a reciprocal obligation on the part of the State to protect its subjects – see Holdsworth *A History of English Law* (3ed 1944) Vol IX at 72 referring to the landmark case *Calvin's Case* (1608) 7 Co Rep 1a at 4b; 77 ER 377 at 382 (CP). The application in New Zealand of *Calvin's Case* was confirmed by the Privy Council in *Lesa v Attorney-General* [1982] 1 NZLR 165. Citizenship has been characterised as one mechanism for identifying who holds rights and what those rights are – see Jenson "Introduction: Thinking about Citizenship and Law in an Era of Change" in Law Commission of Canada (ed) *Law and Citizenship* (2006) 3 at 4; the dissenting judgment of United States Supreme Court Chief Justice Warren in *Perez v Brownell*, 356 US 44 at 64 (1958), subsequently adopted in *Afroyim v Rusk*, 387 US 253 at 268 (1967); *Yan v Minister of Internal Affairs* [1997] 3 NZLR 450 at 456 (HC) (per Hammond J) and *Lee v Deportation Review Tribunal* [1999] NZAR 481 at 494 (HC) (per Williams J).

[98] This is not to suggest that non-citizens do not enjoy the rights embodied in domestic legislation (including BORA), in the common law and under the international covenants to which New Zealand is a party while they are in New Zealand, even (at least to an extent) if they are in New Zealand unlawfully. As the Crown points out, the CRC Committee has criticised New Zealand for its failure to

withdraw the distinction in health, welfare and education services between children according to the nature of their authority to be in New Zealand – see CRC Committee "Consideration of Reports Submitted by States Parties under Article 44 of the Convention Second Periodic Report of States Parties: New Zealand" (12 March 2003) CRC/C/93/Add.4 at [24](i). The withdrawal of the reservation (under art 22 of UNCROC) on children unlawfully in New Zealand is in fact to take place in 2008 with the introduction of a new Immigration Act – see *Appendix 2: Progress on UNCROC Work Programme* <http://www.myd.govt.nz> (last accessed 17 July 2008).

[99] The one major difference between the rights of citizens and non-citizens, however, is the cardinal and absolute residence right of citizens. This right of residence does not accrue to those who are in New Zealand unlawfully (including overstayer children). That this is the case does not constitute discrimination – see Joseph, Schultz and Castan *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary* (2ed 2004) at [12.09], Office of the High Commissioner for Human Rights "General Comment No 15: The position of aliens under the Covenant" (11 April 1986) at [5] – [6] and Human Rights Committee "General Comment No 27: Freedom of movement (Art 12)" (2 November 1999) CCPR/C/21/Rev.1/Add.9 at [4]. See also Irving "Still Call Australia Home: The Constitution and the Citizen's Right of Abode" (2008) 30 Syd LR 133.

[100] The right to residence has been seen as the core right from which all other citizenship rights flow – see Weis *Nationality and Statelessness in International Law* (2ed 1979) at 46 - 47 and 59 and Sawyer "A losing ticket in the lottery of life: expelling British children" [2004] PL 750. In keeping with the affirmation of citizenship as a core right, s 3 of the Immigration Act is emphatic in its protection of the right for New Zealand citizens to remain in New Zealand.

> **3 Rights of New Zealand citizens protected**
>
> (1) For the purposes of this Act, every New Zealand citizen has, by virtue of that citizenship, the right to be in New Zealand at any time.
>
> (2) Nothing in this Act shall abrogate the right declared in subsection (1) of this section, and no provision of this Act that is inconsistent with that right shall apply to New Zealand citizens.

> (3) Without limiting the generality of subsection (2) of this section, no New Zealand citizen requires a permit under this Act to be in New Zealand, or to undertake employment in New Zealand or within the exclusive economic zone of New Zealand, or to undertake a course of study or training in New Zealand, and no such citizen is liable under this Act to removal or deportation from New Zealand in any circumstances.

[101] There is no age limit in s 3 of the Immigration Act. The right to remain in New Zealand and to return at any time is also encapsulated in s 18(1) of BORA. Again there is no age limit. See also art 13 of the Universal Declaration of Human Rights UNGA Resolution 217A (III) (10 December 1948) and art 12 of the International Covenant of Civil and Political Rights (1966) 999 UNTS 171 (ICCPR). Thus, the appellants enjoy the right of residence and this necessarily entails a right to enjoy whatever rights and benefits that residence affords them.

Parental decision or State action?

[102] The Crown argues that, where there is removal of a parent, it is the parent's choice whether the citizen child remains or goes with the parent. The Crown points to ss 16(2)(b) and 28 of the CCA which affirm the right of parents to determine a child's place of residence until the child turns 18 years old, marries, enters into a civil union or a de facto relationship. The Crown relies on the traditional view expressed in numerous cases that the decision of whether a citizen child will leave the country with their deported parent is purely a parental decision and does not reflect state intervention – see, for example, *Elika v Minister of Immigration* [1996] 1 NZLR 741 at 749 (HC), *Schier v Removal Review Authority* [1998] NZAR 230 at 239 (HC) and *P v Director-General of CYPS* [1998] NZFLR 977 at 989 (HC).

[103] I reject the traditional view (and the Crown argument) on this point as artificial. A parent faced with removal has two options – take his or her citizen children or leave them behind. This "choice" is not a free choice but one required of the parents because of the State's actions in removing the parent. The "choice" is either to deprive the children of the benefits of their citizenship by removing them from New Zealand or to deprive them of the benefits of growing up with a parent. It is recognised in art 9 of UNCROC (see above at [69]) and in the principles set out in

s 13(b), (c) and (e) of the CYPFA (also echoed in s 5(a), (b) and (d) of the CCA) that generally a child's welfare and best interests require him or her to be with his or her parents.

[104] It would not usually be seen as a realistic option by parents to leave their children in New Zealand unless at least one parent could stay with them, particularly if there were no other relatives in New Zealand. If it did occur, however, the removal order must be seen as the real and operative cause of the disintegration of the family unit. Equally, if the parents take the child out of New Zealand, this can be seen as a de facto removal of the child by the State. This was the view taken in *Al-Hosan v Deportation Review Tribunal* HC AK CIV 2006-404-003923 3 May 2007 at [65] where Harrison J labelled the arguments based on the "choice" of the parents as artificial and disingenuous.

[105] Similarly Lord Brown of Eaton-under-Heywood (delivering the majority judgment) and Baroness Hale of Richmond in *Naidike v Attorney-General of Trinidad and Tobago* [2005] 1 AC 538 (PC) recognised that children whose parents are deported are often effectively forced to leave – see at [63] and [75]. The majority of the High Court of Australia in *Minister of State for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 also saw action "concerning children" covered by art 3 of UNCROC as extending to the proposed deportation of a foreign national parent of Australian citizen children – see at 289 per Mason CJ and Deane J and at 302 per Toohey J.

[106] The reliance placed by the Crown on the passage in the judgment of the High Court in *Schier v Removal Review Authority* [1998] NZAR 230 is misplaced – see above at [102]. I accept the appellants' submission that that passage has to be read in light of the facts. In that case there was no suggestion or evidence of any unjust or unduly harsh consequences that would flow from the children in question returning to Germany with their German parents. I also note that, while this Court in *Schier v Removal Review Authority* [1999] 1 NZLR 703 at 712 did not call into question the decision of the High Court, it did take a more sensitive stance on citizen children faced with possible de facto removal. It held that the degree of likelihood that other family members, especially New Zealand citizens, would in practical terms have to

leave New Zealand was a relevant consideration in any appeal against a removal order.

[107] In any event, despite the Crown's assertion before us that it is the parents' choice whether to take their children or leave them behind, Ms Ding at least came under a measure of pressure to take the children to China with her. For example, in a report on the removal action against Ms Ding prepared by Mr Maritz, an immigration officer Service Leader, on 23 August 2005, it was noted that "[f]urther attempts will be made to try and convince her to take her children with her". Similarly, in a report of 24 August 2005 Mr Zhou, the immigration officer in charge of Ms Ding's case, said that the Immigration Service was continually trying to convince the client to take her children back to China with her. This illustrates the effective lack of free choice on the parents' behalf that may exist.

Postponement of citizenship rights

[108] The argument has been posited in other jurisdictions that any de facto deportation or removal is merely a postponement of any citizenship rights and not a bar to their exercise – discussed by Mullally in "Citizenship and family life in Ireland asking the question 'Who belongs?'" (2005) 25 Legal Stud 578 at 579. However, since the enjoyment of rights such as welfare, health care and education in New Zealand are dependent on the citizen remaining in this country, even a temporary removal from New Zealand can inflict harm which cannot be remedied by the citizen child returning later to New Zealand (even assuming that the child will be able to afford to do so).

[109] Rights, such as the right to education and welfare, are designed to enable a child to take up their position as an autonomous adult and responsible citizen – see Herring "Children's Rights for Grown-ups" in Fredman and Spencer (eds) *Age as an Equality Issue: Legal and Policy Perspectives* (2003) 145 at 161. The "deferral" of these rights can be seen both as a loss for the child but also potentially for New Zealand. See also the remarks of Smither J in *Kaufusi v Minister for Immigration and Ethnic Affairs* (1985) 70 ALR 476 at 482 – 483 (FCA) and those of Murphy J *Pochi v Macphee* (1982) 151 CLR 101 at [11]. I note, however, that the view

expressed by Smither J does not necessarily represent the law in Australia – see *Kioa v West* (1985) 159 CLR 550, although there was no express mention (and therefore no express disapproval) of *Kaufusi* in that case. See also the discussion at [273] below.

Relevance of citizenship

[110] The fundamental importance of citizenship rights and the fact that removal of the parents can mean de facto removal of citizen children points to the need for a child's New Zealand citizenship to be taken into account as a separate factor in any decision relating to the removal of his or her parents.

[111] This view is supported by Baroness Hale's comments in *Naidike* at [73]. In that case, the issue was whether a work permit renewal ought to have been granted to Dr Naidike to enable him to continue working in Trinidad. Baroness Hale held that, although the protection of the citizen child did not lead to the conclusion that no foreign parent of a citizen child could ever be deported, it was an important part of the decision and, in Dr Naidike's case, had not been properly considered. This conclusion was partly based on the right to respect for family life under art 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950) 213 UNTS 221 (ECHR). But it is clear that Baroness Hale saw citizenship as significant in its own right, given the reference (at [73]) to the comment of Gaudron J in *Teoh* where she said that the State owes particular obligations due to the special vulnerability of the child citizen. Lord Brown, who delivered the main judgment in *Naidike*, considered it unnecessary to deal with this aspect as the majority had held that the deportation order of the father was unlawful on other grounds – see at [63].

[112] The need to consider a child's citizenship rights where his or her parent(s) are liable for removal or deportation (although not creating an absolute right to have parents remain) was also acknowledged in *Qiong* at [92] and *Al-Hosan* at [54]. See also *Wolf v Minister of Immigration* [2004] NZAR 414 at [65] and [72] (HC).

[113] It is significant that in Europe a citizen child's rights have been extended, in some circumstances, to a right to have a parent reside with them in their country of residence. I refer to *Case C-200/02 Chen v Secretary of State for the Home Department* [2005] QB 325 (ECJ). *Chen* is, of course, not directly applicable in New Zealand. To hold that citizenship confers rights to have the parents remain would be contrary to authority. The case does, however, show the importance with which citizenship has been regarded in Europe and lends support to the view that a child's citizenship should be treated as an important factor in the New Zealand context to be independently weighed in immigration decisions affecting their parents.

[114] Underlying the Crown argument appears to be a concern that the floodgates will be opened if a child's citizenship is to be taken into account as a separate consideration. Such concerns have been diminished by an amendment to the Immigration Act by s 16 of the Citizenship Amendment Act 2005. Under s 4A of the Immigration Act, a person is a New Zealand citizen by birth (as against descent) only if the person was born in New Zealand on or after 1 January 1949 and before 1 January 2006. This represents a change from a *lex soli* based citizenship to a *lex sanguinis* based citizenship.

[115] This change in policy means that the numbers of children for whom this question of de facto removal will arise has been limited as at 1 January 2006, although it will continue to be an issue where one parent is an overstayer and one is a New Zealand citizen.

What are the factors to be weighed against the New Zealand citizenship and the welfare and best interests of any child of a person subject to removal?

Right to exclude or expel non-citizens

[116] There is consensus at international law and in discussions of international law in domestic contexts that the right to control borders is a fundamental incident of the sovereignty of a state. Within the limits of its borders, a state is said to have

"exclusive territorial control" (*Corfu Channel Case* (Merits) [1949] ICJ Rep 4 at 18) and on crossing a state's border, all individuals and property fall under the territorial authority of that state – see Jennings and Watts (eds) *Oppenheim's International Law Vol 1 Peace* (9ed 1992) at 384.

[117] The consequence of this is that the State has the right to exclude or expel non-citizens. This is one of the earliest and most widely recognised powers of the sovereign state – see, for example, *R (European Roma Rights Centre) v Immigration Officer at Prague Airport (United Nations High Commissioner for Refugees Intervening)* [2005] 2 AC 1 at [11] (HL) per Lord Bingham of Cornhill; *Attorney-General for the Dominion of Canada v Cain* [1906] AC 542 at 546 (PC); *R (Ullah) v Special Adjudicator* [2004] 2 AC 323 at [6], [30] and [63] (HL); *Fong Yue Ting v United States*, 149 US 698 at 707 (1893); *Pochi* at [5] and at [13] per Gibbs CJ (with Mason and Wilson JJ concurring); and, in the New Zealand context, *Attorney-General v E* [2000] 3 NZLR 257 at [1] (CA).

Limits on this right

[118] The power to exclude or expel aliens is subject to limitations imposed both by international law itself and by New Zealand domestic law. These limitations either prohibit the exclusion or expulsion of certain categories of aliens, or circumscribe the circumstances in which the power of exclusion or expulsion can lawfully be exercised for example, where the person qualifies as a refugee – see s 129X of the Immigration Act and *Attorney-General v E*.

[119] It was also confirmed by the Supreme Court in *Zaoui v Attorney-General (No 2)* [2006] 1 NZLR 289 that, even where an individual poses a threat to natural security, the Minister of Immigration may not order the deportation of the individual if he or she is satisfied that there are substantial grounds for believing that, as a result of deportation, the person would be in danger of being arbitrarily deprived of life, or being subject to torture or to cruel, inhuman or degrading punishment – see at [93]. The recent European Court of Human Rights judgment has affirmed the absolute nature of the ban on torture or inhuman treatment under art 3 of the ECHR – see *Saadi v Italy* (Application No 37201/06 Council of Europe; European Court of

Human Rights, 28 February 2008). See also Asia Pacific Forum of National Human Rights Institutions Advisory Council of Jurists *Reference on Torture Final Report* (2005) <http://www.asiapacificforum.net> (last accessed 17 July 2008).

[120] In *Ullah* it was held that other rights in the ECHR (some of which are contained in BORA) could be used as a basis for a non-citizen to remain in the country such as art 2 (right to life), art 5 (right to liberty and security of person), art 6 (entitlement to fair and public hearing and other minimum standards of criminal procedure) and art 8 (right to family and private life). Lord Bingham stated that reliance could be placed on the above articles but (at [24]) His Lordship held that a very strong case was required. Lord Steyn agreed that, in respect of immigration decisions, articles other than art 3 might be engaged as a basis for a non-citizen to remain in a country (at [39]). Lord Walker of Gestingthorpe (at [52]), Baroness Hale (at [53]) and Lord Carswell (at [67]) agreed.

[121] The right to control borders has been recognised in international jurisprudence as a countervailing factor to children's rights. For instance in *Winata v Australia* CCPR/C/72/D/930/2000 16 August 2001 at [7.3], the United Nations Human Rights Committee observed, with respect to the rights to family life and the rights of the child under arts 17, 23 and 24 of the ICCPR, that it is certainly unobjectionable under the Covenant that a State party may pass laws which require the departure of persons who remain in its territory beyond limited duration permits. It was also said that the fact that a child is born, or that by operation of law such a child receives citizenship either at birth or at later time, is not sufficient of itself to make a proposed deportation of one or both parents arbitrary. However the Committee found that, given the duration of the parents' presence in Australia (14 years) and the child's (13 years), the State was required to show additional factors which justified removal. The Committee held that in that case removal would constitute arbitrary interference with the family. See *Sahid v New Zealand* CCPR/C/77/D/893/1999 11 April 2003 which supports this approach.

[122] The approach of the Human Rights Committee is, of course, in accord with the approach in *Tavita v Minister of Immigration* [1994] NZAR 116 (CA) and

Puli'uvea whereby the right to control borders is balanced against the best interests of the child.

How should the various factors be balanced?

[123] It will be clear from what I have said above that, where "overstayer" children are involved, there will be a clash of two fundamental concepts of international law – the necessity to take into account the best interests of the child and a sovereign State's right to control its borders. That these two fundamental concepts are at issue is a further reason why, absent an explicit statutory provision in the Immigration Act, the paramountcy principle contended for by the appellants could not prevail. Where a citizen child is involved there is yet another fundamental concept of law involved – the rights of residence flowing from citizenship. As I have held above, a child's New Zealand citizenship must be separately identified and weighed – see above at [110].

Detriment to child

[124] In assessing the best interests of a child, the immigration officer will be hampered both by a lack of full information and a lack of expertise. Because of this, the immigration officer is entitled to assume that it is in the best interests of the child to remain in New Zealand with his or her parent or parents – see *Minister of Citizenship and Immigration v Hawthorne* (2002) 222 DLR (4th) 265 at [5] (FCA) per Décary JA (Rothstein JA concurring). It might even be argued that immigration officers are obliged to make that assumption as this accords with the view of the child's parents. The parents must be assumed to be taking their child's best interests into account (subject to there being no care and protection concerns in relation to the parents).

[125] The immigration officer should then assess, on the basis of the information he or she does have, the detriment to the child if the removal proceeds. This obviously involves a comparison between the child's current situation in New Zealand and that which would pertain in the destination country. Both positive and negative aspects would of course be taken into account. It may also involve an assessment of any

realistic (if unpalatable) alternatives, such as a child remaining in New Zealand with one parent.

[126] The need to evaluate the conditions that a child will encounter in the country that their parent(s) are removed to is a theme in the case law – see *Al-Hosan* at [56]; *Daganayasi v Minister of Immigration* [1980] 2 NZLR 130 at 139 – 140 (CA); *Kaufusi* at 482 – 483 and *Cebreros v Minister for Immigration and Multicultural and Indigenous Affairs* [2002] AATA 213 (3 April 2002) at [121] which considered the citizen child's educational opportunities in Albania; *Munar v Canada (Minister of Citizenship and Immigration)* (2006) 261 DLR (4th) 157 at [39] (FC); *Simoes v Canada (Minister of Citizenship and Immigration)* (2000) 187 FTR 219 (FC); *Nguyen v Canada (Minister of Citizenship and Immigration)* [2004] FC 1629 and *Thiara v Canada (Minister of Citizenship and Immigration)* [2007] FC 387.

[127] The assessment of detriment should be performed as far as possible from the perspective of the child. As Sachs J said in *M v The State* at [24], a truly child-centred approach requires a close and individualised examination of the precise real life situation of the particular child and, I would add, in an immigration context, of their possible life if removal of the parents occurred. In the course of this exercise, a citizen child's views should be ascertained and taken into account in the manner discussed below at [138] - [146], or, in the case of "overstayer" children, in accordance with ss 141B – D of the Immigration Act.

Countervailing factors

[128] Any detriment to the child from the removal should then be balanced against the State's right to control its borders. Parental conduct can also be taken into account. It is, for example, legitimate to have regard to the fact that a parent does not meet the character requirements in s 7 of the Immigration Act or that they are a security risk. After all, in such cases public safety will usually be involved. Deliberate evasion of immigration authorities may also be relevant. It must be legitimate to discourage the view that going into hiding and having a child takes a person outside the normal immigration procedures. On the other hand, where

children were conceived at a time when the parents were in the country legally, any later evasion of immigration authorities may be less relevant.

[129] It is logical that the more serious the parental conduct, the more serious the detriment to the child must be to tip the balance and vice versa – see the comments of Baronness Hale in *Naidike* at [75]. Nevertheless, care must be taken as to the weight attached to parental conduct. It must be remembered that the focus where children are involved is on the children, not the parents, and that children are not responsible for their parents' conduct. As Sachs J said in the criminal justice context in *M v The State* at [18]:

> Every child has his or her own dignity. If a child is to be constitutionally imagined as an individual with a distinctive personality, and not merely as a miniature adult waiting to reach full size, he or she cannot be treated as a mere extension of his or her parents, umbilically destined to sink or swim with them.

Result of balancing exercise

[130] It is not possible to lay down any rigid rules as to the result of the balancing exercise. However, if, as in *Schier* and *Rajan v Minister of Immigration* [2004] NZAR 615 (CA), any detriment is, on the information available, relatively low then this is likely to be outweighed by the State's right to control its borders and the detriment is unlikely to be an impediment to removal. Even in cases where the detriment is greater but where it would not constitute a significant and sustained breach of the child's basic human rights (including the child's economic, social and cultural rights) then this too (at least in the case of an "overstayer" child) will likely be outweighed by the State's right to control its borders.

[131] Whether this is so or not will depend on the circumstances of the particular child, including how long he or she has been in New Zealand, and any particular health, financial, cultural, language or educational issues. I note the emphasis the European Court of Human Rights places on length of residence, even for adults without family bonds – see Thym "Respect for Private and Family Life under Article 8 ECHR in Immigration Cases: A Human Right to Regularise Illegal Stay" (2008) 57 ICLQ 87.

[132] Where New Zealand citizen children are involved, the result of the balancing exercise may be different from that which would apply in the case of an "overstayer" child. This is because there is the added factor of their citizenship to be weighed. Citizen children have the right to remain in New Zealand and the consequent right to the benefits accruing from being in New Zealand. As indicated above, at [103] and [108], the removal of their parents will cause either (at the least) a postponement of their enjoyment of their rights arising from that citizenship or their enjoyment of them without the presence of their parent or parents.

[133] Serious potential detriment to a citizen child, even if it does not amount to a breach of the child's human rights may, although not serious enough to protect an "overstayer" child from removal, be sufficient to ensure that the right of New Zealand to protect its borders is outweighed. Again this will, however, depend on the circumstances of the child, including length of residence – see above at [121] - [122].

Do children have the right to be heard and have their views taken into account in any immigration decision affecting their parents?

Submissions

[134] The appellants' submit that children have the right to be heard and have their views taken into account in immigration decisions affecting their parents. Their first argument is that this right arises under s 6(2) of the CCA. That section requires that a child be given a reasonable opportunity to express views on matters affecting the child and to have those views taken into account. Given my decision that the CCA does not apply in the immigration context, this argument obviously fails.

[135] As an alternative, the appellants allege that a breach of natural justice has occurred as they were entitled to be heard either directly or through the intermediary of their parents in respect of the likely impact on their welfare and best interests of their parents' involuntary removal from New Zealand. This argument is based on s 27(1) of BORA and art 12 of UNCROC. In the appellants' submission, a child's

right to be heard is not capable of being satisfied merely by interviewing the parents in relation to their own wishes, intentions and circumstances. It is submitted further that the failure to comply with natural justice considerations vitiates any decision to make the removal order and the subsequent steps in execution of it.

[136] The Crown's first argument in reply is that the right to be heard is unnecessary as the removal of a citizen child's parents does not directly affect the citizen child and therefore there is no adverse treatment of the child's interests. I have already disposed of the argument that the fate of the citizen children is the parents' choice – see above at [102] - [105].

[137] The Crown's alternative argument is that any right of the children to be heard, whether under art 12 of UNCROC or otherwise, is qualified. The right only attaches to a child capable of forming his or her own views and the weight to be given to those views will depend on the age and maturity of the child and the child's level of knowledge of the consequences of removal. Any right to be heard exists for the purpose of ensuring those views are considered and can be exercised by a representative.

Right to be heard

[138] There is no doubt that natural justice or fairness requirements apply in the context of immigration matters. In *Attorney-General v Udompun* [2005] 3 NZLR 204 at [87] (CA), it was accepted that immigration officials are subject to a natural justice requirement even when making decisions about the grant of permits at the border. The extent of what is required to fulfil any obligation to hear a person who will be affected by a decision varies with the power that is being exercised and the circumstances – see *Daganayasi* at 141.

[139] For the reasons I have set out above, the removal of parents has a direct effect on citizen children – see above at [104]. This in itself would trigger the natural justice requirement. Even if that were not the case, art 12 of UNCROC gives a child the right to express his or her views. It provides:

> 1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.
>
> 2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

[140] Article 12 has been very broadly drafted using the words "all matters affecting the child" – see Ang, Berghmans and others *Participation Rights of Children* (2006) at 16. It extends to much wider matters than simply those in which the child has a specific right – see McGoldrick "The United Nations Convention on the Rights of the Child" (1991) 5 Int'l J L & F 132 at 141 and Ang and Berghmans at 17. The CRC Committee has confirmed that art 12 is a procedural guarantee for children who find themselves embroiled in administrative decision-making processes as well as legal proceedings, including procedures relating to asylum and family reunification – see CRC Committee "Concluding Observations of the Committee on the Rights of the Child: Canada" (20 June 1995) CRC/C/15/Add.37 at [13] and CRC Committee "Concluding Observations of the Committee on the Rights of the Child: Germany" (27 November 1995) CRC/C/15/Add.43 at [29].

[141] Article 12 obviously applies to all children, including citizen children. In accordance with the principles discussed above at [87] - [88], the Immigration Act must be read consistently with art 12 if possible. Therefore, in keeping with New Zealand's international obligations, the interpretation of the Immigration Act that allows children to be heard even in situations where the child does not have a legally specific right under the Act ought to be assured, unless there is something in the Immigration Act which would preclude such a right.

[142] The scheme of the Immigration Act provides the greatest clue as to whether a right to be heard ought to be accorded to the citizen child regarding the removal of his or her parents. Under the Immigration Act, children who are classed as "overstayers" have the benefit of provisions designed to protect their rights to be heard. Section 141B provides that children (those under 17 years of age) are to have a responsible adult to represent their interests. Under s 141C, to the extent

practicable given the level of maturity and understanding of the minor, the responsible adult must attempt to elicit the views of the minor and make them known on behalf of the minor where appropriate. Under s 141D due weight is to be given to those views having regard to the age, level of maturity and understanding of the minor. Since children who are classed as "overstayers" have a right to be heard, citizen children should be accorded, at the very least, the same level of protection.

[143] I accept the Crown submission that the right to be heard will only accrue to children capable of forming their own views. However, there has been a sea change in the attitude towards children generally in the period since UNCROC came into force – see Herring "Children's Rights for Grown-ups" in Fredman and Spencer at 145. This applies in particular to the extent to which the views of children should be ascertained and taken into account in decisions affecting them. In *HC v PS* CA115/06 18 September 2006 at [9], for example, it was held that a child as young as four years old could hold a view relating to care arrangements.

How the right is exercised

[144] As the Crown points out, art 12 of UNCROC does allow a representative to state the views of the child. In the case of *Faifai v Chief Executive, The Department of Labour* HC WN AP217/99 14 June 2000, both the mother and child were overstayers and it was held that, since the overstayer child's mother acted as the child's representative, that was sufficient to fulfil the obligations under art 12 – see at [33] – [34]. I agree that this will suffice in relation to citizen children as well.

[145] However, any removal decision is one with significant effects on a child and particularly a citizen child. In light of this and of New Zealand's obligations under UNCROC, to take into account the best interests of any children as a primary consideration, immigration officers must ensure that any representative of a child (usually the parent) is informed of his or her role as the representative of the child and that questions are put to the representative specifically directed to ascertaining the views of the child, particularly with regard to the child's situation in New Zealand and likely future situation should the parent or parents be removed. A

proper opportunity will have to be afforded to the representative to ascertain the child's views in a child-friendly manner.

How the views should be weighed

[146] As to the weight to be accorded to a child's views, I accept the Crown submission that there is a difference between ascertaining the child's views and the weight given to them. The weight to be accorded to these views depends on the age and maturity of the child and the level of knowledge of the child of conditions in the possible destination country. Equally, however, I also accept the appellants' submission that a failure to ascertain and take into account a child's views (as appropriate depending on age, maturity and level of knowledge) may vitiate any decisions made, although this is likely to be only in circumstances where, as a consequence of the failure, matters relevant to the best interests of the child have not been properly taken into account.

How should information as to the best interests of any child (including any assessment of their current and likely future situation) be acquired?

Submissions

[147] The Crown submits that an immigration officer has no positive obligation to make enquiries or conduct an investigation, independently of the parents, into the circumstances of the children. In the Crown's submission, there would be practical difficulties in imposing any such requirement, such as having no powers to compel the production of information. There is also the general principle that applicants seeking a permit, licence or exemption are expected to produce all relevant information in support of their application – see s 34G of the Immigration Act. The Crown also points out that the onus is on the appellant, where an appeal is lodged, to satisfy the RRA that the requirements in s 47(3) are met.

Acquiring information

[148] I accept the Crown's submission that parents (or other nominated representatives) would normally be expected to put all information before the Immigration Service pertaining to the child's current and likely future situation, should the parents be removed. However, if that is not the case, the Service should in my view question the parent or representative appropriately to elicit the relevant information – see *Yang v Minister for Immigration, Multicultural and Indigenous Affairs* (2003) 132 FCR 571 at [29] per Ryan and Finkelstein JJ. This should be done from the child's perspective and not that of the parents.

[149] As discussed at [145] above, specific questions designed to elicit the views of any children should also be posed. There should be specific questions designed to acquire information on the child's views on his or her current situation in New Zealand and his or her likely future situation in the destination country. Where there is more than one child, the situation and views of each child should be considered separately to the extent there are differences between the children.

[150] The Service is not of course obliged to accept the material placed before it by the parents. It can reject the concerns of the child and his or her parents (although one would expect some reason to be given as to why that was the case). The Service can also use any publicly available information about the destination country and other information held by the Service, including, for example, country specific information gathered by its refugee division. The Service would of course put any material they rely on, including publicly available material, to the parents for comment, both from their own perspective and from that of the child.

[151] As publicly available information and that held by the Service generally can be used to the detriment of the child and its parents, I consider that the Service should ensure that it also takes into account any information held by it and publicly available information about the destination country that is favourable to the position of the child and his or her parents. See in this regard, *Del Cid v Canada (Minister of Citizenship and Immigration)* [2006] FC 326 at [30].

[152] I am not suggesting that an immigration officer is required to embark on a major research exercise. What is said above applies to information that is obvious and readily available. I agree, however, with the obiter comments of Wilcox J in *Prasad v Minister for Immigration and Ethnic Affairs* (1985) 65 ALR 549 at 563 (FC) that a decision-maker acts unreasonably by:

> … failing to ascertain relevant facts which he knew to be readily available to him. The circumstances under which a decision will be invalid for a failure to inquire are, I think, strictly limited. It is no part of the duty of the decision-maker to make the applicant's case for him. … But, in a case where it is obvious that material is readily available which is centrally relevant to the decision to be made, it seems to me that to proceed to a decision without making any attempt to obtain that information … [is] so unreasonable that no reasonable person would have so exercised it.

[153] I also refer to *Luu v Renevier* (1989) 91 ALR 39 at 50 where the full Court of the Federal Court of Australia struck down a deportation order for failure to initiate further inquiries which would have taken little effort and were clearly relevant. See also *Bunnag v Minister for Immigration and Ethnic Affairs* (1993) 124 ALR 383 at 390 (FC), although in that case there was no obvious source from which the relevant material was readily available.

[154] I do, however, accept that there is no general duty (or power) to compel the production of relevant material other than that which is publicly available or otherwise held by the Service. In particular, unlike in *Luu*, I do not consider that immigration officers are under any obligation to obtain psychological (or medical) reports on children (even if the parents consent), save perhaps where there are particular concerns about a child – for example, a particular disability.

When should the welfare and best interests of any children and their citizenship be taken into account?

Submissions

[155] The appellants argue that the child's right to be heard should be exercised and their citizenship and best interests taken into account before any decision to make a removal order under ss 53 – 54 and not for the first time at the s 58 stage.

Section 58 permits cancellation of a removal order by a designated immigration officer at any time while the person named in the removal order is still in New Zealand.

[156] In the appellants' submission, there is a significant difference between giving an opportunity to be heard before a decision is made and giving an opportunity to be heard only after an adverse decision has been taken, even leaving aside questions of apparent bias. This is especially the case where the effect of making the decision is to deprive the person concerned of their liberty.

[157] The appellants accept, however, that there may be cases where it is impossible to make satisfactory contact with the person potentially subject to removal or with their children without first initiating the removal process. They agree that in such circumstances the opportunity to be heard and the balancing of relevant factors can occur at the s 58 stage.

[158] The Crown argues that giving an opportunity for the individual to be heard at the time of making a removal order would require notice to be given of the possibility of making such an order and that this would provide a perverse incentive for a person to flee. The Crown, however, accepts that there should be an opportunity to be heard (at least on any new matters arising since the last contact with the Immigration Service) at the s 58 stage.

Timing of consideration

[159] After a removal order is made under s 54, the individual against whom the order was made can be taken into custody under s 59. This obviously has the potential to affect adversely both the detainee and any children. I accept the appellants' submission that these adverse consequences point to the right to be heard being accorded, where practical, before a removal order is made, at least where there are children involved who might be affected by any detention. However, I also accept the Crown's submission that giving notice of a potential removal order may create the risk of flight.

[160] This would suggest that, if there are (reasonable) concerns about flight risk, then any right to be heard can be fulfilled at the s 58 stage rather than at the s 54 stage. After all, by the time a removal order is made, the person is already in breach of their obligation to leave the country. Section 45 imposes an obligation on individuals to leave New Zealand unless subsequently granted a permit, operating "from the moment that a person is in New Zealand unlawfully until that person leaves New Zealand". The person subject to removal has also already had the opportunity to be heard (even if not availed of) by way of appeal to the RRA – see above at [91].

[161] The extent of the process at the removal stage will depend on what consideration has already been given to the case. In many cases, only the effect of any new or updating information will need to be considered, rather than starting the consideration from scratch. I am not suggesting, for example, that it would be proper for the immigration officer to review any decision of the RRA.

[162] If there is significant new or updating information, however, then a new balancing exercise will need to be conducted, taking into account that information. In this regard, where children are concerned, the mere effluxion of time will create new circumstances (for example they will be further into their schooling in New Zealand). Conditions in the likely destination country may also have changed, even within a relatively short timeframe.

[163] Even where the case is effectively being considered for the first time, the fact that the person has had the opportunity to have their case considered at an earlier stage is relevant to the nature and extent of the process at the removal stage. The Crown's characterisation of what must occur at the removal stage as a "final check" is apt. The "final check" is for relevant considerations that might militate against the removal, particularly where children are involved.

[164] I should also make it clear that any right to be heard is not a right to be heard orally, although at present that is the process adopted in the Service through the humanitarian questionnaire process described below at [171] - [176]. I assume that this process has been adopted for good operational reasons, such as ensuring that

only relevant information is placed before the Service, avoiding any difficulties with translating written material and allowing for speedy resolution of any issues that might be raised.

Does the current process adequately fulfil the legal requirements?

Submissions

[165] It is submitted by the appellants that the current New Zealand Immigration Service's Operations Manual (Operations Manual) provisions and the humanitarian questionnaire do not direct the decision-makers sufficiently to a consideration of the best interests of any child whose interests are affected by a parent's removal. The best interests of the child are nowhere referred to in the policy itself and the importance to be attached to that consideration is not adequately stressed.

[166] There are also no relative weightings for the other matters that are weighed against the best interests of the child. The appellants argue that the adverse factors listed involve a direct and primary focus on the position of the parents and their conduct, which is inappropriate as the children cannot be held responsible for that conduct – see above at [128] - [129]. Further, this is inconsistent with and in breach of the need under s 4(3) of the CCA to consider the parents' conduct only to the extent that is relevant to the child's welfare and best interests. In the appellants' submission, the imposing list of adverse affects set out in the Operations Manual at D4.45.5(b) (see below at [169] and [175]) and the humanitarian questionnaire necessarily and of itself results in a failure to address on the merits the best interests of the child or children affected.

[167] It is submitted that the shortcomings of the policy are not mitigated by the assessment at stage three of the humanitarian questionnaire. While the stage three assessment paraphrases some of the international convention material, a statement such as "in all actions concerning children the best interests of the child shall be a primary consideration" is not specific enough and in particular does not identify or

address the special considerations which need to be brought to bear when the child in question is a New Zealand citizen.

[168] The Crown argues that the humanitarian questionnaire covers all relevant matters and provides a reasonable opportunity for the person subject to removal and their children to be heard.

Current procedures

[169] The Operation Manual, at D4.45 and D4.45.5, advises immigration officers to take into account New Zealand's international obligations under UNCROC and ICCPR, as well as other rights of the person being removed and of the immediate family associated with that person (particularly those who are New Zealand citizens and residents). It then says that these matters must be balanced against the rights of the State to determine who should reside within its borders, the principal goals of government residence policy, the intention of the Immigration Act to ensure a high level of compliance with immigration laws and the need to be fair to other potential immigrants who have not met policy requirements and who have not been able to remain in New Zealand – see D4.45.5(b).

[170] The instructions to the humanitarian questionnaire (the document used by an immigration officer to carry out a humanitarian interview) states that it is designed to be carried out "at the time of proposed service or execution of a removal order" which clearly refers to the ss 54 and 58 stages. According to the instructions, the purpose of the interview is to elicit information regarding personal circumstances which require further interview and assessment according to New Zealand's obligations under international law and also the best interests of any children.

[171] Stage one of the interview process commences with basic personal details and circumstances such as their arrival in New Zealand, health, employment, criminal offences and financial circumstances. The questionnaire then asks why the individual has not returned to their home country, where they would live and how they would support themselves if they were to return to their home country and whether they have any family in New Zealand.

[172] Stage two of the questionnaire is completed only if stage one indicates further investigation is required. It asks the interviewee to describe educational and medical services available in their home country and basic questions about their spouse or de facto partner as well as what effect the removal of the individual would have on their spouse/de facto partner. The questionnaire also asks questions about the children such as whether they have any health problems, special needs, who financially supports them and has day-to-day care. It asks whether the children will accompany the interviewee back to his or her home country and what effect remaining in New Zealand or leaving New Zealand would have on the children. Similar questions are asked about children from other relationships, the interviewee's parents and siblings. There is then a sheet provided for supplementary questions.

[173] At stage three the immigration officers are instructed to carry out the assessment. The instructions provided state:

> Matters for consideration in accordance with New Zealand's obligations under International Law including the International Covenant on Civil and Political Rights 1966, the Optional Protocol to that Covenant, the Convention on the Rights of the Child 1989, and New Zealand's reservations to that Convention.
>
> The family is the natural and fundamental group unit of society and the state.
>
> Every child shall have 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.
>
> In all actions concerning children the best interests of the child shall be a primary consideration.

[174] The interviewer is asked to assess the significant changes that have occurred since any appeal or permit decision. He or she must then assess the potential separation from a spouse, partner or child and, whether any are New Zealand's citizens. It then asks whether it is reasonable to expect the spouse, partner or child to live in the interviewee's home country. If the spouse or partner or children are not to accompany the interviewee, the effect on them and any wider family is to be assessed. The location of family members and the interviewee's health and any other relevant factors are also to be considered.

[175] Later in Stage three of the questionnaire there is a heading "Public Interest Factors" and the direction is given to the officers to consider the following points:

> The rights and interests of the government in determining who should reside within its borders
>
> The principal goals of Government Residence Policy
>
> The intention of the Immigration Act to ensure a high level of compliance with immigration laws, and
>
> The intention of the Immigration Act to ensure that persons who do not comply with immigration procedures and rules are not advantaged in comparison with persons who do so comply.

[176] Finally, the questionnaire asks if there are any character concerns, whether there have been refugee claims which have been declined and whether there are other public interest factors.

Assessment of current procedures

[177] The list of countervailing factors set out in the Operations Manual at D.4.45.5(b) (set out at [169] and [175] above) are permitted considerations to be weighed against the best interests of any children and the children's citizenship. However, I consider that these factors really coalesce into one – the right to control New Zealand's borders. This should be the focus of any balancing exercise. There is force in the appellants' complaint that the listing of a number of adverse factors runs the risk of leading to an unbalanced and partisan result where any concerns relating to the best interests of the child or a child's New Zealand citizenship are trumped by the sheer repetition (albeit subtly rephrased and written from a different angle) of one adverse factor.

[178] I also accept the submission that there is an inordinate concentration on the parents' situation and conduct in the list of adverse factors, particularly in cases where a citizen child is involved. As I noted above at [129] children are not responsible for their parents' conduct. This is not a matter of "rewarding" the parents' bad conduct, for example their evasion of immigration authorities. It is

ensuring a proper focus on the best interests of any children involved, who are to be treated as separate individuals with rights and interests of their own.

[179] I comment too that the argument about "queue jumping" (ie not favouring those illegally in New Zealand over those who follow procedures) does not apply to the same extent in relation to the parents of citizen children. There is a different category of immigration entry for family members of citizens so the fact that the parents do not meet the general immigration categories might be thought to have less relevance. When the children are adult, they could sponsor their parents to come to New Zealand under family re-unification policies. Therefore this is not a case involving persons who could never meet immigration requirements.

[180] Further, I accept the appellants' submission that the humanitarian questionnaire does not have a sufficient focus on children. The interviewee who is the parent of a citizen child is not informed of his or her role as representative of the child. All questions are asked from the parent's perspective and there are no questions directed at ascertaining the views of the children. Neither does the questionnaire adequately cover the child's current or future situation. In my view, the questionnaire should ask questions about social, educational, welfare and health opportunities in the destination country, not just generally but specifically in relation to the child. Questions should address whether the child must become a citizen in order to access those benefits and if so, whether the citizen child would have to relinquish New Zealand citizenship.

[181] Questions should be directed at ascertaining the child's mother tongue and other languages spoken and written (and degree of fluency). How this would affect their integration into the community and their participation in the education system in the destination country must be considered. If the parent states that, if removed, he or she and the child will live with a particular family member, questions should be asked about the means of that family member (and any other family members) to help support the parent and the child. The child's current situation in New Zealand as to social integration, educational, welfare and health issues should also be explored to give a proper point of comparison.

[182] A possible solution to ameliorate these deficiencies in the humanitarian questionnaire would be to devise a separate questionnaire or a separate section of the parents' questionnaire which would appropriately concentrate on the views of the child and the likely effects that removal would have on him or her. A separate humanitarian questionnaire may in fact already be administered in some cases for overstayer children.

[183] The need for specific concentration on the views of a child and the child's current and likely future situation may require more work on the part of immigration officers. This follows inevitably from the requirement to take the best interests of any children into account as a primary consideration. The extra work will, however, largely be in the need to ask further questions of the parents or other representative where all relevant information may not be before the officer. As such, any extra work is unlikely to be unduly onerous.

Summary of factors

[184] I now attempt a summary of relevant factors in any removal decisions where children are involved.

Best interests of the child

[185] The Immigration Act can and therefore should be interpreted consistently with New Zealand's obligations under UNCROC – see above at [87] - [88].

[186] The best interests of any children should be a (not the) primary (not paramount) consideration in any removal decision affecting the children and/or their parents – see art 3(1) of UNCROC – see above at [66] - [68]. Weight ("a *primary* consideration") is built into the standard.

[187] It should be assumed and taken as a starting point that it will be in a child's (whether "overstayer" or citizen) best interests to remain in New Zealand with his or her parent or parents. The immigration officer will not have sufficient information

or expertise to assess the best interests of the child independently of the parents' and child's views – see above at [124].

[188] The task of the immigration officer is to assess (on the basis of the information set out below at [196]) the detriment to the child that will arise from removal – see above at [148] - [154]. The inquiry as to detriment should be child-centred and not parent centred – see above at [127].

Citizenship

[189] The New Zealand citizenship of any children of a person to be removed is a separate consideration that must be taken into account in any removal decision – see above at [110]. The citizen child has a right to remain in New Zealand and to have the benefits (including education, health and welfare) that accrue from that residence – see above at [99] - [101]. Removal of the parent or parents will either require a citizen child to forego (at least temporarily) the benefits of residence and citizenship in New Zealand or will require those benefits to be enjoyed without the presence of his or her parent or parents – see above at [103] and [108].

Right to control borders

[190] A State's right to control its borders is a fundamental incident of statehood. A State thus has the right to exclude or expel aliens (subject to certain limits at international and domestic law such as where a person qualifies as a refugee, where the person would be in danger of being subjected to torture or where other fundamental human rights are at stake) – see at [116] - [122] above.

Parental conduct

[191] While the conduct of a parent and other considerations relating to the parents' situation can be taken into account in the balancing exercise, some care must be taken as to the weight placed on those factors. The child ought not be burdened with responsibility for the parent's actions – see at [128] - [129].

Balancing of factors

[192] Any detriment to the child from the removal and, where relevant, the child's citizenship is to be balanced against the State's right to control its borders and, where relevant, parental conduct.

[193] No rigid rules can be laid down as to the result of the balancing exercise. However, as a generalisation, significant and sustained deprivation of the basic human rights of a child (including economic, social and cultural rights) is likely to be necessary before the State's rights to control its borders will be out-weighed. This will depend, however, on factors related to the particular child, such as length of time in New Zealand and any particular health or educational issues. Less significant detriment may suffice in the case of citizen children – see above at [130] - [133].

Summary of process

[194] Where a citizen child's parents are subject to a removal order the views of the child ought to be ascertained. This can be carried out via an adult representative (most likely the parents). The position of "overstayer" children is covered by ss 141B – D of the Immigration Act – see above at [142].

[195] The child's representative must be informed of his or her role as the representative of the child. Questions should be put to the representative directed to ascertaining the views of the child, particularly regarding the child's views on remaining in New Zealand, their views on the potential removal of their parents and on the possibility of moving to their parents' destination country – see above at [145].

[196] Although the individual subject of the removal order is usually expected to put all relevant information before the Immigration Service, the Service should, where this is not done, question the child's representative appropriately as to the child's current situation in New Zealand and likely future situation in the destination country – see above at [148].

[197] The Service should also use any readily accessible public information and information held by the Service as to the destination country. Such material should be put to the person liable for removal and the child's representative for comment – see above at [150] - [154].

[198] Where there is more than one child, the situation and views of each child should be considered separately to the extent there are differences between the children – see above at [149].

[199] The best interests and views of the child should be taken into account at the ss 53 – 54 stage of the removal process except where there are (reasonable) concerns about flight risk. In such cases any right to be heard can be fulfilled at the s 58 stage (consideration of whether to cancel the removal order) – see above at [159] - [160].

[200] The extent of the right to be heard and the consideration required at the removal stage will depend on what consideration has been given to the case earlier in the process. The immigration officer is not required to review earlier decisions made by the Service, by specialist authorities or by the courts. The task of the officer is to review the effect of any new or updating information or any information clearly not considered before – see above at [161] - [162].

[201] Even in cases where the first consideration of the matter is at the removal stage, the process can still be characterised as a "final check" to ensure all relevant information is taken into account in the balancing exercise – see at [163] above.

What is the effect of the 1999 amendments to the Immigration Act?

[202] The humanitarian questionnaire process set out above at [171] - [176] was the Immigration Service's response to this Court's decision in *Tavita*. The discussion so far in this judgment has assumed that *Tavita* and *Puli'uvea* still represent the law in New Zealand and are still applicable to the removal process under the Immigration Act.

[203] Chambers and Robertson JJ, and to a lesser extent Hammond and Wilson JJ, take the view that the 1999 amendments to the Immigration Act overruled the decisions of *Tavita* and *Puli'uvea*, insofar as they apply to the removal process. Chambers and Robertson JJ characterise the current humanitarian interview process as contrary to Parliament's intention. In their view, the RRA and the Minister of Immigration are the only authorities that have the power to consider humanitarian considerations. Hammond and Wilson JJ, taking a less extreme stance, suggest that the humanitarian interviews at the ss 54 and 58 stages are laudable but not necessary under statute.

[204] That the 1999 amendments had rendered the processes followed by the Immigration Service voluntary (at best) was not a position advanced by any of the parties. We thus did not have the benefit of hearing argument on it. Indeed, the Crown, in the course of argument, accepted that the current humanitarian interview process was necessary, at least to gather any updating information. In my view, this was a position that was both responsible and legally correct.

[205] Far from overruling *Tavita* and *Puli'uvea*, the 1999 amendments were passed in full knowledge of the humanitarian interview procedure and with the intention that this should continue. Those procedures are in accordance with New Zealand's obligations at international law and also accord with principle. I propose to elaborate on these matters under the following headings:

(a) Parliament's purpose;

(b) Statutory indications within the Immigration Act; and

(c) Processes not explicit in statute.

Parliament's purpose

[206] There is nothing in the 1999 amendments which explicitly deals with *Tavita* and *Puli'uvea*. If Parliament had intended to overrule them, insofar as they apply at the removal stages, it would have said so explicitly. Indeed, given the presumption

that statutes will be interpreted to accord with the fundamental values of the common law, BORA and international obligations, Parliament would have been required to deal specifically (or by necessary implication) with *Tavita* and *Puli'uvea*, had its purpose been to overrule those decisions. This applies with even more force if UNCROC does form part of customary international law – see above at [89].

[207] Parliament was well aware of the procedures operating within the Immigration Service just prior to the 1999 amendments. During the Select Committee process, the Social Services Select Committee requested information on the procedure current at that time and the procedure that would pertain following the 1999 amendments. The Immigration Service produced documentation that included a flow chart on the procedure in operation – see Social Services Committee Submission Imm/NZIS/4. This alerted the Select Committee to the fact that immigration officers considered *Tavita* implications prior to removal.

[208] I also refer to a report discussing the submissions received and recommendations relating to suggested alterations to the 1999 Amendment Bill, submitted by the Immigration Service on 21 December 1998, at the request of the Select Committee. In that report, the Immigration Service responded to the New Zealand Law Society's concerns that New Zealand's international obligations, as affirmed in *Tavita*, might be neglected under the proposed 1999 amendments – see Social Services Committee Submission Imm/NZIS/7 at 17. The Immigration Service report provided reassurance on that issue. It said:

> (iii) The NZIS [Immigration Service] has very well developed guidelines for assessing the implications of the *Tavita* decision in individual cases and these have had endorsement in their use from the High Court and Court of Appeal. The proposed changes to the removal regime do not alter in any way the need for, or the NZIS's commitment to, taking appropriate account of *Tavita* implications when executing a removal order.

[209] It is clear from the above that the Immigration Service itself made a conscious decision to continue the humanitarian interview procedure after the 1999 amendments. I note too that, at the foot of D45.5 of the Immigration Service's Operations Manual which describes the effect of international obligations on

removal actions, it is recorded that the policy is "Effective 01/10/1999", which is the date on which the 1999 amendments came into force.

[210] It is also clear from the above that the Select Committee, and therefore Parliament, was well aware of the procedures in operation before the 1999 amendments and the Immigration Service's commitment to their continuation after the amendments. If Parliament had intended that these procedures would cease, it would have said so. It did not. As noted above, this is unsurprising as the continuation of the procedures is necessary in many cases under BORA and for the fulfilment of New Zealand's international obligations. Parliament did not envisage any change to s 54 as stated in the explanatory note to the Immigration Amendment Bill no. 183-1 at (x):

> The new sections 54 to 57 deal with removal orders, and largely replicate existing removal order provisions in the Act.

[211] There is no doubt that the 1999 amendments sought to "ensure that persons unlawfully in New Zealand are removed quickly" – see Immigration Amendment Bill no. 183-1 Commentary, p. (ii). An important aspect of the amendments is the new obligation on persons to leave New Zealand "from the moment" they are unlawfully in New Zealand (the current s 45). Coupled with this is the obligation on individuals to activate any appeal to the RRA within what became 42 days from the expiry of their permit.

[212] What this means is that the administrative removal decision of the immigration officer (made after the humanitarian interview at the removal stage) is not subject to review by the RRA. This is because an opportunity for review by the RRA now occurs at an earlier stage. Because of the strict time limits for any appeal to the RRA, however, there will be many cases where there is no RRA appeal at all – see *Removal Review Authority Annual Report 2007* (*Appendix Three)* <http://www.removalreviewauthority.govt.nz> (last accessed 21 July 2008) for statistics on late/invalid appeals. (However there are no figures existing for those who did not file an appeal at all.) For those who do not file an RRA appeal or who file it outside the time limits, the Immigration Service's humanitarian procedure will be the only time New Zealand's international obligations will be considered.

[213] An internal Immigration Service memorandum documenting the changes pursuant to *Tavita* and the Immigration Amendment Act 1999 makes this point:

> **Legal: International Obligations/Tavita implications**
>
> The Immigration Amendment Act 1999 substantially changes the way in which removals will operate. … Where once removing people was the final and a long process, under the new regime, there is likelihood that this final step will be the process.
>
> In practical terms, the removals process has now become a "one step" process and as such, increases the likelihood that a person's first contact with NZIS could be when you arrive to physically remove that person from New Zealand.
>
> That being the case, you must be prepared to carefully consider the person's circumstances when making a removal decision. Officers must be aware of our international obligations when making such decision.

[214] It is true that there remains the possibility of consideration by the Minister of Immigration under s 130. However, the Minister is not obliged to consider any such applications – see s 130(6)(a). Further, there is no obligation to give reasons and it must be assumed that the Minister would operate under advice from immigration officials in any event. The ability to apply for a special direction therefore provides no guarantee that New Zealand's international obligations will be met. That is the province of the Immigration Service's humanitarian questionnaire procedure, as outlined to the Select Committee.

Statutory indications within the Immigration Act

[215] Although the humanitarian questionnaire process is not contained within the statute itself, it is clear from [208] and [210] above that this was not necessary as the procedure was already in operation at the time of the 1999 amendments and was to continue. It was already seen as a necessary process to ensure compliance with international obligations.

[216] Further, there are two statutory indications that are consistent with its existence. The first is the current s 54(2), which contains a requirement that "[a]n 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." This requirement was first inserted by the 1991 amendments.

[217] The preservation in the 1999 amendments of this requirement for a fresh look to be taken at the removal stage by a different immigration officer is telling. The rationale for this must be that there is still some kind of assessment to be undertaken at the s 54 stage and Parliament saw it as unfair for the decision to be made by the same immigration officer who refused the applicant's permit application. If the removal order under s 54 was a mere formality (a mere matter of ticking the s 53 boxes), then a different person would not be required to make the decision.

[218] Another indication that a considered assessment is required even after a removal order is served is demonstrated in s 55, subs (2)(a) of which provides for notice of a removal order to be given to the person named in the order and subs (2)(c) of which provides for advice to be given to a person that he or she may contact a solicitor or counsel or responsible adult designated or nominated under s 141B. The advice to the person who is being removed that he or she can contact a lawyer or responsible adult suggests that, even after the removal order has been made, all is not necessarily lost.

[219] For completeness, I note that s 58 was carried over essentially in its current form from the 1991 Act which was the period in which the decision in *Puli'uvea* was made. Its existence in the Act cannot therefore herald an intention to overrule *Puli'uvea* (or indeed *Tavita*), nor an intention to change the humanitarian interview procedure already undertaken by the immigration officers at the removal stage. Further, in terms of s 130, which allows the Minister to make special directions, there was no statutory indication that the 1999 amendments heralded a return to the position prior to 1991 whereby the Minister decided all humanitarian concerns. This obligation had placed an inordinate burden on the Minister, which the 1991 amendments were designed to remove.

Processes not explicit in statute

[220] Fairness, the cornerstone of administrative law, acts to guard against the arbitrary use of power and enjoins those making administrative decisions to hear parties and to give reasons. As stated by Lord Bridge of Harwich, the courts will not only require procedure prescribed by statute to be followed, but will readily imply such additional procedural safeguards as will ensure the attainment of fairness – see *Lloyd v McMahon* [1987] AC 625 at 702 – 703 (HL). That view has now, according to Woolf, Jowell, and Le Sueur *De Smith's Judicial Review* (6ed 2007), been widened (at [7-014]):

> The test today of whether to supplement statutory procedures is no longer whether the statutory procedure alone could result in manifest unfairness [*Furnell* [1973] AC 660 at 679]. The preferable view is that fairness must, without qualification, be attained, and that the "justice of the common law" may supplement that of the statute unless by necessary implication the procedural code must be regarded as exclusive.

[221] Factors to be considered are the comprehensiveness of the code, the degree of deviation from the statutory procedure required and the overall fairness of the procedure to the individual concerned – see *De Smith* at [7-014]. Fairness, proper purpose and anti-discrimination considerations will come to the fore here.

[222] The Supreme Court has already seen fit to read in procedural requirements not explicitly provided for in the Immigration Act. In *Zaoui (No 2)* the Supreme Court read into s 72 of the Immigration Act 1987, a procedure which was not explicit on the surface of the provision. Section 72 states that:

> **72 Persons threatening national security**
>
> Where the Minister certifies that the continued presence in New Zealand of any person named in the certificate constitutes a threat to national security, the Governor-General may, by Order in Council, order the deportation from New Zealand of that person.

[223] This is prescriptive in the same sense as s 54 is prescriptive. However, the Supreme Court held that the surface meaning of the words ought to be imbued with a meaning that is consistent with international law – see at [90]. The Supreme Court read in three procedural aspects to s 72 (see at [92]):

(a) That there is no pressing prescriptive time requirement and that "those charged with responsibility, while having regard to the purpose stated in s 114A(f) that a decision can when necessary be taken quickly and effectively, should have adequate time to address the issues of fact and judgment involved.";

(b) The bar on the Minister's obligation to give reasons when confirming the certificate does not apply to decisions under s 72. Rather, the general right to have reasons on request found in s 23 of the Official Information Act 1982 applies, although there may be applicable provisions under that Act limiting the statement of reasons; and

(c) The right to natural justice affirmed in s 27 of the Bill of Rights and found in the ICCPR would provide procedural protection under s 72.

[224] The decision of the Supreme Court to read in these procedural requirements is all the more important, given that the provision being interpreted applies to circumstances where individuals have been certified as threats to national security, not mere overstayers. There is every reason to imply similar elements into s 54, in cases where fundamental human rights are at stake, such as the right to life and the right to freedom from torture.

[225] The need to read in procedural steps and considerations is strengthened in a case where children are involved. The special protection of children, which permeates UNCROC, the whole of our domestic law and the fundamental value structure of New Zealand society, indicates that full effect to their rights ought to be given, including their interests in maintaining a united family. Where the interests of New Zealand citizen children are involved, the considerations must take on even greater importance.

[226] In my view, these considerations must be read into the s 54 stage rather than at the s 130 or s 58 stages because the statute explicitly provides that there is no duty to consider or give reasons at those latter stages. However, I consider that the restrictions in s 58(5) apply only if all humanitarian considerations have been

properly taken into account at the s 54 stage. If the assessment was not able to be carried out at the s 54 stage, then the s 58 stage assessment must be treated as effectively a delayed s 54 assessment and thus not subject to the s 58(5) restrictions.

[227] If I am correct in saying that the humanitarian interview procedures (or something similar) are required at the removal stage, then they are reviewable. As stated in *De Smith*, it is the constitutional "function of the judiciary to determine the lawfulness of the acts and decisions and orders of public authorities exercising public functions, and to afford protection to the rights of the citizen" – see at [4-016]. Merely because an individual is an overstayer does not mean that recourse to the courts is forfeited.

[228] Even if I am wrong and the humanitarian interview procedures, including the giving of reasons, is purely voluntary, I agree with Hammond and Wilson JJ that this does not exclude review. As *De Smith* says at [3-026]:

> *Informal action*
>
> First, there are situations where a public authority seeks to deal with a problem by informal action outside the expected statutory procedures or in the absence of a statutory regime. It is submitted that where a public authority takes such action to further its public functions this should, in principle, be reviewable.

[229] For the avoidance of doubt, this is not to be taken as agreement with the form of order for reconsideration in the case of the Ye children as set out in Hammond and Wilson JJ's judgment – see above at [414]. The order states that the decision is reviewable by the Immigration Service only if it sees fit. If there has been error in a purely voluntary situation, then an order such as is made in the present case would allow that error to be perpetuated. That is tantamount to excluding review.

Specific issues in these appeals

[230] I now turn to the specific issues in these appeals, starting with the issues common to both families and then those relating solely to the Ye children. I concentrate on the most recent decision of the Service even though in both cases there has been earlier interaction with the Service and the Minister of Immigration and, in the case of Mrs Qiu, with the RRA and the High Court. I mention any earlier

decisions and communication only to the extent that matters were dealt with in those earlier decisions that are not referred to or not dealt with adequately in the most recent decision.

Basis of removal decision for Ms Ding

[231] On 23 August 2005, Ms Ding was served with a further removal order (the first removal order having been served on 11 June 2004). She was taken into custody. The same day she underwent a third humanitarian interview. In that interview she expressed concern as to how she and her three children would survive financially in China. She mentioned in particular difficulties with medical and education services for her children, given that they are not citizens of China.

[232] The interview was followed by a decision, either taken immediately or on 31 August 2005, not to cancel the removal order. On 31 August 2005 Mr Zhou, the immigration officer assigned to Ms Ding's case set out his reasons for his decision in the following terms:

> I have considered the interests of the 3 NZ born children. I understand that Ms Ding may face financial difficulties with the schooling and any hospitalisation of the 3 NZ born children.
>
> I have also considered that Ms Ding has no family support in NZ. Her husband, mother, 2 additional children, 3 brothers & 3 sisters are currently living in China. Ms Ding and the 3 NZ born children will have the support of the family members in China. The 3 NZ born children all speak Cantonese.

[233] He goes on to say that Ms Ding will have limited ability to support herself and her three New Zealand born children in New Zealand. He posits that she would no doubt have to rely on a benefit eventually. Mr Zhou also says that he has considered the recent submission in the form of the psychiatric report from Dr F, which says that Ms Ding is suffering from a depressive disorder and that she had suffered domestic violence, and sexual and emotional abuse at the hands of her husband. This report is discussed in more detail at [279] - [280] below.

[234] Mr Zhou states that these claims (I assume he means the violence claims given Mr Zhou's first hand knowledge of Ms Ding's suicide attempt – see at [277]

below) are recent and have never been put in submissions before, including in the six representations to the Minister of Immigration. He states that, beside the fact that there is no document or other evidence that suggests she suffered abuse at the hands of her husband, Ms Ding could call on the protection of the Chinese authorities once back in China should her husband become abusive.

[235] Mr Zhou then notes that he has considered the right of the New Zealand government to determine who should remain within its borders including the right to expel persons not lawfully in New Zealand. He finishes stating:

> I have carefully weighed the competing matters set out above and I believe that Ms Ding should be returned to China and that it would be of the best interests of the 3 NZ born children to return to China with their mother and join their father and the rest of the family.

Basis of removal decision for Mr and Mrs Qiu

[236] As noted above at [9], on 14 June 2005 Mr and Mrs Qiu were both served with a removal order. The day after Mr Qiu was served with the removal order, a humanitarian interview was carried out (15 June 2005). There has as yet been no humanitarian interview of Mrs Qiu.

[237] In his humanitarian interview, Mr Qiu stated that he was afraid of taking his two New Zealand born children back to China because of the one-child policy. He was also concerned about his children's future as they would not be able to attend school in China and he and Mrs Qiu would not be able to find employment.

[238] At stage three of the humanitarian interview, Mr Wang, the immigration officer in charge of the Qius' applications, reached the conclusion that there were no compelling reasons why a custodial removal of Mr Qiu should not take place. Mr Wang deposed on 23 June 2005 that, in making his decision whether to set aside Mr Qiu's removal order, he took into account New Zealand's international obligations under the ICCPR, its optional protocol, UNCROC and the interests of Mr Qiu's children as a primary consideration. He concluded:

> I took into account the young age of Mr Qiu's children and the fact that the language they speak at home is Mandarin. Indeed, even though he has been

> in New Zealand for over 8 years, Mr Qiu still requires a Mandarin interpreter. I also took into account the fact that all of Mr Qiu's extended family reside in China – both of his parents, 2 brothers and 1 sister.
>
> I also considered the public interest factors set out [in the humanitarian questionnaire]. Particularly important, in my view was the fact that Mr Qiu had been unlawfully in New Zealand for almost 5 years and that he had previously been given an opportunity to leave New Zealand voluntarily which he had not taken up.

ISSUES COMMON TO BOTH FAMILIES

The children's right to be heard

Submissions

[239] It was submitted by the appellants that, despite the relevant immigration officers knowing that the children were New Zealand citizens, there was no attempt in the present case to afford the children a reasonable opportunity to express their views. Nowhere does the evidence show that their views, on either the removal of their parent(s) or potentially their own de facto removal were obtained even indirectly from their parents. Any views sought were those of the interviewee and not the children. Further, the questions asked did not focus on the children's current situation in New Zealand or likely future situation in China.

[240] The Crown submitted that none of the children in these proceedings have any real knowledge of circumstances in China and that they are too young to hold an informed view. No weight therefore could be accorded to their views. The Crown argued further that Ms Ding and Mr Qiu were given the opportunity to provide all relevant information and were asked specifically if they had anything to add.

Were the appellants heard?

[241] I accept the appellants' submission that the humanitarian questionnaires did not contain any questions directed at ascertaining the views of the children even indirectly. Most of the children are clearly old enough to hold an independent view,

as shown by evidence before the High Court from two psychologists, Ms M (who assessed the Qiu children) and Mr S (who assessed the Ye children). Further, the children were clearly qualified to express their views with regard to their current situation in New Zealand.

[242] It is true that the children have not been to China but that does not mean that the children's views on this should not have been ascertained. Had those views been ascertained, it would have been permissible for the immigration officers to take into account that the children's views relating to life in China would be held largely in ignorance of the situation in China and that they might be influenced by their parents. The children's experience of living in New Zealand, on the other hand, is based on first hand knowledge and therefore their views relating to New Zealand cannot be similarly discounted.

Was proper information on the children's situation obtained?

[243] I also accept the appellants' submission that there was no proper ascertainment, from the perspective of the children, of the children's current situation in New Zealand and their likely situation in China. It is true that the officers involved gave Ms Ding and Mr Qiu the opportunity to add further information but this was not specifically directed to ascertaining the children's situation.

[244] Taking the Ye children first, there was no proper concentration on what they would lose if they moved to China and what detriments they might face. The extent of the financial, health, educational and social detriment was not assessed. Furthermore, since Mr Zhou had made no enquiries and accessed no information at all about the circumstances of the children in New Zealand, I accept the Ye children's submission that he had no factual basis for saying that the children would be better off going to China rather than remaining in a country in which they had spent their whole lives and in which they were well settled.

[245] Further, Mr Zhou assumed that Ms Ding's family in China would support her without ascertaining the family's financial situation. The humanitarian questionnaire

contained the question "[w]here will you live in your home country and how will you support yourself" to which Ms Ding responded "I will live with my mother. I don't know how will I support myself". This ought to have triggered questions from Mr Zhou relating to the Chinese family's income and resources. Mr Zhou would not have been obliged to accept Ms Ding's answer to these questions but they ought to have been asked.

[246] In addition, as discussed in more detail below at [277] - [282], Ms Ding was in a state of depression at the time of the interview, which should have led to greater care on Mr Zhou's part in his information gathering role. I also note that Ms Ding's role as representative of her children was not explained to her.

[247] Similarly, in relation to the Qiu children, there is no indication that Mr Wang, the officer involved in the Qiu decision, explained the role of representative to Mr Qiu. Nor did Mr Wang, it appears, make proper enquiries into the Qiu children's circumstances or their possible future in New Zealand or China. He makes cursory reference to the young age of the children. Most answers Mr Wang has recorded to the questions at stage three of the humanitarian questionnaire consist of no more than one word answers. In response to the questions whether the interviewee's children are New Zealand citizens or residents and whether it is reasonable to expect a New Zealand citizen child to live in the interviewee's home country, Mr Wang merely wrote "children are NZ citizens", without any assessment of possible detriments of the children's relocation to China. In response to the assessment question asking what the effect would be on the children if the children did not accompany the parent to China, Mr Wang merely stated "separation". In the section entitled "[a]ny other compelling reasons" Mr Wang wrote "no".

[248] A further issue arises in relation to the Qiu children. There was no separate inquiry into or consideration as to the effect on the children of any removal of their father, in circumstances where there was no decision yet made as to the other parent and therefore uncertainty as to the ultimate living arrangements of the children. The Qiu children submitted that it may have been in their best interests that any decision in respect of Mr Qiu awaited the outcome of the humanitarian interview of Mrs Qiu. There is some force in that submission, although there is no reason to suppose on

current information that there is anything in the situation of Mrs Qiu that would differentiate her situation from that of her husband.

Language

[249] The Ye children all speak Cantonese. The official language in China is Mandarin and schooling is in that language – see Law of the People's Republic of China on the Standard Spoken and Written Chinese Language 2000 (Order of the President No.37) art 10. Modern Chinese consists of six to eight distinct languages, including Mandarin and Yue, the latter is colloquially known as Cantonese.

[250] The differences among the Chinese languages extend vastly beyond phonology and even vocabulary. There are also divergences in syntax and function words which make the languages as different from each other as English and Austrian German – see Windrow "From State to Nation: The Forging of the Han through Language Policy in the PRC and Taiwan" (2005) 37 N Y U J Int'l L & Pol 373 at 377 – 378. Thus the Ye children are, it seems, likely to be at a disadvantage in schooling because they do not speak Mandarin. Obviously, the older a child is, the more likely it is that a change in the language of their schooling will affect their educational development.

[251] Further, there was nothing to suggest that the children have been taught to write in Chinese. This is a significant matter about which inquiry should have been made. If they have not been taught Chinese characters, this should have been taken into account in assessing the educational detriment that could arise for these children in China.

[252] Although the Qiu children speak Mandarin, it is not clear if Alan is able to read or write in Mandarin (Stanley is not school age). The same issue as to schooling difficulties in China might therefore arise for Alan (although not as acutely as for Willie and Candy, given they are older).

[253] I also accept the appellants' submission that it would be a disadvantage to all those who have started schooling in New Zealand (and perhaps even to Stanley) if

they are required to change schools and countries and receive schooling in another language in another cultural and educational environment. They are used to being schooled in English in the New Zealand environment. This was a relevant matter that should have received consideration.

[254] I am not of course suggesting that these matters would necessarily be determinative. There are many instances of immigrant children adapting very successfully to the different language and culture in schooling in New Zealand. Nevertheless, the changes in language and schooling that children whose parents are subject to removal might face do remain a relevant and weighty consideration – see *Winata* where it was held that since the child had lived 13 years in the country, further factors justifying removal of the child's parents were required (above at [121]).

[255] I accept that Mr Wang's reference to the young age of the Qiu children might have been a (very) shorthand way of saying that he had taken this factor into account and that he considered that they would adapt to schooling in China. I also accept that the situation of Alan had been taken account of in the RRA decision but that decision was some time ago and he was much older at the time of Mr Wang's decision.

Status of Ye and Qiu children as "black children" in China

[256] Both the Ye children and the Qiu children have siblings in China. Mr Ye and Ms Ding have two older children who are still in China, a son, Jia Hao Ye, born on 26 February 1991 and a daughter, Qiao Xian Ye, born on 30 November 1995. They live with Mr Ye's mother. Mr and Mrs Qiu also have two other children in China. Those children were born in 1992 and 1994 respectively.

[257] All of the appellants were born in breach of China's "one-child" policy and are thus *hei haizi* or "black children". The appellants argue that the consequences of the one-child policy for the children ought to have been taken into account as this will affect the Ye and Qiu children's ability to access welfare, education and health services in China.

[258] The seminal refugee case in New Zealand on the topic of "black children" accepted that there might be discrimination against those breaching the one-child policy but concluded that this was not for a Convention reason – see *Refugee Appeal No. 3/91* 20 October 1992. The fact that discrimination based on status as a "black child" may not constitute a Refugee Convention reason does not mean, however, that any disadvantages are not relevant to immigration decisions generally – see Convention relating to the Status of Refugees (1951) 189 UNTS 150.

[259] *Refugee Appeal No. 3/91* noted that compulsion to submit to abortion or sterilisation does occur, although it said that the Government of China does not condone this. It also noted that disciplinary measures to comply with the one-child family policy can be extreme, ranging from stiff fines to loss of employment. The views expressed contrast with those referred to in *Qiong* at [41] – [43], that a softening of the one-child policy has occurred recently. However, the information relied on in that case was from the *Guardian Weekly* newspaper, which would not necessarily be an authoritative source – see *Qiong* at [42].

[260] Other jurisdictions have recognised that "black children" may be disadvantaged in China. See *Chen Shi Hai v Minister for Immigration and Multicultural Affairs* (2000) 201 CLR 293 at [31] - [38] per Gleeson CJ, Gaudron, Gummow and Hayne JJ and at [58] per Kirby J and *Cheung v Canada (Minister of Employment and Immigration)* (1993) 102 DLR (4th) 214 at 222 (FCA). These cases have recognised that such children may be part of a social group for the purposes of the Refugee Convention. See also Feller, Turk and Nicholson *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (2003) at 57.

[261] In the United States, the concentration has been on the parents rather than the children. The definition of refugee has been expressly broadened to include those forced to undergo abortion or sterilisation due to their government's population control scheme – Illegal Immigration Reform and Immigration Responsibility Act 1996 8 USC § 1101(a)(42)(B), *Corpus Juris Secundum* vol 3A § 966. The situation of the children has been considered in some cases but with varying results – see *Lin v Ashcroft*, 377 F 3d 1014 at 1023 and 1029 (9th Cir, 2004), *Zhang v Gonzales*, 408 F

3d 1239 at 1246 - 1247 (9th Cir, 2005), and *Wang v Gonzales*, 405 F 3d 134 at 144 (3rd Cir, 2005).

[262] I also note that enforcement techniques do vary widely over China, especially because of the lack of a national law regarding enforcement – see Sicard "Section 601 of IIRIRA: A Long Road to a Resolution of United States Asylum Policy Regarding Coercive Methods of Population Control" (2000) 14 Geo Immigr L J 927 at 929. Thus the issues to be faced may vary depending on the region in China.

[263] I also refer to the following reports and articles on the one-child policy: Immigration and Refugee Board of Canada "China Treatment of 'illegal' or 'black' children born outside the one-child family planning policy: Country of Origin Research" (26 June 2007) <http://www.irb-cisr.gc.ca> (last accessed 17 July 2008); Austrian Centre for Country of Origin and Asylum Research and Documentation (ACCORD) *China: 10th European Country of Origin Information Seminar Budapest* (2005) <http://www.unhcr.org> (last accessed 17 July 2008); Skalla "China's One-Child Policy: Illegal Children and the Family Planning Law" (2004) 30(1) Brook J Int'l L 329; and Mathew "Conformity or Persecution: China's One Child Policy and Refugee Status" (2000) 23(3) UNSWLJ 103 at 107.

[264] Since the one-child policy has been accepted in other jurisdictions as leading to possible serious detriment for children, it should, in my view, have received explicit consideration. The questions in the humanitarian questionnaire merely gave space for a four line answer to ascertain the views of the parents as to their concerns for the children if they were to accompany them back to China. In the case of Ms Ding, her answers as to difficulties in medical care and education did not allude specifically to the one-child policy, although it had been mentioned in earlier submissions on Ms Ding's behalf. Mr Qiu did mention specifically the one-child policy and his concerns as to the effect this would have on the children.

[265] In his decision on Ms Ding, although the immigration officer, Mr Zhou, referred to "financial difficulties with the schooling and any hospitalisation", the effects of the one-child policy were never specifically mentioned or considered in relation to the specific possible effects on the Ye children. Ordinarily, vague

indications of financial difficulties, without any further information, would not be sufficient to trigger concern – see the second appendix in *Rajan* at [4]. However, in this case the children's status as "black children" might well give credence to Ms Ding's claims. Information on the status of "black children" is readily accessible in the public domain and there is likely to be specialist information on that policy held by the Service. In accordance with the principles discussed above at [194] - [201], it should therefore have been considered by Mr Zhou.

[266] It is difficult to see how Mr Zhou could rationally have concluded that the children would be better off in China without having decided that their status as "black children" would not affect their access to education and health services. If he had decided that there were no issues with the children's status, then one would have expected at least brief reasons for coming to that conclusion, particularly as the human rights of New Zealand citizen children were potentially at stake.

[267] The need to give reasons is all the more important where fundamental human rights are at stake. Mr Zhou made no reference to the children's status as "black children" at all. The inevitable inference therefore is that this clearly relevant factor was not taken into account.

[268] In terms of the Qiu children, Mr Wang made no mention of the one-child policy, despite this having been put to him by Mr Qiu. There was no discussion of why this point was not of concern. The matter does not seem to have been earlier considered from the viewpoint of Stanley and Alan. The effect of the one-child policy in China on Mr Qiu had been earlier assessed in relation to the children in China but not in relation to Stanley and Alan. The RRA decision in relation to Mrs Qiu did not mention the point, because Stanley had not been born. Mrs Qiu does not seem to have referred to the two children in China as the RRA talks about the children in China being from Mr Qiu's previous marriage.

[269] Nothing in the above discussion is to be taken as a comment on what should or should not be the result of any reconsideration of this issue.

The appellants' New Zealand citizenship

Submissions

[270] The next submission made was that the appellants' New Zealand citizenship was not properly taken into account.

Assessment

[271] In this case, as a function of their New Zealand citizenship, the appellants are entitled to remain in New Zealand. They are not "overstayers". Deferral of their citizenship rights is an important loss to them and to New Zealand – see above at [109]. This is a matter that should have been separately taken into account and weighed.

[272] While the New Zealand citizenship of both the Ye and the Qiu children was mentioned, there was no real attempt to compare the life they would have in New Zealand with that in China and no proper recognition of the importance of their citizenship rights. In the case of the Qiu children in particular there does not seem to have been any consideration of their citizenship in the final decision at all. Mr Wang merely stated that the Qiu children are New Zealand citizens with no consideration of what that citizenship might mean. In my view, this means that has been an error in the decision-making as citizenship has not been properly treated as a separate and important consideration.

[273] I accept the appellants' submission that it is highly relevant that they have never been to China – so they are not being "returned" there, despite this terminology being used frequently by the immigration officers. Being sent to China involves losing many aspects of the only life they have known, including their sense of stability and their current identity as young Chinese New Zealanders. If it is true that they will face serious financial difficulties in China, then the children have little prospect of ever returning to New Zealand. This would impact on their identity and their material wellbeing throughout the balance of their lives and on their citizenship rights.

[274] One further issue relating to citizenship is whether the children have to be Chinese citizens to access benefits that Chinese citizens enjoy in terms of education, health and welfare. It is unclear whether they would be Chinese citizens by descent or whether they would have to go through a particular process of gaining citizenship. It is also not certain whether the children would be permitted to retain their New Zealand citizenship throughout life and still enjoy the benefits of Chinese citizenship. I understand that, as at 2005, art 31 of the People's Republic of China Nationality Act did not acknowledge dual citizenship – see CRC Committee "Consideration of Reports Submitted by States Parties under Article 44 of the Convention Second periodic report of States: China" (15 July 2005) CRC/C/83/Add.9 at [51]. There are reports of difficulties in receiving education for migrant children. Although there is legislation in place stating that Chinese provincial governments have the responsibility to provide education to migrant children, little attention has been paid to this legislation at local level – see Hannum and Park *Education and Reform in China* (2007) at 119.

ISSUES RELATING PRIMARILY TO THE YE CHILDREN

Ms Ding's state of depression

Submissions

[275] The Ye children submit that Ms Ding's state of depression was not properly factored into the decision-making process. They submit that Dr F's report, received before Mr Zhou recorded his final decision on 31 August 2005, raised serious questions about Ms Ding's mental health against a background where Mr Zhou knew there had been a previous incident involving self-inflicted harm by Ms Ding at the immigration service office.

[276] The Crown submits that this factor was adequately taken into account and that, in any event, Ms Ding was not psychiatrically unwell.

Evidence as to Ms Ding's depression

[277] Ms Ding's attempted suicide occurred on 24 November 2004. She had attended at the Immigration Service for a humanitarian interview, her second such interview. In the course of that interview, Ms Ding cut her wrists with a carpet cutter in the toilets. She was found and taken to hospital, after one of the children told the receptionist that Ms Ding was attempting to kill herself. Ms Ding stated that she had been ordered by her husband to commit suicide while in the custody of the New Zealand Immigration Services.

[278] Ms Ding's psychological state has been the subject of several reports. In an affidavit of 1 September 2005, the supervisor of the social worker assigned to the Ye children, notes that the Department investigated a notification from the Immigration Service when Ms Ding cut herself at the Immigration Services offices. She states that it was believed that Ms Ding was not suicidal at the time of the investigation. Mental health services confirmed that her actions were as a result of her husband's removal and her own pending removal. The children were not believed to be at risk of physical harm.

[279] On 4 August 2005 Ms Ding was assessed by Dr F. In his report, Dr F gave his clinical opinion that Ms Ding was suffering from a major depressive disorder with a very real risk of suicide. He considered that it was likely there was an element of post traumatic stress disorder but further history was required to substantiate this. In his opinion, any attempts by the Immigration Service to remove Ms Ding would exacerbate her condition and increase her risk of suicide, particularly if this involved separating her from her children. He considered that Ms Ding's clinical state had been caused primarily by living in constant fear of being apprehended by the authorities and being forcibly removed to China and the harm this would cause to her and particularly her children.

[280] Dr F recorded Ms Ding as asserting that she had been regularly assaulted by her husband in China when he was intoxicated. On settling in New Zealand she said she had been kept isolated from the rest of the Chinese community in New Zealand while her husband went out to work. She had never been taught to speak English or

acquire any basic money management skills. She reported that her husband's alcohol consumption worsened which led to frequent assaults. On one occasion she lost all her front teeth, requiring the placement of dentures. The assaults included sexual assaults and frequent emotional abuse. The assaults also involved the children, particularly the eldest child, Willie, who was often assaulted around the head which frightened her. Ms Ding said that she did not contact the police because she was too afraid of her husband.

[281] In a health and safety management plan made for Ms Ding while she was in custody at Auckland Central Police Station on 23 August 2005, nine months after the attempted suicide, it was recorded that, although Ms Ding was not psychiatrically unwell, she was acutely distressed and she remained at risk of self harm.

[282] On 24 August 2005, there is a letter from a psychiatric nurse who says that she had informally assessed Ms Ding at the request of police and counsel because of the concerns that she may be at risk of harming herself. She said:

> In the presence of counsel, Chinese interpreter and the writer, the defendant responded minimally to the assessment. She appeared depressed, expressing shame, head bowed, little eye contact. The defendant was unable to give reassurance for her safety. She said that she did not want to go back to China.
>
> I will inform the medical unit at Women's Remand Prison of her ongoing potential for self harm.
>
> I respectfully suggest that due legal process should continue.
>
> Although there is no need for this service to be currently involved with this client, forensic services are available to assist in the future if this is deemed necessary.

Assessment by the Service

[283] As noted above at [233], Mr Zhou said in his report of 31 August 2005 that he had taken Dr F's report into consideration in his decision. There were two other references to Dr F's report. The first was in a report dated 23 August 2005 regarding removal action written by Mr Maritz, another immigration officer who was a Service

Leader, under the heading "To Note", it was stated that Ms Ding may be suicidal and that "[t]his case may attract media attention due to her suicidal tendency …".

[284] The second was on 24 August 2005. Mr Zhou, the immigration officer dealing with Ms Ding's case, forwarded a summary of facts to the private secretary of the Associate Minister of Immigration via email indicating his intention to proceed with Ms Ding's removal. Mr Zhou advises that a flight booking for Ms Ding (alone) had been made, departing on 1 September 2005. He advised that he had taken a psychiatric report on Ms Ding "into consideration in my decision-making". Mr Zhou also noted that he had requested that two New Zealand police officers escort Ms Ding back to China due to Ms Ding's previous suicide attempt.

Was Ms Ding's depression taken into account?

[285] I deal first with the Crown submission that Ms Ding was not psychiatrically unwell. In my view, while there appears some disagreement as to whether Ms Ding was psychiatrically unwell (see above contrast: [279] with [281]), there is agreement as to her depressed state and the potential suicide risk – see at [279], [281] and [282]. Dr F appears to be the only person to have undertaken a full evaluation of Ms Ding's state and it was his opinion that she was suffering from a major depressive disorder.

[286] The issue is whether this factor was adequately taken into account. First, although Mr Zhou said he had considered Ms Ding's depressive state and risk of self-harm, Mr Zhou did not take into account that, if Ms Ding committed suicide, this would have extremely serious effects on her New Zealand citizen children in that they would be permanently deprived of a parent and in particular the parent on whom they have the greatest physical and emotional dependence.

[287] Secondly, there was no consideration by Mr Maritz, in his report of 23 August 2005, of the fact that removal could deprive Ms Ding of her life, albeit by her own hand. It appears that his concern at that stage was in relation to the likely publicity involved – see above at [283].

[288] Thirdly, while sending a police escort with Ms Ding was a sensible arrangement to keep her safe on the flight, it is difficult to see why Mr Zhou organised this and yet failed to try to make some arrangements for the adequate care for Ms Ding on arrival in China in order to try and ensure she did not take her own life on her return.

[289] I thus accept the Ye children's submission that Ms Ding's suicide risk was highly relevant and not properly taken into account, both with regard to its possible effect on them and the potential risk to Ms Ding's life.

Mr Ye's alleged violent behaviour

[290] Mr Zhou discounted the alleged violent behaviour of Mr Ye on the basis that this had not been mentioned by Ms Ding prior to Mr Ye's removal. He considered that in any event this would be appropriately dealt with by the Chinese authorities – see above at [234].

Contentions of the parties

[291] The Ye children and Ms Ding submit that it is understandable (given the history of violence) that Mr Ye's violent behaviour was not mentioned while Mr Ye was still in the country. They submitted that it should not have been discounted by Mr Zhou and that there would not be proper protection by the authorities in China.

Should it have been discounted?

[292] It was open to Mr Zhou, on the information then available to him, to find Ms Ding's claims of family violence to be unsustained. He was also entitled to assume that Ms Ding could seek protection from the Chinese authorities, in the absence of any evidence before him that this was not the case. When the matter is reconsidered, however, all the material now available (and any further material placed in front of the Service) will need to be considered, including Ms Ding's explanation for not raising the matter earlier.

Likelihood of Ye children remaining in New Zealand

Submissions

[293] The Ye children and Ms Ding submit that, by the time Mr Zhou made his decision, he knew that Ms Ding did not intend to take the children with her to China. He also knew that the Immigration Service had no authority to require the children to go to China and he had no other basis to think that they would be going to live there in the foreseeable future. It was thus not possible for Mr Zhou to justify his decision by saying that it would be in the best interests of the three New Zealand children to return to China, a country to which they had never been.

Children staying or going?

[294] There is force in these submissions. In this case, Ms Ding had been saying for some time that she could not take her children to China with her. Efforts were being made to persuade her to take the children but, although this could have been mere brinkmanship, she appeared to maintain her position even when she appeared in imminent danger of removal. Further, if Ms Ding was prepared to leave the children behind, this might add some credence to her concerns that she would not be able to survive in China with her children and possibly also to her concerns about the children's father.

[295] I consider, however, that whether or not a citizen child will accompany his or her parent is of limited significance to any decision-making. As stated above at [103] and [108], the citizen child faced with removal of a parent is faced with either relinquishing or postponing rights of residence and citizenship or enjoying them without the parent, neither alternative being satisfactory. This choice is not a free choice of the parents but one that is a direct result of the removal decision. The detriment associated with each alternative should be assessed.

[296] Nevertheless, I accept the Ye children's submission that the best interests of the children should have been assessed on the basis of the correct factual situation.

Even if the children were to remain in New Zealand, however, their likely situation in China should still have been explored as it may have led to the decision to leave the children behind. Further, Ms Ding could have changed her mind and taken the children with her.

Wardship

[297] The issue may now, however, be further complicated with regard to the Ye children. The current legal status of the Ye children is that, as from 1 September 2005 pursuant to an order made by the Family Court at Auckland under s 33 of the CCA, they are under the guardianship of the Family Court. On the same date as the order was made on 1 September 2005, the Family Court directed that the Chief Executive be appointed as the agent of the Court and counsel for the children was also appointed. The proceedings in the Family Court are adjourned, awaiting a determination as to whether Mrs Ding is permitted to remain in New Zealand. The children are currently in her care.

[298] The effect of a wardship order is to place all guardianship functions in relation to the child in the hands of the Court and to place the child under the Court's protection – see Inglis *New Zealand Family Law in the 21st Century* (2007) at [16.5.1]. This includes the power to decide whether the ward leaves the jurisdiction (even for a holiday) – see *Family Law Service* at [6.302]; *J v T* [2005] NZFLR 379 at [26] (FC); Inglis at [16.4.2] and s 16(2)(b) of the CCA.

[299] In making any relocation decisions, the Court must take into account the welfare and best interests of the child as the first and paramount consideration – see *Stadniczenko v Stadniczenko* [1995] NZFLR 493 at 500 (CA) and *D v S* [2003] NZFLR 81 at [17] (CA). Therefore, even if Ms Ding did change her mind and decided to take the children with her to China, it is not predetermined that the Court would allow the children to go with her. The Family Court would have to be satisfied as to the conditions in China and that living in China would be in the children's best interests.

[300] As stated by Quilliam J in *Re T* [1982] 2 NZLR 662 at 664 (HC), there can be no doubt that, in a conflict between the natural guardian and the Court itself as the guardian under a wardship order, the Court's rights would prevail – see also *Family Law Service* at [6.301]. (This was cited with approval in *Re RSR* [2005] NZFLR 228 at [38] (HC).) The process the Court would wish to undertake to ascertain the children's best interests would no doubt be similar to that described below at [347] - [350].

Remedy

[301] There is no doubt that Ms Ding and Mr and Mrs Qiu have had their cases considered numerous times. It is understandable that the Crown feels a certain exasperation with their continued efforts for reassessment and with their evasion of immigration authorities. It is easy to speak pejoratively of their actions and, particularly in the case of the Qius, their economical approach to truth. Looked at in another light, however, they can be seen as doing what every parent tries to do: the best for their family. This is not to condone their actions: it merely explains them.

[302] What must not be lost sight of, however, is that the children are not responsible for the actions of their parents and it is with the children's best interests that the Service and the courts must concern themselves, particularly in light of their New Zealand citizenship. It must be a primary role of the New Zealand executive and the courts to protect the rights of New Zealand citizens. I have identified some failings in the removal process as regards their respective children. The question now is one of remedy. I start by discussing the standard of review and then examine the case for each set of appellants in turn.

Standard of review

[303] As this is a case involving the fundamental human rights of children, it is one where the courts should apply the standard of "anxious scrutiny" – see *R v Secretary of State for the Home Department, Ex parte Bugdaycay* [1987] AC 514 at 531 (HL) per Lord Bridge; *R (Mahmood) v Secretary of State for the Home Department* [2001] 1 WLR 840 at [18] (CA) and *Pharmaceutical Management Agency Ltd v Roussel*

Uclaf Australia Pty Ltd [1998] NZAR 58 at 66 (CA). See also *Discount Brands Ltd v Westfield (New Zealand) Ltd* [2005] 2 NZLR 597 (SC) at [54] per Keith J, and [116] per Blanchard J (with Richardson J in agreement at [179]) (SC) for support for the concept of variable standards of review.

[304] Professor Taggart in his article "Proportionality, deference, *Wednesbury*" referred to at [85] above, has suggested that a full proportionality review ought to replace the *Wednesbury* unreasonableness standard where fundamental rights and values are involved. See also Joseph at [21.7.5]; *R (Daly) v Secretary of State for the Home Department* [2001] 2 AC 532 (HL) and *R v Ministry of Defence Ex parte Smith* [1996] QB 517 at 554 (CA) per Sir Thomas Bingham MR. The UNCROC standard clearly qualifies as relating to fundamental human rights and is embedded in the values of a civilised society – see below at [312] - [315].

[305] It must also be borne in mind that, since the standard in UNCROC has built in weight ("a *primary* consideration"), any decisions which clearly do not accord the proper weight to the best interests of any child must be reviewable as errors of law. Given that the weight is built in, a standard administrative law inquiry may thus in any event not be sufficient.

Position of the Ye children

[306] In the case of the Ye children, it is not necessary to rely on any heightened scrutiny or even on the fact that the UNCROC standard has weight built in. Nor is it necessary to come to any view on the proportionality test. The decision in relation to Ms Ding and her children can be impugned on normal administrative law grounds for failure to take into account relevant considerations and asking and answering the wrong question.

[307] The relevant factors not taken into account, include Ms Ding's suicide risk and therefore the possibility that the children might be deprived totally of their mother. That the Ye children do not speak or write Mandarin and the length of time they have lived in New Zealand were also not considered.

[308] The extent of any possible disadvantages to the children as a consequence of their status as "black children" was also not considered, including the possibility that their fundamental rights to education and healthcare might be compromised if they were to be taken to China. The status as "black children" has been recognised in other jurisdictions as being capable of sustaining a refugee claim. It is inconceivable that New Zealand citizen children might be afforded less protection potentially than non-New Zealand citizens were New Zealand jurisprudence to follow that overseas precedent in a future case.

[309] The children's views were not sought. This may not have led to the appeal being allowed if Mr Zhou had taken into account all relevant factors and if he had had adequate information on the children's current and likely future situation in New Zealand. He did not. Further, the situation was one that called for particular care in the information gathering role, given Ms Ding's distressed state.

[310] With the Ye children there is a further issue. Mr Zhou attempted to assess where the best interests of the children lay (ie whether or not the children ought to stay in New Zealand or go to China), an assessment that he was not qualified to make. In any event, he did not have adequate information upon which to make the assessment. Further, the assessment was made on the wrong factual basis. There was every indication that the Ye children were not going to accompany their mother to China.

[311] There is now an added complication. Given their status as wards of court, Ms Ding is now unlikely to be able to take the children (at least immediately), even if she wanted to. This means that any decision to remove Ms Ding now will involve separating the children from the parent they most identify with and about whom there are no care and protection concerns; leaving the children in the care of strangers. As I said above at [299], the Family Court could not responsibly discharge the order unless it was satisfied that it was in the best interests of the children to do so. This would necessarily involve an assessment of the possible effects of their status as "black children" in China, as well as an assessment of the arrangements in China for their support.

[312] Hammond and Wilson JJ say in their judgment that the fact that removal of Ms Ding would result in the separation of the children from their mother would not suffice in itself to stop Ms Ding's removal – see below at [409]. For myself, I have doubts that merely upholding immigration policy could ever be proportionate to breaking up a family, without there being other public interest factors involved, such as may arise in deportation cases or those involving revocation of permits. Separating children from their parents, absent care and protection concerns, goes against the family values that are so ingrained in New Zealand and which are reflected in domestic legislation such as CYPFA and CCA – see above at [103].

[313] Hammond and Wilson JJ state that children deprived of parents through death or other human circumstance often show great resilience and wonderful development as human beings. This may be true, but equally there are many instances of children who do not survive such events very well. Further, deprivation of parents through death is unavoidable. Removal leads to deprivation of a parent through the actions of the State and not fate.

[314] Murphy J's views in *Pochi*, expressed prior to the signing of UNCROC, support the view that breaking up a family due to deportation (or effectively forcing the citizen spouse or child to leave the country with the deported spouse), is inhumane and uncivilised. Murphy J likened it to the separation of families when members were taken as slaves. In *Teoh*, Gaudron J's approach was comparable – see at 304 – 305. Similarly in the New Zealand case of *Wolf*, Wild J reviewed a decision of the Immigration Service to deport Mr Wolf who had two New Zealand citizen children. Wild J held (at [65]) that, because the decision involved the break up of the family coupled with New Zealand's obligations under international treaties, the court was obliged to scrutinise the decision carefully and closely.

[315] Further in the recent House of Lords case *E B (Kosovo) v Secretary of State for the Home Department* [2008] 3 WLR 178 (HL), in an appeal against an order for removal based on article 8 of the ECHR, Lord Bingham commented at [12] (with the other Lords in agreement) that it would rarely be proportionate to uphold an order for removal of a spouse if the effect of the order is to sever a genuine and subsisting relationship between parent and child – see Taggart at 35 - 36.

Position of the Qiu children

[316] While the case with regard to the Qiu children is not as strong as that of the Ye children, nevertheless the decision to remove Mr Qiu can also be impugned on ordinary administrative law grounds of failing to consider relevant considerations. The Qiu children's citizenship was mentioned but there was no attempt to assess that as a separate consideration. Further, the Qiu children's views were not sought and there was inadequate information as to their situation in New Zealand and likely situation in China. I do not need to decide if those factors would have led to the appeal being allowed because the Qiu children's status as "black children" raised a real issue as to the possible detriment to them of Mr Qiu's removal. Their status as "black children" received no consideration at all.

Result I would have arrived at

[317] For the above reasons, I would have allowed the appeal of both the Ye and the Qiu children and remitted the matter for reconsideration in light of my judgment. The appellants' argument based on s 4 of the CCA seeking affirmative relief has failed. Given that the decisions have been invalidated on normal administrative law grounds, the normal remedy (that the matter be remitted to the Immigration Service to be reconsidered) applies.

CROWN'S CROSS-APPEAL

[318] The Crown's appeal and cross-appeal covers the following matters:

(a) The judgment wrongly joined the children as parties;

(b) The children should have had litigation guardians;

(c) The principle of legality and the *parens patriae* jurisdiction was invoked in a manner that is inconsistent with statute and unjustified on the facts;

(d) There should not have been court appointed counsel for the children;

(e) Irrelevant evidence was admitted, which post-dated the decisions challenged by application for judicial review;

(f) The declarations that the children were not to be removed from New Zealand, except by decision of the parents, were misconceived and premature and were based on the mistaken assumption that adoption of the children outside New Zealand was imminent; and

(g) The *Qiu* application for judicial review should not have been moulded into the image of the *Ding/Ye* case where there were vital factual differences; and

(h) The interim orders with regard to Ms Ding should not have been made.

Were the children wrongly joined as parties?

Submissions

[319] The Crown submitted that the children were joined as parties in circumstances where their interests were properly advanced by an adult parent with full capacity and about whom there was no care and protection concern. The Crown argued that the indirect effect on the children of the decision not to cancel the removal order of a parent is insufficient to give them independent party status as there are no legal consequences for them. Any practical consequences arise, in the Crown's submission, from the decision of the child's parents as to where the children should live and are consequences which the parents are legally entitled to bring about irrespective of any state involvement.

[320] The Crown pointed out that the joining of the children is unnecessary because the children's views can be made known through their parent or parents. It was also submitted that separate party status is contrary to the scheme of the Immigration Act

and could lead to a situation where the children seek to appeal or to review a decision not to cancel a removal order of his or her parents but the parents themselves choose not to appeal (as in this case).

[321] The appellants argue that the Crown contentions are contrary to ss 4(3) and 6 of the CCA as well as UNCROC. In their submission, the Crown position also fails to give recognition to the children's rights as New Zealand citizens.

Discussion

[322] The Crown's argument is akin to stating that the children should have no standing in judicial review proceedings. In New Zealand, a generous approach to standing prevails, which is said to be based on the constitutional principle that the courts must ensure that public bodies comply with the law – see Joseph at [26.6.3] and *Environmental Defence Society Inc v South Pacific Aluminium Ltd (No 3)* [1981] 1 NZLR 216 at 220 (CA). As a result of this generous approach, the question of standing is combined with the substantive issues as part of the judicial review discretion and standing decisions are made on the totality of the facts – see Joseph at [26.6.3(3)(a)] and *Budget Rent A Car Ltd v Auckland Regional Authority* [1985] 2 NZLR 414 at 419 (CA) per Cooke J.

[323] In terms of this case, one of the primary considerations in the removal decisions is the best interests of the children. The children stand to lose their primary caregiver(s) or will be subject to de facto removal from New Zealand even though they are New Zealand citizens. I have already disposed of the argument put forward by the Crown that the decision to take the children to China is a decision of the parents and not the State – see above at [103] - [104]. I accept that parents would legally be entitled to make a decision to leave their children in New Zealand if they voluntarily went overseas (provided proper care for those children was arranged) or they could legitimately decide that their children should accompany them overseas. However, in the case of immigration removals, neither of these options is the free choice of the parents.

[324] The children's future is thus intimately bound up in the decision of whether to remove the parent(s) in this case and the decision-maker is required to take into account their best interests. This means that standing for judicial review cannot be in question.

[325] I accept that in most cases it would be unnecessary to join the children as parties as they will usually be aligned with their parents, although, given the approach to standing outlined above, if the children desire to participate through a litigation guardian, it may be difficult to limit their involvement. Parties with the same interests are often named as plaintiffs in the same proceeding (although of course they are exposed to costs orders).

[326] I do not accept the Crown submission that it is against the scheme of the Immigration Act to join the children as parties. I have held above that the children's views should be taken into account in any immigration decision, albeit normally that will be through their parents or another responsible adult. However, the fact that their views can be sought through a parent or representative does not mandate that they cannot be separate parties if they wish. The children's interests are directly engaged in any decisions relating to their parents.

[327] Nor do I see anything necessarily untoward in a situation where the children might wish to appeal a decision even if the parents do not. For example, children could take more seriously than their parents the possible deprivation of their citizenship rights through the removal of their parents. Of course, if the children did take this step, then they (through their litigation guardian) would be exposing themselves to costs orders in the normal way.

[328] Even if I am wrong and normally children should not be joined as parties, this case involved an argument that was not frivolous – that the CCA had direct operation in the immigration context. The CCA quite clearly would give the children the right to be heard and joined to any proceedings. Even if it would be inappropriate to have children as parties as a general rule in immigration cases, it was not inappropriate in what was effectively a test case on the application of the CCA.

Should litigation guardians have been appointed?

[329] The Crown argues that, subject to some exceptions which do not apply in this case, a minor must have a litigation guardian as his or her representative in any proceeding. They refer in this regard to rr 82 – 85 of the High Court Rules. The Crown submits that none of the children involved in this case have sufficient maturity to instruct counsel.

[330] I agree that a litigation guardian should have been appointed in this case. The fact that a litigation guardian was not appointed, however, cannot, in my view, undo the separate party status of the children and therefore does not mean that the appeals must be dismissed. Effectively the court appointed lawyers in this case have made the decisions for the children in the litigation, including the decision to appeal. In doing so they have been acting in what they consider to be the best interests of the children in the way that a litigation guardian would.

[331] It is true that the children will not be exposed to costs and that would apply also to the lawyers acting on their behalf and that this would differ from the situation of a litigation guardian. However, as stated above, this was in the nature of a test case and that would have made costs orders against these children and any litigation guardian inappropriate in any event.

Was the *parens patriae* jurisdiction wrongly invoked?

Submissions

[332] The Crown argues that the principle of legality and the *parens patriae* jurisdiction was wrongly invoked to justify the joinder of the children as separate parties.

Discussion

[333] There is force in the Crown's submission. However, as noted above at [322], I see the question as one of general standing in judicial review proceedings.

Should there have been court appointed counsel?

Submissions

[334] The Crown's next submission is that, even if the children were rightly given separate party status, there was no basis for the involvement of state funded and court appointed counsel to represent the children. The Crown argues that there was no power to appoint counsel to act for the children under the CCA, the inherent jurisdiction, the *parens patriae* jurisdiction or any other Act. Further, art 12 of UNCROC, if it does apply, does not require the child to have separate representation as there is no conflict of interest between parent and child – see McGoldrick at 141.

[335] In addition, the Crown argues that there is a "public purse" reason why appointment of counsel for children in these appeals is inconsistent with the Immigration Act as it involves the subversion of the legal aid regime as it applies to immigration litigation. Legal aid is unavailable for persons unlawfully present in New Zealand and is currently available for only limited categories of immigration litigation, which are inapplicable in this case.

Discussion

[336] I agree that the power to appoint counsel would not arise out of the CCA, the *parens patriae* jurisdiction or any other legislation. I see the counsel acting in this case as having been appointed as *amicus curiae*. As has been held by this Court in *Solicitor-General v Miss Alice* [2007] 1 NZLR 655 at [17] – [18] (CA), there is nothing improper in *amici* taking a partisan role in litigation.

[337] The Crown points out that the High Court did not express the appointments of Dr Harrison and Mr Mahon as appointments of *amicus curiae*. They are expressed as appointments as counsel for children. It is whether there was power to appoint counsel that matters, however, and not the label that was put upon it.

[338] I agree that it would not normally be appropriate to appoint *amici* to represent children in immigration matters for the "public purse" reasons articulated by the Crown. This, however, was a test case on an argument that was by no means frivolous. Therefore it does not come within the normal category of cases and it was well within the discretion of the High Court Judge to appoint counsel.

[339] Even where the children are not a party to the litigation and the case is not a test case, however, it may be that, if there is a conflict between the interests of the parent and the child's interests or other special circumstances, consideration should be given to appointing counsel to put arguments for the child. As Baroness Hale said in *Naidike* at [68], "[i]t is all too easy to lose sight of those rights and interests in proceedings which are mainly concerned with the rights and interests of adults". Although the appointment of a lawyer for the child is a difficult issue that must depend on the particular circumstances "[a]t the heart of this analysis is whether, considering all the circumstances, those whose interests were affected had a meaningful opportunity to present their case fully and fairly" – see the majority in *Baker* at [30].

[340] In the case of the Ye children, there may have been features of the case (aside from it being a test case) that warranted separate representation (in particular Ms Ding's depression).

Was irrelevant evidence admitted?

Submissions

[341] The next concern of the Crown is that the High Court allegedly wrongly considered a large amount of inadmissible evidence that post-dated the decision of

the immigration officer in each proceeding. This evidence includes statements from court appointed counsel for the appellants, reports filed by the psychologists about the children, affidavit evidence of Ms Ding purporting to resile from or add to responses in her humanitarian interview and an affidavit from a purported expert in the law in China.

[342] In the Crown's submission, judicial review is concerned with lawfulness of the process by which a challenged decision was reached on the basis of information held at the time and the reason given by Baragwanath J that the information was relevant to remedy is not, in the Crown's submission, sufficient to render it admissible.

Discussion

[343] The argument before the High Court was that the best interests of the children are paramount and that the children had a right under the CCA to be heard. In these circumstances, it is unsurprising that the additional evidence was considered possibly relevant. In the normal course, such evidence would only be admissible in exceptional circumstances.

[344] However, if there had been major changes in circumstances or highly relevant information not placed before the Service then, given the importance of the best interests of the child in the decision-making process for immigration matters, it may not be wrong to allow further evidence to be adduced, even in judicial review proceedings. It is pertinent to note that in order to make decisions based on the best interests of the child, the decision needs to be made on the best information available. This also tips the scales towards allowing further evidence in this particular case.

Was the declaration of Baragwanath J that the children should not be removed from New Zealand necessary?

Crown submissions

[345] The Crown submits that Baragwanath J wrongly declared that the appellants ought not to be removed from New Zealand except by decision of their parents. The Crown submits that the declaration was unnecessary as there is no power to remove the children from New Zealand. Baragwanath J made the order because of a suggestion in an affidavit from the Children and Young Persons Service (discussed below at [349]) that the Ye children might be placed for adoption in China.

[346] The Crown submits that the affidavit was simply an attempt to describe possible outcomes that may or may not occur depending upon what facts and situations ultimately face social workers. Any contingent possibility of adoption outside New Zealand in the distant future would not be entertained unless authorised by law or order made under the authority of the Family Court.

Social worker's affidavit

[347] The affidavit referred to above was sworn on 13 December 2005. This outlined what steps might be taken should Ms Ding be removed, leaving her children behind without having made proper provision for their care. The social worker said that the Children and Young Persons Service would seek to obtain a permanent rather than temporary solution for the children as soon as possible.

[348] There would be an assessment of the children's current circumstances and future living arrangements, taking into consideration the best interests of the children. Any assessment would consider the advantages and disadvantages of remaining in New Zealand and having stability in education, language and environment but being separated from immediate family, balanced against being placed with or having regular contact with their parents in another country. The

children's wishes would be ascertained and taken into account, depending upon their age and maturity. Psychological reports would be sought if necessary.

[349] To assist in determining if placement with the children's relatives in China would be in their best interests the Children and Young Persons Service would, through the Office of the Chief Social Worker, consult with International Social Services in China, a non-governmental organisation. Any assessment would need to include further information about the siblings who had been left in China. If a decision was taken that it was in the best interests of the children to live in China and extended family were unable to care for the children, consideration may be given to placing the children with non-family caregivers in China, who would be assessed by International Social Services.

[350] On receipt of a favourable assessment, the Children and Young Persons Service would then weigh the placement option in this case in China against any other New Zealand placement options. It would consider all relevant factors and the principles provided in ss 5, 6 and 13 of the CYPFA or in ss 4 and 5 of the CCA depending upon which statute applied.

Declaration unnecessary

[351] I accept that the declaration was unnecessary. The Ye children are under the wardship of the Family Court. That necessarily has the effect that the children cannot be removed from New Zealand without order of the Court – see above at [298]. The Qiu children have an absolute right to remain in New Zealand under s 3 of the Immigration Act and could not be removed without parental consent.

Did the Judge wrongly mould the Qiu case into a mirror of the Ding case?

Submissions

[352] The Crown next complained that Baragwanath J moulded the Qiu case into the image of the Ding case, although there were significant differences in fact and

differences in the manner of argument in the High Court between the two cases. The Crown complained that the pleadings in the Qiu case were never formally amended to reflect the argument the Qiu children were invited to present.

Discussion

[353] It is not improper for a Judge to suggest other lines of argument to counsel, provided this is not unfair to one of the other parties. If these arguments are adopted by counsel (as they were in this case), then they will be dealt with by the Court in the same way as any other submission.

[354] It would probably have been better in this case to have required a formal amendment to the pleadings but that this did not occur cannot invalidate the arguments. If the way the arguments were dealt with by the Court is in error then that can be challenged on appeal substantively in the normal manner.

[355] Judges should, however, be circumspect in suggesting new lines of argument. In civil cases, it is the responsibility of parties to argue their cases and judges should, where possible, attempt to avoid entering the fray – Sir Gavin Lightman QC "Is the Adversarial System Past its Use By Date?" (New Zealand Bar Association and Legal Research Foundation Conference *Civil Litigation In Crisis – What Crisis?*, Auckland, 22 February 2008) at [17]. See also Partridge and Farmer QC "Civil Litigation in Crisis – What Crisis?" NZ Lawyer (30 May 2008) at 10.

Should the interim orders have been made?

[356] The Crown appeals against the granting of interim orders by Harrison J in this case – see *Ding v Minister of Immigration* HC AK CIV 2005-404-4900 1 September 2005.

[357] Aside from the question being moot because those original interim orders have expired, the fact that this was a test case means that it was well within Harrison J's discretion to make those orders.

Result and costs

[358] In CA184/06, the Ye children's appeal, the appeal is allowed (by majority) and the matter is remitted to the Immigration Service for reconsideration. Of those who would remit the matter (Glazebrook, Hammond and Wilson JJ), the majority view is that expressed in Hammond and Wilson JJ's judgment. In accordance with that judgment, if the Service sees fit, the matter should be reconsidered in light of the reasons for judgment given by Hammond and Wilson JJ.

[359] The cross-appeal in CA184/06 is allowed unanimously, but only to the extent that the declaration made by the High Court that the appellants cannot be removed from New Zealand without parental consent is set aside.

[360] Costs of $12,000 plus usual disbursements are to be paid by the Crown to the second respondent in CA184/06, on condition that the costs award is used to pay the fees of counsel involved in the appeal. Mr Bassett, in the best traditions of the Bar, was prepared to act for Ms Ding in the appeal on a pro bono basis but that should not inhibit him and any other counsel involved in the appeal from rendering an account for their services up to the level of this costs award. There are no other costs awards.

[361] In CA192/06, the Qiu children's appeal, the appeal is dismissed by a differently constituted majority, (Hammond, Chambers, Robertson and Wilson JJ). There is no costs award.

[362] The cross-appeal is allowed unanimously, but only to the extent that the declaration made by the High Court that the appellants cannot be removed from New Zealand without parental consent is set aside.

[363] Mr and Mrs Qiu must not, however, be removed from New Zealand within 20 working days after the date of this decision. If, within that time, they or the Qiu children apply for leave to appeal to the Supreme Court, the Qius must not be removed from New Zealand before that application is determined, unless the Supreme Court determines otherwise.

[364] In CA205/05, the appeal by the Minister of Immigration, the appeal is dismissed (unanimously) and there is no order as to costs.

ADDENDUM

[365] For the avoidance of doubt, this addendum is to be treated as part of Glazebrook J's judgment.

Specific matters relating to the Ye children

[366] [Suppressed].

[367] [Suppressed].

[368] [Suppressed].

[369] [Suppressed].

Considerations relating to refugee status

Comments relating to possible detriment

[370] At the time of the Ye children's birth, the parents were in the process of having their appeal against the refusal of refugee status considered by the RSAA. The appeal was heard on 2 April 1997, shortly before Willie's birth, and the decision upholding the refusal of refugee status was released on 8 June 2000, just after Tim's birth.

[371] The RSAA explained that there had been a long delay because initially they were going to look at this and a related appeal as being suitable test cases on "black children" and membership of a particular social group. They decided that this was not the case to re-examine this issue because they found against Ms Ding and Mr Ye on credibility grounds. They also rejected the submission that the reason for having more than one child was because of the parents' Buddhist faith.

[372] The RSAA, however, recognised that there might be adverse consequences on their return to China but that these would not be for reasons covered by the

Refugee Convention. Any adverse consequences to Ms Ding would, however, be relevant to the consideration of the effects of the one-child policy – see above at [256] - [263]. It said:

> It may be that on their [Mr Ye and Ms Ding's] return to China they will face penalties such as fines and the likes and/or be required to undergo sterilisation. Any such state sanctions will be imposed in accordance with the generally applicable family planning regulations, and not as a discriminatory measure for a Convention reason. (*Refugee Appeal No. 3/91* 20 October 1992).

[373] Mrs Qiu arrived in New Zealand on 28 December 1996. On 5 March 1997 she made an application for refugee status. This was declined on 15 October 1998 by the Refugee Status Branch of the Service because she had failed to present for her refugee interview. Mrs Qiu's appeal to the RSAA was lodged in May 1999 and dismissed on 28 January 2000. Before Mrs Qiu lodged the appeal with the RSAA she had been served with a removal order. As well as appealing to the RSAA she lodged an appeal with the RRA. The RRA appeal was determined after the RSAA appeal. It is discussed above at [9] and [268]. It appears that Mrs Qiu was given another permit while the RSAA appeal was being conducted.

[374] Mr Qiu arrived in New Zealand on 1 December 1997 and applied for refugee status on 10 December 1997. Mr Qiu's application was based on the alleged effects of the one-child policy he had suffered in China (he having had two children there). The Refugee Status Branch declined his application on 31 May 2000. It did state, however, that disciplinary measures against those who violate the one-child policy include financial penalties in the form of a fine or loss of employment.

Status as failed refugee claimants

[375] The Ye children and Ms Ding submit that Mr Zhou appears to have considered that, as Ms Ding was a failed refugee complainant, she could not be given a permit, under any circumstances. In their submission, this was an error of law. The Qiu children point to a similar alleged error by Mr Wang.

[376] In support of their submission the Ye children and Ms Ding point to Mr Zhou's affidavit of 14 October 2005 where he said that, since 1 September 2000, Ms Ding had an obligation to leave New Zealand and that she was prevented from applying from any further permits and from requesting a special direction or a permit under s 35A. Mr Zhou said it follows that Ms Ding cannot remain lawfully in New Zealand. In the Qius' case, Mr Wang wrote at the end of the humanitarian questionnaire:

> A failed refugee claimant, there are no compelling reasons why a custodial removal should [not] take place.

[377] In the appellants' and Ms Ding's submission Mr Zhou (and probably Mr Wang) wrongly equated the restriction on applying for a s 35A permit with a restriction on the granting of one. Section 35A expressly states that the Minister or his or her delegate may at any time, of the Minister's own volition, grant a permit of any type.

[378] I accept the appellants' submission that Ms Ding and Mr and Mrs Qiu's status as failed refugees should not be seen by immigration officers as automatically requiring their removal and it does not mean that a permit cannot be granted under s 35A. That factor can be taken into account but cannot be, of itself, determinative. The humanitarian assessment must be carried out and all factors, including the best interests of the children, appropriately balanced. The whole point of conducting a humanitarian interview is to determine whether the discretion under s 35A should be exercised.

Publication

[379] Section 129T of the Immigration Act provides that confidentiality as to the identity of a refugee claimant and the particulars of the case must be maintained at all times during the determination and subsequent to the determination. As the provision is inserted for the benefit of refugee claimants I accept that it can be waived. In my view the mere filing of a judicial review application would not consitute waiver. However, I understand that Chambers J takes the view that, as the refugee proceedings were referred to in Baragwanath J's judgment and we were not

asked to consider suppression of those details in this Court, this would constitute a waiver. On reflection, I agree with this view and therefore this section of the addendum [370] - [378] may be published without restriction.

HAMMOND & WILSON JJ
(Given by Hammond J)

Introduction

[380] In our view, the appeal by the Ding interests – the three Ding children and, effectively, Ms Ding – should be allowed. The result is that the issue of Ms Ding's removal from New Zealand should be remitted to the Immigration Service for reconsideration in light of what we have to say hereafter.

[381] The appeal by the Qiu interests should be dismissed.

The Ding appeals

A long saga comes to a climax

[382] Ms Ding, a Chinese national, came to New Zealand from China in May 1996 with her husband, Mr Ye, who was also a Chinese national. Certain temporary permits held by Ms Ding eventually expired in September 2000. Thereafter she had no lawful right to be in New Zealand. She became what is commonly referred to as an "overstayer". Since that time she has fought a tortuous rearguard action to stay in New Zealand. She has exhausted every possible avenue under the law to try and stay here.

[383] In fairness to Ms Ding, it should be said that there is nothing unusual in that course of action, however much it frustrates the immigration authorities, and possibly members of the public. This phenomenon is happening all around the world as less well-placed persons struggle to improve their circumstances in life by removing themselves to another country. The great swirl of people throughout the

world seeking to change their "home" is one of the most obvious and difficult dilemmas of our age.

[384] Ms Ding bore three children to Mr Ye in New Zealand: Willie Ye, who was born in April 1997; Candy Ye, who was born in September 1998; and Tim Ye, who was born in May 2000.

[385] These three children are New Zealand citizens. They acquired their citizenship while their parents were lawfully in the country, on temporary permits. The children are entitled to the full measure of protection provided to them by New Zealand's public and private law, as well as any international obligations to which New Zealand has subscribed.

[386] The law has now changed. If born after 1 January 2006, such children would not be entitled to New Zealand citizenship, by birth. Doubtless there is room for considerable debate about the wisdom of the adoption of such a measure but that is of no present consequence. That was a decision for Parliament to make. We observe the usual convention of not commenting on the merits of the law as adopted. The present significance is simply that, as Dr Harrison QC reminded us, there is what he termed "a significant cohort" of young New Zealand born citizens who are in the same position as the Ye children. So this case has a practical import beyond the circumstances of just these three children.

[387] On 23 December 2004, after his temporary permits had expired and he had exhausted his legal remedies, Mr Ye was removed from New Zealand pursuant to a removal order. That left Ms Ding as a solo mother in New Zealand, with three young children ranging from four to seven years of age. Those three children are New Zealand citizens, but Ms Ding has no lawful right to be in New Zealand, unless she is permitted to remain with the children for humanitarian reasons.

Last-gasp endeavours to avoid removal

[388] After Mr Ye was removed from New Zealand, Ms Ding is said to have gone into hiding with her children. Certainly she proved to be difficult to locate. When

she was eventually located on 23 August 2005, she was served with a removal order and she was taken into custody pursuant to s 59 of the Immigration Act 1987 (the Act).

[389] The removal order served on Ms Ding was issued under s 54 of the Act, under the signature of an immigration officer, Mr Zhou. Under s 133 of the Act an immigration officer has to be designated as such by the Secretary of Labour, and performs functions of quite some consequence for individuals. For instance, the removal order in s 54 has to be made by the chief executive or an immigration officer (as was true of this case) on being satisfied of certain things. Some of those things are of a more "bureaucratic" character: that Ms Ding was not a New Zealand citizen; did not hold a permit; was not exempt under the Act; and so on. But the effect of a removal order is to authorise the police to take into custody the person who is subject to the order (see s 55). And the immigration officer also has authority under s 58 of the Act to cancel the removal order. Those are decisions of distinct importance.

[390] When Ms Ding was taken into custody, two things took place.

[391] First, Mr Zhou elected to consider again the question of whether Ms Ding should be "removed" from New Zealand. He was empowered – although not required – to take this step by s 58 of the Act, 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.
>
> (2) The cancellation endorsement serves as a direction to any person who may be detaining the person in custody in reliance on the order to release the person from custody immediately.
>
> (3) An immigration officer who cancels a removal order must ensure that any person who is detaining the person named in the order in reliance on this Part releases the person immediately.
>
> (4) In the case of a person who has already been removed from or has left New Zealand, an immigration officer of the type referred to in

> subsection (1) may cancel a removal order by sending the person named in it a notice to that effect in the prescribed form.
>
> (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
> > >
> > > (ii) Section 23 of the Official Information Act 1982 does not apply in respect of the application.

[392] Ms Ding had been taken to the Auckland Central Police Station. Mr Zhou interviewed her there. He filled out what is termed a humanitarian questionnaire. He did so because this is part of the Immigration Service's operational procedures. Mr Zhou has deposed:

> The humanitarian questionnaire specifically refers to New Zealand's obligations under international law including the International Covenant on Civil and Political Rights 1966, the Optional Protocol to the Covenant, the Convention on the Rights of the Child 1989 and New Zealand's reservations to that covenant. It refers to the importance of the family being the natural and fundamental group unit of society and the state. It also refers to the requirement that every child shall have the right to such measure of protection as are required by his status as a minor on the part of his family, society and the state and that in all actions concerning the children the best interests of the child shall be a primary consideration.

[393] To the extent that Chambers and Robertson JJ appear to suggest, in various ways explicitly, and in some ways implicitly, that this process simply goes too far and is not required because it lards what could be termed "a process on top of a process", the learned Judges go too far. In the first place, it is well within the competence of a Government department – and one would have thought it admirable – to see that international obligations of the kind we have just referred to are respected. And perhaps equally as importantly, once an inquiry in pursuance of obligations of that kind is undertaken, it is a well established principle of public law that a body should follow its own established internal "rules", otherwise it risks

discriminating unlawfully in the particular case. We will return shortly to the outcome of that inquiry by the immigration officer.

[394] To continue for the moment with the flow of the narrative, the second thing that happened is that on 30 August 2005 Ms Ding's solicitor, Mr Foliaki, sent correspondence to the Office of the Associate Minister of Immigration, the Hon Damien O'Connor. It should be said by way of acknowledgement – it is set out in full in the judgment of Chambers and Robertson JJ at [481] - [485] – that the Minister had been invited to intervene in Ms Ding's case on several occasions. He had last declined to do so on 21 March 2005. Part of what went to the office of the Associate Minister on this occasion was a psychiatric report which had been obtained by Mr Foliaki's office, indicating that Ms Ding was extremely sick. She was suffering from depression and was possibly suicidal.

[395] The Private Secretary to the Associate Minister replied to Mr Foliaki on 31 August 2005 saying:

> As the present and a former Minister have declined to intervene in Ms Ding's case on six prior occasions and she has exhausted all appeal processes, this case will not be put before the Minister again based on the information you have provided. As I understand it Ms Ding's removal is planned for tomorrow and I anticipate her removal will proceed as currently planned.

That communication is endorsed also with "copy for Phillip Zhou". That was obviously advice to him of the stance being taken in the Minister's office.

[396] The correspondence we have just referred to suggests that the approach to the Minister's office never even reached his desk; that is, it was dealt with at the staff level and was not considered by him. In fairness to the Minister, we should add here that it is not our understanding that there was any obligation in law on the Minister to consider the matter; as we have already indicated the "last ditch" consideration (if it occurred at all) had to be that of Mr Zhou, who was therefore a duly appointed official of the state making an important decision – once he elected to embark on the exercise – as to whether this woman was to be sent from New Zealand.

[397] Chambers and Robertson JJ suggest that this is all very undesirable, and discuss why this sort of "last tier" consideration after all other processes have been exhausted is unsuitable, and is not even required. In that respect, those arguments go well beyond what was put to us by Mr Carter in his very responsible submissions in a difficult case. This "tacked on" procedure has been adopted in New Zealand for good reasons, which include an endeavour to squarely face international law obligations. Further, given the drawn out nature of these cases, circumstances may have changed since the last consideration of the case. We do not see why this Court should "roll back" this safeguard procedure adopted in the Department. There must also be a concern that Chambers and Robertson JJ go much further than what the Crown contended for at the hearing, with the consequence that counsel for the appellants did not have the opportunity to respond.

[398] For present purposes, the important point is that Mr Zhou *did* take on the difficult burden of considering whether the removal order which he had caused to be issued should be "cancelled" under s 58 of the Act. Not only that, he issued something which he himself endorsed as being a formal "decision", on 31 August 2005. It is as well if we set that document out in full:

> **Humanitarian Interview with Ms Yueying DING (cn: 15587446) conducted on 23/08/2005.**
>
> **Stage Three: Decision:**
>
> Ms Ding arrived in NZ on 06/05/1996 with her husband Mr. Weiguang Ye and was granted a visitor's permit on arrival valid till 06/06/1996.
>
> Ms Ding claimed refugee status on 27/05/1996. This claim was declined on 29/11/1996.
>
> Ms Ding's appeal to the RSAA was also declined on 09/06/2000.
>
> A subsequent appeal to the RRA was withdrawn.
>
> Ms Ding has made 6 representations to the Minister of Immigration. The Minister declined to intervene in all representations.
>
> Ms Ding was taken into questioning by NZ Police on police matters on 11/06/2004. She was served with a Removal Order on the same day but was released to allow her to take care of her children.
>
> Ms Ding's husband Mr Weiguang Ye was located on 19/11/2004 and was removed from NZ on 23/12/2004.

> Ms Ding was offered the chance of returning to China on a voluntary basis on 2 different occasions dated 11/06/2004 and 25/11/2004 respectively to avoid removal action and a 5-year-ban. Ms Ding failed to cooperate with NZIS and went into hiding with her children to avoid contact with NZIS.
>
> Ms Ding had been advised, during an interview with NZIS, that non cooperation would result in removal action. She was also advised that it would not be in the best interests of herself and her children to remain unlawfully in NZ.
>
> Ms Ding has taken High Court actions on 2 occasions: on 23/06/2004 and on 21/12/2004.
>
> I have considered the interests of the 3 NZ born children. I understand that Ms Ding may face financial difficulties with the schooling and any hospitalisation of the 3 NZ born children.
>
> I have also considered that Ms Ding has no family support in NZ. Her husband, mother, 2 additional children, 3 brothers & 3 sisters are currently living in China. Ms Ding and the 3 NZ born children will have the support of the family members in China. The 3 NZ born children all speak Cantonese.
>
> Ms Ding has limited ability to support herself and the 3 NZ born children in NZ. Ms Ding has claimed that she is only able to earn about $100 per week as a cleaner and would no doubt have to rely on a benefit eventually.
>
> I have also considered the recent submission from her legal representative in the form of a Psychiatric report which claims that Ms Ding is suffering from a depressive disorder, domestic violence, sexual and emotional abuse. However, these claims are recent and have never been put as submissions to the RSB, RSAA, RRA and the 6 representations to the Minister of Immigration. Besides for the fact that there is no document or other evidence to suggest that she suffered abuse at the hands of her husband, she could call on the protection of the Chinese authorities (Police) once back in China should her husband try to abuse her.
>
> I have also considered the rights of the NZ Government to determine who should remain within its borders including the rights of expulsion of persons not lawfully in NZ.
>
> **I have carefully weighed the competing matters set out above and I believe that Ms Ding should be returned to China and that it would be of the best interests of the 3 NZ born children to return to China with their mother and join their father and the rest of the family.**
>
> Signature of Immigration Officer: "Mr Zhou"
>
> Date: 31/08/2005
>
> [Emphasis added].

[399] One may wonder what had become of the three children after Ms Ding was taken into custody. The day after this "decision", the three Ye children were made

wards of the Family Court at Auckland, pursuant to an order made by that Court on 1 September 2005. The Chief Executive of the Department of Child, Youth and Family Service was appointed as agent of the Family Court. The order was applied for and made while Ms Ding was in immigration detention. The fact that the children became wards of Court is significant: they cannot be removed from New Zealand without the permission of the Family Court.

[400] To complicate matters, Ms Ding was released from immigration detention on 14 September 2005 – pending the finalising of this long running litigation – and the children have been in her continuing care since that date. To our knowledge, the order of the Family Court has never been varied or discharged. If that is correct, the children are still wards of the Family Court, although they have continued in the day to day care of their mother.

The immigration officer's "decision"

[401] In what we are about to say, we do not for one moment wish to be taken as in any way seeking to deflect immigration officers from giving written "decisions". Given the terms of s 58 of the Act it is admirable that the officer who reconsidered the "removal" reduced his consideration to writing, and took responsibility for it.

[402] There may be a question as to whether, once an official decides to take a step under s 58 – where the statute specifically provides he or she does not have to consider or do anything at all other than to say that he or she is not going to consider the matter – the subsequent decision is then reviewable. The view we have come to is that it is. It seems to us that the officer was exercising a statutory power of decision within the Judicature Amendment Act 1972, in that he was (admittedly voluntarily) reconsidering a lawful decision which had already been made under s 54 of the Act. And we are fortified by the view we have taken by the observations of Woolf, Jowell, and Le Sueur in *De Smith's Judicial Review* (6ed 2007) at [7-108], who consider that "reasons given voluntarily where there is no duty – will be reviewed in accordance with the same standards as are applied to compulsory standards …". Indeed it would, in our view, be surprising and regrettable if an official decision with serious consequences was immune from review by the Courts

simply because the official concerned was permitted, but not required, to make the decision.

[403] Once that point is reached, we think it plain on the face of the "decision" that the immigration officer asked himself the wrong question. And that of course is a classic public law ground for intervention by way of judicial review – see *O'Reilly v Mackman* [1983] 2 AC 237 at 278 (HL) and *Peters v Davison* [1999] 2 NZLR 164 at 207 (CA) per Tipping J.

[404] If the immigration officer was going to consider the matter at all, we would have thought the first issue before him was one of fact: whether these children were going to return to China. At the point of time the officer made his decision, Ms Ding was (understandably) hopelessly equivocal. If in fact Ms Ding determined that the children were going to go with her, that would have been the end of this whole matter. If she could not, or would not, do so there are mechanisms available at law to determine that issue. Mr Zhou could have said: "I am not going to make a final decision on this issue until I know what *is* happening to the children". And if Ms Ding could not or would not make the determination, then of course the Family Court could have, as part of the exercise of its wardship jurisdiction. We suspect – although it is not determinative of this appeal – that the decision of that Court would likely have been that the children would remain in New Zealand.

[405] In any event, a second question might then have been: were there any humanitarian reasons to interfere in the removal of Ms Ding herself? She could make that claim, in her own right, on humanitarian grounds, including that of "family connection". Here we agree with Chambers and Robertson JJ that it seems inconceivable, given everything that she had put up over some years – and on a somewhat shifting sands basis – that she could hope to persuade the officer that she should remain in New Zealand.

[406] A third question, also of a humanitarian nature, was whether these children or any of them had a present need for Ms Ding to stay in New Zealand – at least for the foreseeable future – for whatever reasons were able to be identified. But what was not open to the immigration officer was for him to decide – as he did – that it would

be in "the best interests" of the three New Zealand born children and citizens to "return" to China, as he said in the last and critical paragraph of his decision. The officer had no ability in law to make that decision. For reasons we have already given it was either their mother or the Family Court who were going to have to determine that issue.

[407] Overall, the critical question was surely as follows: was there something about the circumstances of the children which meant that Ms Ding really should be allowed to stay – perhaps for some defined period of time – in New Zealand?

[408] The relevant inquiries suggest themselves at different levels. First, most people would not take much persuading that it is better for a child to have a present parent, than not have one at all, save of course in a case where the parenting is demonstrably hopelessly deficient and the child is at risk. As the House of Lords noted recently, "[t]ime and again the Strasbourg case law emphasises the crucial importance of family life": *Beoku-Betts v Secretary of State for the Home Department* [2008] UKHL 39 at [37]. Secondly, at another level, the child in question may suffer from particular difficulties, whether medical or otherwise.

[409] It will be said – and rightly so – that the responsibility for advancing some present reason for her staying in New Zealand rested with Ms Ding and/or her advisors. Indeed one would have thought that the officer could have responded to the situation he was addressing simply by saying that no changed or special circumstances had been drawn to his attention. The short answer however is that – an inquiry having been embarked upon – the right question was simply never asked: was there anything about the current circumstances of these three New Zealand children, or one of them, that suggested Ms Ding should be allowed to stay in New Zealand? One would have thought that (at least at this late stage of her case) the mere fact that these children would not henceforth have a present mother would not be sufficient; sadly some children are separated from mothers by death and other human circumstances and yet show great resilience and wonderful development as human beings.

[410] To put it at its simplest, any hope Ms Ding had of staying in New Zealand depended on a case being made out that there was some present and particular humanitarian reason why one or more of these children required that she be here. Instead, the officer seems to have embarked on an exercise in which he was assuming that he had to determine what was in the best interests of the children, as to where they should be for the future.

The content of humanitarian considerations at the removal stage

[411] In case we have not made it sufficiently clear, we consider that resort to s 58 is of a very limited character.

[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.

The problem of remedy

[413] If the officer chose to embark on the course he took, and got the question wrong, should the Court intervene and send the matter back for reconsideration? There are a number of problems here. One difficulty is that under s 58(5)(a) the officer was under no obligation to consider the cancellation application in the first place. We have already given it as our answer, for better or worse, that if however he or she does so, public law principles apply. Secondly, s 58(1) makes it clear that the power to cancel is of an ongoing variety – it operates "at *any* time while the

person named in the removal order is still in New Zealand …". Hence, the officer still has a present ability to reconsider the removal.

[414] On this reasoning, we consider this Court is in a position to, and should, allow the appeal with respect to the Ding children and remit this case to the Immigration Service for reconsideration. By that we mean the restoration of the position as if the immigration officer had not yet made *any* determination under s 58. Whichever officer it may be will have to decide whether to entertain any consideration of the (current) circumstances of the children and the family. But in that respect the officer will presumably be faced with the Immigration Service's own manual, and the issue of even-handedness as between persons subject to removal. In the event a decision is made to consider any representations for Ms Ding and/or the children, the observations we have made earlier in this judgment may be thought to be of assistance, but we emphasise that the consideration of any present humanitarian issues are for the officer.

[415] We have considered whether, given the limited nature of the relief we can order, as a matter of discretion we should decline relief at all here. However we think it important that where officials embark on a wrong enquiry, they should be directed to start again, and make a correct enquiry – even though the final determination in that respect rests with the official. This is standard public law learning, and entitles the appellant to a judgment.

[416] Given that the children are wards of the Family Court, we make one further observation. We would have thought that the officer would be perfectly entitled to make inquiry through the Family Court as to whether there are considerations relating to the children's health and well-being which he or she might take into consideration.

No over-arching displacement of the Immigration Act

[417] It is of course implicit in everything that we have said that we agree with our colleagues, and in particular Glazebrook J, that there is no over-arching interest on

the part of the Ye and Qiu children arising under New Zealand domestic legislation which has the effect of displacing the provisions of the Act.

[418] Dr Harrison has made an understandable, and even noble, attempt to persuade us to the contrary. But it simply cannot be the case, in the most general terms, that the Act is displaced in this manner.

The Qiu family

[419] The circumstances of the Qiu family are set out concisely in [8] of Glazebrook J's judgment.

[420] In his humanitarian interview, Mr Qiu stated that he was afraid of taking his two New Zealand born children back to China because of the so-called "one child" Chinese policy. He was concerned about his children's futures as they would not be able to attend school in China. He had concerns over being able to find employment for himself and Mrs Qiu.

[421] The particular immigration officer reached the conclusion that there were no compelling reasons why a custodial removal of Mr Qiu should not take place. We can see no proper basis on which this Court can intervene on public law grounds in that decision.

[422] As to Mrs Qiu, that departmental process had still not been carried out, and of course may not yet be.

[423] In the circumstances, we would join in the dismissal of that appeal.

Conclusion

[424] The presiding Judge, Glazebrook J, has summarised the outcome of the various appeals and cross-appeals at [358] to [364]. We agree with that summary.

CHAMBERS AND ROBERTSON JJ

(Given by Chambers J)

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Introduction

[425] Yueying Ding, a Chinese national and an unlawful overstayer in New Zealand, sought to review in the High Court what she said was an immigration officer's decision under s 58 of the Immigration Act 1987, made on 31 August 2005. (We shall call this "the s 58 decision", without prejudice, for the moment, as to whether it was truly a decision at all.) She said that the immigration officer, Philip Zhou, had unlawfully refused to cancel a removal order, which he had made eight days earlier under s 54 ("the Ding removal order").

[426] Subsequently, in the same High Court proceeding, her three infant children, Willie Ye (born in 1997), Candy Ye (born in 1998), and Tim Ye (born in 2000), all New Zealand citizens, joined in their mother's challenge. As New Zealand citizens, they have never been at risk of removal. But through their court-appointed counsel, Dr Harrison QC, they have challenged the Immigration Service's attempt to remove their mother. They challenged not only the s 58 decision but also the Ding removal order. They also challenged the lawfulness of paragraphs D4.45 and D4.45.5 of the New Zealand Immigration Service Operations Manual on the basis that those provisions were inconsistent with the Care of Children Act 2004 ("the CCA").

[427] In separate proceedings, He Qin Qiu and Xiao Yun Qiu, both Chinese nationals and unlawful overstayers, sought to review in the High Court orders made by immigration officers, again under s 54, to remove them ("the Qiu removal orders"). Their two New Zealand-born children, Alan (born in 2000) and Stanley (born in 2005) were joined as third and fourth plaintiffs.

[428] All three applications for review were heard together in the High Court. Baragwanath J dismissed them. Ms Ding and her children have appealed to this court, as have Mr and Mrs Qiu's infant children. (For some reason, Mr and Mrs Qiu are merely respondents on this appeal.) We have decided their appeals should be dismissed. We now set out our reasons.

[429] We begin with the legislative framework under which the removal orders were made. That is at the heart of our decision and is the basis for our profound

disagreement with Baragwanath J's reasoning (although not with his substantive result) and with Glazebrook J's reasoning. Baragwanath J defined the primary issue on the appeal as a "reconciliation of the right of the Crown to remove aliens and the rights of citizen children". Glazebrook J in her opinion has similarly focused on that issue. She describes her first issue in these terms:

> Should the welfare and best interests of any child be the first and paramount consideration when any immigration decision affecting the child or his or her parents?

[430] Those are not the primary issues as we see this case. There is no dispute that the rights of New Zealand-born children are relevant when assessing the position of aliens in New Zealand. The primary question is, however, where and when such matters are considered. That requires a detailed analysis of the legislative framework. It is our respectful view that these cases, which are essentially very simple, have gone off the rails because too little attention has been paid to the legislative framework within which the removal orders were made.

[431] Once we have explained the legislation and its history, we shall then turn to the relevant facts, first with respect to the Ding/Ye appeal and then with respect to the Qiu appeal. The legal arguments advanced on both appeals were essentially the same. Effectively Mr Mahon, for the Qius, adopted Dr Harrison's submissions.

The legislative framework

[432] The Immigration Act 1987 came into force on 1 November 1987. It is still the current statute, although since 1987 it has been the subject of two major amendments, which are highly significant so far as these appeals are concerned. The first was in 1991: the Immigration Amendment Act of that year came into force on 18 November 1991. The second major amendment was in 1999: the Immigration Amendment Act of that year came into force on 1 October 1999. In this opinion, we refer to the period between 1 November 1987 and 17 November 1991 as "period 1", the period between 18 November 1991 and 30 September 1999 as "period 2", and the period since 1 October 1999 as "period 3".

Period 1

[433] Part II of the Act dealt with "persons in New Zealand unlawfully". If an immigration officer believed someone to be in New Zealand unlawfully, the officer applied to the District Court for a removal warrant: s 50. That court was required to issue a removal warrant if satisfied that the person was not a New Zealand citizen, did not hold a permit to be in New Zealand, and was not exempt under the Act from the requirement to hold a permit: s 51(3).

[434] If the District Court issued a removal warrant, the person named in it (whom we shall call for convenience "the overstayer") had 21 days in which to appeal to the Minister of Immigration to cancel the warrant: s 63(1). Under subs (3), the minister, on such an appeal, could cancel the removal warrant if satisfied that –

> (a) Because of exceptional circumstances of a humanitarian nature, it would be unjust or unduly harsh for the appellant to be removed from New Zealand, or for the removal warrant to remain in force for the full period of 5 years following the appellant's removal from New Zealand; and
>
> (b) It would not in all the circumstances be contrary to the public interest to allow the appellant to remain in New Zealand or (as the case may require) to reduce the period during which the removal warrant would otherwise remain in force following the appellant's removal from New Zealand.

[435] We refer to those criteria in this opinion as "the humanitarian criteria". Those criteria are replicated, as we shall show, in the 1991 and 1999 amendments, with only minor variations in wording.

[436] The minister's decision on a s 63 appeal was final. The minister had no jurisdiction to reconsider the matter after the appellant had been notified of the decision, unless a court directed otherwise following a successful application for judicial review: s 63(7).

[437] If the minister decided to cancel a removal warrant, the appellant had to be immediately released from custody (if in custody). The minister was also required to determine, "by special direction", the type of permit the appellant should be granted: s 63(9).

[438] The reference to a "special direction" was a reference to the minister's overall discretionary power conferred by s 130. Under that section, the minister had an unlimited discretion to give special directions in respect of "any person, permit, visa, or document". This was a means by which the minister could deal with "hard cases" where someone was seen as deserving of the right to be in New Zealand, even though that person might not come within existing immigration policy criteria.

[439] A removal warrant could be cancelled in two other circumstances. If the minister was satisfied that a removal warrant had been issued on an application made in error or that for any other reason it was inappropriate that the removal warrant should remain in existence, the minister or an immigration officer could apply to the District Court for an order cancelling the warrant. The court was obliged to "cancel the warrant accordingly": s 65(1). Where a warrant was so cancelled, the minister was required to determine, again "by special direction", the type of permit the person should be granted: s 65(2).

[440] While s 65 was in broad terms, it must, however, have had to be read consistently with s 63(7) (discussed above at [436]). Its primary function would appear to have been to provide a safeguard for those cases where the original application for the warrant was tainted by factual error or where circumstances had changed since a warrant was made, rendering the continuation of the warrant inappropriate.

[441] As originally enacted, the Act did not make statutory provision for the handling of refugee applications. They were handled pursuant to the prerogative. Nor did the Act make any express reference to Government immigration policy. That too was developed under the prerogative and would have been held within the Department of Labour, the department responsible for administering the Immigration Act.

[442] The leading decision of *Tavita v Minister of Immigration* [1994] 2 NZLR 257 (CA) was concerned with this statutory regime. We shall deal with this case in more detail below. But, in brief, Mr Tavita was seeking to review a minister's decision on a s 63 appeal.

Period 2

[443] The 1991 amendment made substantial amendments to the 1987 Act. We deal here only with those relevant to the current appeals. First, while Government immigration policy continued to be made pursuant to the prerogative, the minister was required, for the first time, to publish the Government's policy "relating to the rules and criteria under which eligibility for the issue or grant of visas and permits [was] to be determined": s 13A, as inserted by s 7. The departmental manual of immigration instructions was to be publicly available. In like manner, the Government residence policy was to be "reduced to writing and certified by the Minister as Government residence policy": s 13B, as inserted by s 7. By s 13C, immigration officers were required to comply with Government residence policy and any discretions were to be exercised "in terms of that policy". The Act made clear, however, that such restriction on immigration officers did not prevent the minister from making any decision to issue a residence visa or grant a residence permit as an exception to Government residence policy in any particular case: s 13C(2). The minister's powers under s 130 remained unaffected.

[444] The 1991 amendment made substantial changes to the regime for removing overstayers. Now removal orders could be made by immigration officers themselves. There was no longer any need to apply to the District Court for a removal warrant. The criteria for removal orders (as removal warrants were now called) remained unchanged; namely, the immigration officer had to be satisfied that the person was not a New Zealand citizen, did not hold a permit to be in New Zealand, and was not exempt under the Act from the requirement to hold a permit: s 50, as inserted by s 23.

[445] The overstayer's right of appeal was changed. Instead of an appeal to the minister on the humanitarian criteria, the Act now provided for an appeal to a new statutory body, the Removal Review Authority ("the RRA"). This authority was an independent appellate tribunal, constituted under s 63 (as inserted by s 31). The tribunal members were to be senior lawyers with expertise in this field. Two kinds of appeal were possible. The first was an appeal on the facts, for those situations where the appellant disputed that he or she was unlawfully in New Zealand: s 63A.

The second type of appeal was one "on humanitarian grounds": s 63B. Here, it was for the RRA to apply the humanitarian criteria which previously the minister had applied under a s 63 appeal.

[446] The fact that a humanitarian appeal was provided for would affect, we think, the matters an immigration officer could consider before making a removal order. It would make no sense for an immigration officer to make a removal order if there were clear humanitarian grounds justifying the overstayer's remaining in New Zealand. To close one's eyes to such considerations would simply lead to unnecessary appeals to the RRA, unnecessary in the sense that they would be bound or highly likely to succeed.

[447] If the RRA allowed the appeal, it would cancel the removal order. It was empowered to direct an immigration officer to grant to the appellant the appropriate permit: s 63E(c).

[448] For the first time, the Act made provision for a further appeal. Section 115A, as inserted by s 35, provided for a right of appeal to the High Court on questions of law. An appeal to the Court of Appeal was also provided for, by leave: s 116, as inserted by s 35.

[449] The 1991 amendment also empowered immigration officers to cancel removal orders on their own initiative: s 52A, as inserted by s 23. Presumably this power was to be exercised in situations similar to those in which the minister would have applied to the District Court to have a removal warrant cancelled under the old s 65. It would seem inevitable that s 52A's scope would, in general, be confined to cases of changed circumstances. It is inconceivable, for instance, that Parliament could have envisaged any level of immigration officer countermanding a decision of the specialist appellate authority, still less the High Court or the Court of Appeal.

[450] Even in a case of changed circumstances, Parliament was concerned that s 52A should not be interpreted as conferring rights or expectations on overstayers. Parliament included a new subsection, which had not been in the old s 65. That new subsection, subs (3), read as follows:

> 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
>
> (ii) Section 23 of the Official Information Act 1982 shall not apply in respect of the application.

[451] We shall refer to this subsection, and its successor in the 1999 amendment, as "the no rights clause". We should also explain the reference to s 23 of the Official Information Act. That is the section which generally speaking gives people a right to reasons for any decision affecting them.

[452] The scheme of s 52A was, therefore, *empowering*; it did *not* confer rights on overstayers. Obviously, there had to be a mechanism to cancel removal orders, as, while a removal order remains in place, the police have an obligation to effect the removal mandated by the order.

[453] It was this statutory regime which was under consideration in the landmark decision of *Puli'uvea v Removal Review Authority* (1996) 2 HRNZ 510 (CA). Again, we shall deal with this decision in more detail later. This was a challenge to the RRA's authority on a humanitarian appeal. It was brought as a judicial review application presumably because Mrs Puli'uvea wanted interim relief under s 8 of the Judicature Amendment Act 1972. (She would have been out of time for a s 115A appeal, although she could have applied for an extension of time under s 115A(2).)

Period 3

[454] The 1999 amendment made further substantial amendments. Its principal purpose, as described in the Act's long title, 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 …

[455] The most important change, for current purposes, was effected by s 34. It substituted an entirely new Part II dealing with "Persons in New Zealand Unlawfully". It is this part with which we are principally concerned in these appeals. The new s 45 provides expressly for overstayers "to leave New Zealand". That obligation arises "from the moment" they are in the country "unlawfully". If the overstayer wishes to appeal against that requirement, he or she has to appeal to the RRA within 42 days after the day on which the person becomes unlawfully within New Zealand: s 47(2). The RRA's jurisdiction is to determine the appeal on the humanitarian criteria: s 47(3). The important point to note is that the RRA appeal now occurs prior to the making of a removal order, not after it. There remains the possibility of an appeal from the RRA to the High Court (under s 115A) and to the Court of Appeal (under s 116). Subject to those two rights of appeal, the decision of the RRA on an appeal is final and it has no jurisdiction to reconsider an appeal, unless a court otherwise directs: s 51.

[456] If the RRA (or the High Court or the Court of Appeal on appeal) decides the appeal should be allowed, the RRA directs the immigration officer to grant the successful appellant either a residence permit or a temporary permit: s 52. Note that the RRA no longer orders, in the event of a successful appeal, the cancellation of a removal warrant, as the removal warrant has not been made at this point under the new procedure.

[457] If the appeal (including any further appeal) is determined against the overstayer or if the overstayer elects not to appeal, then the overstayer at that point becomes liable to be removed from New Zealand: s 53. Section 54 empowers an immigration officer to make a removal order. The immigration officer can make that order "if … satisfied that section 53(1) or section 70(3) applies to [the] person": s 54(1). (Section 70(3) can be ignored for present purposes: it was effectively a

transitional provision.) Under the Act as now constituted, the immigration officer does not have to be satisfied of anything else. Indeed, it would be quite contrary to the scheme of the Act, as now constituted, for a s 54 immigration officer to consider anything beyond what s 54(1) specified. In particular, it is not the job of a s 54 decision-maker to consider the humanitarian criteria, such as would be appropriate (and indeed mandatory) for the RRA to consider on a s 47 appeal. We say that for the following reasons.

[458] First, there is no hint in s 54(1) itself that such considerations need or even may be taken into account. Subsection (1) provides for only one matter to be satisfied – and that is a simple factual enquiry. That a s 54 decision-maker is so limited in his or her discretion is entirely consistent with the purpose of the 1999 amendment. That is to say, the procedure has been "streamlined" so that the humanitarian criteria are considered *before* the removal procedure gets under way.

[459] Secondly, the scheme of the Act is such that a removal order is made straight after the decision of the RRA, assuming there has been an appeal to that tribunal. Parliament would not have envisaged that any immigration officer should turn his or her mind to the very question which the specialist appellate authority (or perhaps even the High Court or the Court of Appeal) has just turned its mind to and found against the overstayer on. That would make no sense at all. Nor can a humanitarian duty be forced on a s 54 decision-maker in cases where the overstayer has elected not to appeal. If the overstayer wishes to raise a humanitarian plea, then the primary forum for such special pleading is the RRA on appeal under s 47. There is nothing in the legislation to suggest that the overstayer has a choice of forums for a humanitarian argument: either the RRA or a "quasi-application" to the immigration officer who is scheduled to make a s 54 order. Indeed, the structure of the Act is quite to the contrary.

[460] Thirdly, it is important to note that s 130 remains in the Act after the 1999 amendment. That is a route by which overstayers can approach the Minister of Immigration himself or herself for a case of special pleading. Many overstayers take advantage of this provision – sometimes repeatedly. (As we shall see, Ms Ding approached the minister under s 130 on no fewer than six occasions.) The minister,

under s 130, clearly is empowered to consider humanitarian concerns as a final check before anyone is actually removed from New Zealand. The minister acts, as it were, as the final appellate authority. He or she could, ultimately, effectively overturn decisions not only of his or her officials but even of specialist appellate tribunals and the High Court and the Court of Appeal – of course, only in the overstayer's favour. We say "effectively overturn" as, in formal terms, the RRA's decision, say, would stand uncorrected, but the minister could give a special direction requiring an immigration officer to issue, say, a residence permit to a person, even though that person had not established to the RRA's satisfaction that there were exceptional humanitarian concerns justifying the appellant remaining in New Zealand.

[461] Given that any person fighting his or her removal from New Zealand will almost inevitably have exercised his or her right to approach the minister under s 130, and given that a s 54 immigration officer will be considering making the removal order only if the minister has declined to intervene, it simply cannot have been Parliament's intention that any immigration officer should be, on a s 54 decision, able to countermand not only decisions of the specialist appellate tribunals but also his or her own boss's decision!

[462] Section 58 provides for cancellation of removal orders. It is effectively in the same terms as s 52A: see [449] above. It contains the same no rights clause. It remains an empowering provision; it does not confer rights on overstayers. It is akin to s 162 of the Education Act 1989, which this court, in *Attorney-General v Unitec Institute of Technology* [2007] 1 NZLR 750, held was merely "empowering" (at [38]) and did not confer rights.

[463] The 1999 amendment also introduced a statutory regime for the determination of applications for refugee status: see the new Part VIA, inserted by s 40.

[464] Both appeals with which we are concerned fall within period 3. Although Ms Ding, Mr Ye, and Mr and Mrs Qiu all applied for refugee status prior to the 1999 amendment, those applications in each case were not finally determined until after the 1999 amendment had come into force. It was not until 1 September 2000 that

Ms Ding and Mr Ye became unlawfully in New Zealand. Mrs Qiu became an unlawful overstayer at some point in period 3 and certainly by early 2002: her position is complicated by the number of appellate proceedings she commenced, during which her status in New Zealand may have been protected by temporary permits or interim court orders. (It is rather difficult to check, and the point is in any event not material.) Mr Qiu became an unlawful overstayer on 22 September 2000. The period 3 regime accordingly applies to all four of them.

[465] While, therefore, the period 3 regime requires primary focus, it is essential to understand what preceded it so as properly to understand the purpose of the 1999 amendment. One also needs to understand how the period 1 and period 2 regimes worked in evaluating cases like *Tavita* and *Puli'uvea* on which Dr Harrison relied. They are not directly transferable because of the different statutory framework under which they were determined. Indeed, the 1999 amendment was in part a reaction to those two landmark decisions.

[466] With this legislative background, we now turn to consider the factual and legal background to the Ding removal order and the Qiu removal orders.

The factual and legal background to the Ding removal order

[467] We set out the facts leading up to the Ding removal order in some detail. We do this so that it can be seen how this case fits within the legislative framework we have outlined. We also want to demonstrate our view that the Immigration Service have dealt with Ms Ding and her husband at all times fairly and appropriately.

Arrival in New Zealand

[468] Ms Ding and her husband, Wei Guang Ye, arrived in New Zealand on 6 May 1996. They were interviewed by immigration officers. They were asked why they had come to New Zealand. Ms Ding replied that she did not like China because the Government wanted to take her husband away "and lock him in jail". Mr Ye explained further that he had a friend in Hong Kong who imported cars into China.

Mr Ye said that the Chinese Government had seized the cars and were now looking for him as they believed he had been selling the cars illegally.

[469] The immigration officers declined to issue Ms Ding and Mr Ye with visitors' permits and requested they be detained by the Airport Police under s 128B of the Immigration Act. They were so detained. An immigration officer then re-interviewed them. During the course of that interview, Mr Ye made application for refugee status for himself and Ms Ding. Both of them were then issued with 30 day visitors' permits while the refugee status applications were being processed. Subsequently, Ms Ding's permit was extended. Mr Ye's permit was replaced with a work permit.

Refugee status

[470] Ms Ding and Mr Ye were assisted by lawyers on their application for refugee status. The Refugee Status Branch of the Immigration Service made its decision on 29 November 1996. The two officers who made that decision concluded that Ms Ding and Mr Ye were not refugees. Ms Ding and Mr Ye had pitched their case on the basis that they risked punishment if they returned to China because they had broken China's family planning laws. (They had two children at that time.) Their opposition to China's family planning policy was said to stem from their Buddhist religious beliefs. On that basis, they said they would be persecuted for a reason prohibited under the Convention relating to the Status of Refugees (1951) 189 UNTS 150, namely political opinion or religious beliefs.

[471] As to the former, the branch officers determined, based on earlier decisions of the Refugee Status Appeals Authority (the RSAA), that opponents of the one-child policy were "not imputed with a political opinion by the State because of their opposition". The officers also found that China's family planning policy did not differentiate between religions, with the consequence that the applicants' fears stemming from their opposition to the family planning policy could not be said to stem from their religious beliefs. Finally, the branch officers noted that Ms Ding and Mr Ye did not meet the Government's "humanitarian policy".

[472] Ms Ding and Mr Ye then appealed to the Refugee Status Appeals Authority. The RSAA was and is an independent appellate tribunal, originally constituted under the prerogative and since 1999 constituted under s 129N of the Act. Tribunal members are senior lawyers with expertise in the field.

[473] Before the RSAA, Ms Ding and Mr Ye were again represented by counsel. The hearing began on 2 April 1997 but was then adjourned until 13 August 1999. The RSAA did not deliver its decision until 8 June 2000. The reason for the delays is explained in the decision and is not material to the issues we need to determine. Ms Ding and Mr Ye continued to live in New Zealand while this decision was pending. While here, they had three further children, Willie, in 1997, Candy, in 1998, and Tim, in 2000.

[474] The RSAA dismissed the appeal. The authority found that much of Ms Ding's and Mr Ye's evidence was "not to be trusted". The authority found that the appellants' wish to leave China was not related to their opposition to China's one-child policy or to a fear of punishment for having breached that policy. The RSAA also found that the appellants' desire to have more children was not motivated "by sincerely held Buddhist beliefs". The authority also rejected a suggestion that the appellants might suffer if they returned to China because of "pro-democracy activities". The authority concluded that the appellants had "no political background whatsoever".

[475] The RSAA held that the true reason Mr Ye wanted to leave China was because "he had been sought by the Chinese authorities in respect of illegal commercial practices". The RSAA concluded that the Chinese authorities' interest in Mr Ye was "unremarkable" and could not "constitute a discriminatory act for one of the Convention reasons".

Appeal to Removal Review Authority

[476] Ms Ding's and Mr Ye's temporary permits expired on 1 September 2000. They should have left New Zealand by that date: see s 34. Instead, they exercised

their right to appeal to the RRA against the requirement to leave New Zealand. That appeal right, as we have set out above at [455], is conferred by s 47(1).

[477] While those appeals were pending, Ms Ding and Mr Ye, through the New Zealand Refugees Self-Help Association, applied to the Minister of Immigration for a "special direction" under s 130. The lengthy application to the minister referred to the fact that Ms Ding and Mr Ye had had three children since being in New Zealand. The letter referred to what was said to be "common knowledge that those who breached China's one-child policy [would] be penalised to certain extent [sic] with no exception". The applicants' representative asked that that "humanitarian factor" be taken into account by the minister in assessing their case.

[478] The application concluded:

> Mr Ye and Ms Ding have been residing in this country since May 1996 and they had since had three New Zealand-born children. The family considers themselves well settled in this lovely country and wish they could be allowed to stay. They told me that they missed the two daughters who are currently in China and they wanted the girls to join them here.

[479] The minister, the Hon Lianne Dalziel, responded on 18 January 2001. She said that she had considered the application "carefully". She declined to take any further step at that stage, however, because it was not her practice to intervene "in any case that is under active consideration, review or appeal".

[480] It seems that decision led to Ms Ding and Mr Ye deciding to abandon their appeals to the RRA.

Applications to the Minister of Immigration

[481] In March 2001, Ms Ding and Mr Ye made a second application to the minister for a special direction under s 130. The principal point made in Ms Ding's letter was that her and Mr Ye's "youngest children" were born in New Zealand and had the right to remain here. She said that, if she and Mr Ye were forced to leave New Zealand, they would not wish to take the children with them to China "where human rights receive so little consideration". The minister declined that application

on 5 July 2001. She allowed Ms Ding and Mr Ye, however, 14 days within which to leave the country without removal action being taken against them. She strongly advised Ms Ding and Mr Ye to take up that offer, because if they left New Zealand voluntarily, they would not be penalised and would be able to reapply to enter New Zealand in the normal manner. The minister's decision has never been challenged.

[482] Ms Ding and Mr Ye did not take the minister's advice. They remained in New Zealand unlawfully. On 5 September 2001, they made a further application to the minister for a special direction. This was their third such application. They were once again represented by a lawyer. This application was much more detailed than the earlier applications. It referred to various legal authorities. It also relied on the United Nations Convention on the Rights of the Child and the Universal Declaration of Human Rights. In particular, the application stressed the rights of Ms Ding's and Mr Ye's New Zealand-born children to remain in New Zealand.

[483] On 10 October 2001, the minister declined this application. She said she had given "careful consideration to [the] submission, with particular reference to New Zealand's obligations under international law", and in particular in this case to the effect that removal to China would have on the New Zealand-born children involved. She also advised that she had taken these matters into account in her previous consideration of "Mr and Mrs Ye's circumstances". Again, that decision has never been challenged.

[484] Ms Ding and Mr Ye still did not leave New Zealand. In June 2003, they made a fourth request to the minister for a special direction or residence. The minister declined that application on 30 July 2003.

[485] Still Ms Ding and Mr Ye did not leave New Zealand. The immigration authorities were not aware of their current whereabouts, as Ms Ding and Mr Ye had moved from the address where the service believed them to be living and had not disclosed to the service their new address. But the service caught up with Mr Ye in Nelson at a "Sanctuary Day" organised by the service. An immigration officer, Geoffrey Parr, interviewed Mr Ye. Mr Ye completed a humanitarian questionnaire, but failed to declare to Mr Parr that he had previously applied for refugee status.

Mr Parr issued his decision on 24 February 2004. By that time, he had found out about Mr Ye's failed application for refugee status. That prevented him from being able to assist Mr Ye, as Sanctuary Day conditions did not permit the grant of temporary permits to declined refugee applicants. Mr Parr told Mr Ye he should immediately make arrangements to return to China. He explained that, if Mr Ye returned voluntarily, he could then lodge an application for a visa at the New Zealand embassy in Beijing "where every consideration will be applied to your family circumstances in New Zealand".

[486] Still Ms Ding and Mr Ye did not depart. On 11 June 2004, Ms Ding was served with a removal order.

The first court proceeding is commenced

[487] On 22 June 2004, Ms Ding and Mr Ye filed an application for judicial review in the High Court. They sought to challenge the decision of the RSAA made back in 2000. They also applied for interim relief, but, for some reason, their lawyers chose not to bring that application on for hearing at that stage.

[488] The filing of this application did not prevent the service from proceeding with Ms Ding's removal, but that did not happen because Ms Ding and Mr Ye moved yet again and the service could not find them. It was not until November that year that Ms Ding and Mr Ye were found. At that time, Mr Ye was served with a removal order. He was taken into custody. The immigration officer involved, Mr Zhou, decided not to take Ms Ding into custody as someone needed to remain at home to care for the children.

[489] Later that month, Mr Zhou undertook "humanitarian interviews" with both Ms Ding and Mr Ye. He concluded there were no compelling humanitarian reasons why removal should not proceed.

[490] These decisions prompted yet another application – the fifth – to the Minister of Immigration for a "special direction" for a residence permit. That application was considered by the Hon Damien O'Connor, Associate Minister of Immigration.

Mr O'Connor advised, on 22 December, that he had "considered the information" Ms Ding's and Mr Ye's lawyer had provided, but was not prepared to intervene. Mr O'Connor noted that Mr Ye was scheduled to depart from New Zealand on 23 December. He indicated that the service was prepared to allow Ms Ding to remain in New Zealand until the outcome of her High Court proceedings. He was aware that the Crown, acting on behalf of the respondent, the RSAA, had applied to strike out Ms Ding's application for review and that that application was due to be heard on 9 February 2005.

[491] Mr Ye made a last-ditch attempt to stall his removal. Priestley J declined that application on 21 December 2004: *Ye v The Refugee Status Appeals Authority* HC AK CIV2004-404-3177. Mr Ye was removed from New Zealand two days later.

Events in 2005

[492] The service's strike-out application came before Cooper J on 9 February. The application was adjourned as Ms Ding's and Mr Ye's lawyer was not ready.

[493] Ms Ding made a further application – the sixth – to the Minister of Immigration. He declined to intervene on 21 March.

[494] On 27 April, Harrison J struck out the application for judicial review Ms Ding and Mr Ye had filed. The service had promised not to effect Ms Ding's removal until that application had been dealt with. Now that it had been dismissed, the service once again tried to effect Ms Ding's removal. But they could not find her: she had moved yet again. Eventually, she was located on 23 August, served with a further removal order, and taken into custody. It is this removal order which Ms Ding has now sought to challenge.

[495] While in custody, Ms Ding completed a further "humanitarian questionnaire". The service also arranged for Ms Ding to be psychiatrically examined. The doctor concluded Ms Ding was "not psychiatrically unwell" but was "clearly acutely distressed". Mr Zhou decided not to cancel the removal order. That is the s 58 decision, which is the second decision challenged.

[496] The following day, Ms Ding commenced a new judicial review application and secured from Harrison J an interim order preventing her removal. She has remained in New Zealand ever since pursuant to various court orders pending the determination of this appeal.

The factual and legal background to the Qiu removal orders

Arrival in New Zealand

[497] Mrs Qiu arrived in New Zealand on 28 December 1996 under the name of Jingyuan Li. On 5 March 1997, she claimed refugee status using this name. In her refugee application, she stated that her date of birth was 23 January 1970. She also ticked the box to indicate she had never been married. She did not claim to have any children. We now know this to be false, as Mrs Qiu was in fact married (to Mr Qiu) and she and her husband already had two children, who remained in China. That she had lied was not known, however, at that time to the Immigration Service.

[498] Mr Qiu arrived in New Zealand on 1 December 1997, using a false passport. He was granted a visitor's permit. (He subsequently obtained work permits, which, through extensions, remained valid until 22 September 2000.)

[499] On 10 December 1997, Mr Qiu too applied for refugee status, now using his true identity. The grounds for his application were that he and his wife had breached China's one-child policy. In his application, he said he was married to a Xiao Yun Qiu, date of birth 23 January 1967. He said she was overseas in the People's Republic of China and was not included in the application. He said he had two children, Han Feng Qiu and Han Bin Qiu, born in 1992 and 1994 respectively, and that these children were in China. All of this was true, except for his assertion that his wife was in China. She was not: she was here with him in New Zealand under a false name.

Mrs Qiu's application for refugee status

[500] The Refugee Status Branch of the Immigration Service delivered its decision on Mrs Qiu's application on 15 October 1998. (Of course, at this stage, the service believed it was dealing with a Miss Li.) Mrs Qiu had failed to turn up for her refugee interview. The branch officers concluded:

> In the absence of Miss Li, no findings of credibility or fact can be made and it cannot be determined whether she is a refugee within the meaning of Article 1A(2) of the Refugee Convention. As such, this application is declined.

[501] The same branch officers also undertook a "humanitarian consideration". Their conclusion in this regard was as follows:

> As Miss Li has not indicated that she has any close family residing in New Zealand it would appear she is not eligible to apply for residence under current humanitarian residence policy.

[502] As a consequence, Mrs Qiu's visitor's permit, which she had been given pending resolution of her refugee application, was revoked with effect from 12 February 1999. She was served with a removal order on 8 April 1999. At that time, the period 2 statutory regime applied. She accordingly had the right to appeal against the removal order to the RRA under s 63B. She exercised that right on 20 May 1999. At the same time, she also appealed against the refugee decision to the RSAA.

[503] The refugee status appeal was heard first. Mrs Qiu continued to present as a single woman. Her claim for refugee status was based on alleged political activities in which she said she had engaged in China. She said she had been told she would be arrested immediately upon her return to China and believed that she could well be executed.

[504] The RSAA did not believe Mrs Qiu. It concluded there were "a number of implausibilities and inconsistencies" in her account and the authority found her explanations, when these implausibilities and inconsistencies were put to her, "less than convincing". The RSAA concluded Mrs Qiu was not "a credible witness". Her appeal was dismissed on 28 January 2000. It should be noted that, while the RSAA

was by this stage aware of the fact that Miss Li was in fact Xiao Yun Qiu, it was not aware of the connection between Xiao Yun Qiu and He Qin Qiu.

Mr Qiu's application for refugee status

[505] Meanwhile, Mr Qiu's application for refugee status was proceeding before the Refugee Status Branch. Mr Qiu's claim rested not on any alleged political activity in China but rather on Mr Qiu's and his wife's breach of China's one-child policy. He said he had an unpaid fine of RMB5,000. He said that he feared, if he were to return to China, he would be arrested and imprisoned for his failure to pay the fine.

[506] The branch officers considered in detail China's one-child policy. They referred to the fact that that policy had been the subject of "most comprehensive discussion" in a number of RSAA decisions. They accepted that those who breached China's family planning policies were frequently fined, but that disciplinary measure was not classified as "persecutory". The branch officers also noted that the details of that policy were well publicised in China, ensuring people were well aware of the consequences of breaching the policy. Mr Qiu was presumed to have known that a substantial fine would be the likely consequence of his and his wife's breach of the one-child policy. The branch officers rejected his claim for refugee status on 31 May 2000. His last work permit expired on 22 September that year.

Alan Qiu is born

[507] The next event was the birth, on 12 June 2000, of Alan Qiu in New Zealand. His father was He Qin Qiu, his mother Xiao Yun Qiu. No mention had been made of this pending birth when Mr Qiu presented his submission to the Refugee Status Branch, even though Xiao Yun Qiu must have been pregnant at that time. Presumably this was because Mr Qiu was still asserting that his wife, Xiao Yun Qiu, was back in China looking after their two children.

Application to the Minister of Immigration

[508] The first the Immigration Service knew about the connection between applicant Xiao Yun Qiu and applicant He Qin Qiu was when their immigration consultant made application to the Minister of Immigration on 2 October 2000. By this time, Mr Qiu was an overstayer. The consultant asked Ms Dalziel for a special direction (under s 130) to allow Mr Qiu "and his partner Qiu Xiao Yun" to make an application for permanent residence. The consultant referred to the fact that Mr and Mrs Qiu had "formed a relationship in New Zealand and that they had a New Zealand-born son". There was no reference in this letter to the alleged wife in China (of the same name) or to the two children in China. It was not, of course, true that Mr and Mrs Qiu had "formed a relationship in New Zealand": they had been married in China.

[509] The minister responded on 26 April the following year. She said she had given Mr Qiu's "request for residence … careful consideration". But she had decided not to grant Mr Qiu a permit. She noted that Mr Qiu was now "in the country unlawfully and [was] expected to leave". She indicated, however, that she would give him 14 days within which to leave the country without removal action being taken. She strongly advised Mr Qiu to take up that offer because, if he left New Zealand voluntarily, he would not be penalised and would be able to reapply to enter New Zealand in the normal manner. Mr Qiu did not take up that suggestion.

Appeal to the RRA and High Court review

[510] Mrs Qiu's appeal to the RRA remained undetermined. It had been parked while her refugee appeal was being considered. The RRA, after giving Mrs Qiu the opportunity to make additional submissions following the RSAA decision, delivered a detailed decision on 11 June 2001. The authority referred to and quoted from all the leading authorities, including *Tavita*, *Puli'uvea,* and *Patel v Removal Review Authority* [2000] NZAR 200 (CA). It is clear from the decision that the humanitarian criteria relied on were two-fold:

(a) The matters raised before the RSAA. The RRA considered Mrs Qiu's criticisms of the RSAA decision.

(b) The birth of Alan.

[511] The RRA was not persuaded that the attack on the RSAA's decision was in general well-founded. It regarded Alan's birth as "a weighty factor to be considered" but "not decisive". The authority dismissed the appeal.

[512] Although the Act provided a right of appeal against the RRA's decision (on a question of law), Mrs Qiu elected not to exercise that right. Instead, she applied for judicial review. O'Regan J heard that application and delivered his decision on 21 December 2001: *Qiu v Removal Review Authority* [2002] NZAR 430 (HC). In summary, His Honour found:

(a) The RRA had not misunderstood s 63B and had correctly applied that section as interpreted by the Court of Appeal in *Patel*: at [12].

(b) The RRA had applied the correct legal test in determining the importance of the interests of the child. It had correctly held that the child's interests were a weighty but not a decisive factor. It was within its discretion to rule that the interests of the child did not amount to exceptional humanitarian circumstances in this case: at [20].

(c) The RRA had correctly made use of the RSAA's decision. It had not allowed its discretion to be improperly fettered by the RSAA's decision: at [25]. That was demonstrated, His Honour said, by the fact that the RRA's findings "deviated … from the findings of the RSAA when Ms Qiu put new evidence before the RRA": at [26].

[513] His Honour considered three other challenges to the RRA's decision, all of which he rejected. None is of current importance. O'Regan J dismissed Mrs Qiu's application for judicial review.

Further application to the Minister of Immigration

[514] It was now Mrs Qiu's turn to apply to the minister for a special direction. She made the application through the Hon Matt Robson MP. In supporting documentation, she stated that her status was married with one child, a male born in New Zealand on 12 June 2000.

[515] The minister responded to Mr Robson on 16 July 2002. She said she had given his representations "careful consideration" but she could not justify her intervention in the case. She remarked:

> This case has been thoroughly reviewed by the appeals authorities and the High Court. Although you have presented to me reasons why you believe the decisions made by these bodies have been limited in some way, I do not accept that there is sufficient basis to your claims to warrant my intervention in this process.

[516] By this stage, of course, both Mr and Mrs Qiu were overstayers of long standing. Mr Qiu had had his application for refugee status declined. The minister had declined to make a special direction. Mrs Qiu's application for refugee status had been declined by the Refugee Status Branch and her appeal to the RSAA had been unsuccessful. Her humanitarian appeal to the RRA had been turned down, and a judicial review of that decision had failed. The minister had also declined her application for a special direction under s 130. But nothing happened. The reason appears to be that the Immigration Service lost contact with Mr and Mrs Qiu and could not find them.

Events in 2005

[517] It was not until 12 May 2005 that a police check revealed some new information about the Qius. They were eventually located living at an address in Blockhouse Bay, Auckland, on 14 June 2005. At that time, Charles Wang, an immigration officer, served Mr Qiu with a removal order. He was taken into custody. On the same day, Mr Zhou served Mrs Qiu with a removal order. Mrs Qiu was not taken into custody because she had the care of her two young sons. A second son, Stanley, had been born in New Zealand just two months earlier.

[518] On 15 June 2005 Mr Wang conducted a humanitarian interview with Mr Qiu at the Auckland Central Police Station. During the course of the interview, Mr Qiu said he had two New Zealand-born children – one born in 2000, and one born in 2005. He also said that Mrs Qiu was his wife from China and that she had come to New Zealand earlier under a false identity. He did not refer to any other children during this interview. Mr Wang concluded there were no compelling reasons why Mr Qiu should not be removed.

[519] Mr and Mrs Qiu then applied for judicial review of the Qiu removal orders.

Evaluation of Mr Zhou's and Mr Wang's actions

What has not been challenged

[520] Before we look at what is challenged, we emphasise what has not been challenged.

[521] First, there is no challenge to the Government immigration policy. It is to be assumed therefore that it, in general terms, complies with New Zealand statute law and with international obligations to which the New Zealand Government has subscribed. The evidence discloses that at all material times Government immigration policy has included a humanitarian residence policy.

[522] Secondly, the challenge to the RSAA's decision has been finally disposed of. Ms Ding has not suffered Convention discrimination. She is not a refugee. Similarly, it is definitively established that Mr and Mrs Qiu are not refugees.

[523] Thirdly, various Ministers of Immigration have considered Ms Ding's case under s 130 on no fewer than six occasions. None of those decisions is challenged. The ministers considered exactly the same humanitarian arguments which were presented to us. The sixth ministerial consideration was just months before Mr Zhou determined to make his (second) removal order.

[524] Likewise, the Minister of Immigration has considered the Qius' case under s 130 on two occasions. Neither of those decisions is challenged. In both applications to the minister, the Qius had strongly relied on the fact they had a New Zealand-born son.

The Ding removal order

[525] Mr Zhou made the Ding removal order on being satisfied that s 53(1) applied to Ms Ding. Dr Harrison does not dispute that s 53(1) applied to her. On our view of the case, there is nothing further to be said on this topic. There is no authority supporting the contention that a s 54 decision-maker *under the period 3 regime* need consider anything further.

[526] *We stress that this does not mean humanitarian considerations go unconsidered.* We have italicised that sentence as it seems to us our colleagues insinuate that our approach leads to a regime where humanitarian considerations are unimportant. Nothing could be further from the truth. Humanitarian considerations do get taken into account – and not just once. First, one can in general terms assume Government immigration policy is broadly consistent with our international obligations and we know it includes a humanitarian residence policy. Secondly, in so far as discretionary decisions are taken under Government immigration policy, one can assume such discretions will be exercised taking into account humanitarian considerations. Thirdly, if the humanitarian considerations fall within the Refugee Convention (as many do), then the person may remain in New Zealand as a refugee. Fourthly, the overstayer can avail himself or herself of an appeal to the RRA on humanitarian grounds, with further appeals possible to the High Court and this court.

[527] Those are the appropriate occasions on which humanitarian considerations are taken into account. It is not the task of the s 54 decision-maker to evaluate yet again those considerations. Nothing could be further from the statutory purpose of the 1999 amendment. Indeed, in this case, the humanitarian considerations, on which Glazebrook J places so much weight, were pressed by Ms Ding on no fewer than five occasions in various forums.

[528] The challenge to the Ding removal order must fail.

The s 58 decision

[529] After making the removal order, it is true that Mr Zhou did complete a humanitarian questionnaire and then, in his words, "decided to proceed with [Ms Ding's] removal from New Zealand". Ms Ding's lawyers have categorised that decision as a decision under s 58. We are not at all sure it was a decision under that section. Rather, the evaluation appears to have been undertaken pursuant to a provision in the departmental manual.

[530] The provenance of the manual is unclear. Only "relevant pages" of the manual were before the High Court, and, according to the index of our case on appeal, those pages came in as part of an "agreed bundle of documents". According to Baragwanath J, the pages with which we are concerned were "prepared as a response to the decision of the Court of Appeal in *Tavita* and amended following *Puli'uvea*": at [189]. (To remind, *Tavita* was decided at the end of 1993 and *Puli'uvea* in 1996.) If that is right, then it would seem the manual was prepared during the period 2 regime.

[531] What is clear is that the manual is mere "NZIS operational policy and does not constitute Government immigration policy as described in section 13A(1) of the Immigration Act 1987": it specifically so states.

[532] It appears Mr Zhou undertook the humanitarian questionnaire pursuant to D4.45.5 of the manual. (We observe that this is the section which Dr Harrison submitted was unlawful on the basis that it had not been updated to take into account the effect of the passing of the CCA in 2004.) D4.45.5 of the manual reads as follows:

> (a) When determining whether or not to execute a removal order it is necessary for the immigration officer to take into account the particulars of the case and the impact removal might have on the rights of:
>
> i the person being removed; and

ii any immediate family associated with that person, (particularly those who are New Zealand citizens or residents).

(b) The immigration officer must then balance the factors set out in (a) above against:

i the rights and interests of the State in determining who should reside within its borders;

ii the principal goals of Government residence policy;

iii the intention of the Immigration Act 1987 to ensure a high level of compliance with immigration laws;

iv the need to be fair to other potential immigrants who have not met policy requirements and who have not been able to remain in New Zealand.

[533] In another part of the manual, it is said that "these obligations can be considered at any point during the removal process, depending on the circumstances, but should be considered at the earliest opportunity and must be prior to the actual removal".

[534] It seems likely that D4.45.5 was drafted during the period 2 regime. At that time, as we have explained, immigration officers made removal orders *prior to* humanitarian appeals to the RRA. In those circumstances, as we have explained at [446] above, it was sensible for immigration officers to make sure there were no humanitarian considerations which might justify the overstayers remaining in New Zealand. To do otherwise would simply lead to unnecessary appeals to the RRA, as we explained. But that is not the legislative framework currently applicable. It may be through oversight that the manual has not been updated to reflect the 1999 amendment.

[535] The other possibility, of course, is that the manual drafter did turn his or her mind to D4.45.5 following the 1999 amendment and concluded it was still applicable to the new statutory scheme. If that is what happened, then, in our respectful view, the manual updater erred. The updater failed to assess the full implications of the change.

[536] The first explanation is on balance more likely to be correct. If there had been a conscious updating following the 1999 amendment, it is almost inconceivable

that D4.45 as a whole could make no reference to decisions of the RRA. If there has been a s 47 appeal, then in the normal case the RRA's adverse decision will have immediately preceded the removal action with which D4.45 is concerned. The manual says nothing about the weighting to be given to any RRA decision, still less the propriety of an immigration officer purporting to consider humanitarian criteria when such may just have been pronounced upon by the RRA, the High Court, or this court. That glaring omission makes us think it more likely this section of the manual is a carry-over, which is no longer applicable to the new regime.

[537] We note in passing that, since 2003, the chief executive of the Department of Labour has had power to give, from time to time, "general instructions to visa officers and immigration officers": s 13BA(2). We do not know whether the manual is included within the expression "general instructions": we had no submissions on this. Two subsections of s 13BA are interesting, however. We set them out:

> (6) Nothing in this Act, or in any other law or enactment, requires a visa officer or an immigration officer to process an application for a visa or permit in any particular order or manner, whether or not consistent with any general instructions given by the chief executive from time to time.
>
> (7) The question whether or not an application is processed in an order and manner consistent with any general instructions given by the chief executive from time to time is a matter for the discretion of a visa officer or immigration officer, and –
>
> (a) no appeal lies against the decision of the officer concerned, whether to an Authority, the Board, the Tribunal, the Minister, any court, or otherwise; and
>
> (b) no review proceedings may be brought in any court in respect of –
>
> (i) any general instructions as to the order and manner of processing applications as given by the chief executive from time to time; or
>
> (ii) the application of any such general instructions; or
>
> (iii) any failure by the Minister or a visa officer or immigration officer to process or to continue to process an application for a visa or a permit; or
>
> (iv) any decision by the Minister or a visa officer or immigration officer to process (including a decision to continue to process), or any decision no tot process (including a

> decision not t continue to process), an application for a visa or permit.

[538] In the absence of submissions on this topic, we do nothing more than note those provisions.

[539] Dr Harrison challenged D4.45.5 on the basis that it failed to mention the CCA. We agree that D4.45.5 is wrong, but for a rather different reason.

[540] It was, of course, perfectly understandable that Mr Zhou should comply with the departmental manual. But the fact he did undertake a humanitarian questionnaire cannot now confer rights on Ms Ding which the statute did not. She has had the benefit of a fresh look to which she was not entitled. Any errors in reasoning in this non-statutory fresh look cannot be the subject of judicial review.

[541] Even if Mr Zhou's enquiry was undertaken not pursuant to the manual but rather under s 58, it could not be reviewed. The section, as we have said, is purely empowering; it confers no rights or expectations. The no rights clause makes that crystal clear.

[542] In our view, the evaluation Mr Zhou carried out did not involve the exercise of a statutory power; nor did he make a decision as such.

[543] Having said that, it was a very good idea for him to discuss removal with Ms Ding. He had to find out what she planned to do with her New Zealand-born children. If she intended to leave them here, then he would want to be sure that they were going to be properly looked after. If they were not, then the appropriate State agencies would have to become involved.

[544] It was also perhaps appropriate for Mr Zhou just to check that there had been no significant change of circumstances since the minister had last considered the matter in March that year. There were none. Indeed, the humanitarian considerations which Dr Harrison and Mr Bassett pressed on us are, save in one respect, the same considerations as have been considered and pronounced upon by the RSAA and the ministers. The one new aspect – the relevance of the CCA – is an

argument that this court unanimously rejects: for our view on that, see below at [547].

The Qiu removal orders

[545] There is no dispute that Messrs Zhou and Wang, who made the Qiu removal orders, were satisfied that s 53(1) applied to Mr and Mrs Qiu and that they were correct to be so satisfied. That means the Qiu appeal must also fail.

Our view on some of the issues considered by Glazebrook J

[546] For the reasons already given, we have held that the Ding removal order, the s 58 decision, and the Qiu removal orders were not reviewable in the circumstances. That disposes of both appeals. But there are some topics on which Glazebrook J has expressed an opinion on which we too wish to comment.

Care of Children Act 2004

[547] Glazebrook J has held that the CCA did not effect "a significant shift in the law" in so far as immigration matters are concerned: at [56] - [57]. We agree, for the reasons Glazebrook J gives. (We do not pretend, however, to have read all the authorities and articles referred to, many of which were not cited to us.) When we say we agree the CCA did not effect "a significant shift in the law", we are, however, referring to the CCA's effect (or non-effect) at a different stage of the immigration process. The rights of children fall to be considered at the level of departmental policy-making, the exercise of humanitarian discretions when considering applications for permits and residency, on s 47 appeals, and on applications to the minister under s 130. They do not fall to be considered when the service is moving to remove the overstayer, the s 53(1) criteria having been satisfied.

Tavita v Minister of Immigration

[548] We want to say a word about *Tavita*, on which Dr Harrison strongly relied. It is important to recognise, as we have said, that *Tavita* was decided under the period 1 statutory regime. Viliamu Tavita, a Western Samoan overstayer, had appealed to the Minister of Immigration under s 63. (Note there is an error in the NZLR report at 259, line 27: it refers to the appeal being under s 63B. That is an editorial error. The signed judgment, which we have checked, refers accurately to s 63, as does the NZLR headnote at 257, line 40.) A s 63 appeal incorporated the humanitarian criteria: see above at [434]. The minister had declined Mr Tavita's appeal. The point of the case was whether the minister, when considering the humanitarian criteria, was required to take into account New Zealand's obligations under relevant international instruments, such as the International Covenant on Civil and Political Rights 1966 and the Convention on the Rights of the Child 1989. The minister, when making his decision, admitted he had not taken those international instruments into account: at 261. As this court said, "the essential argument for the Crown" was that the minister was not obliged to do so: at 261.

[549] This court rejected the Crown's contention. In the end, the court delivered no more than an "interim judgment" just before the conclusion of the 1993 court year. The appeal was adjourned for both sides to consider their positions carefully. But with respect to the Crown's argument, this court 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.

[550] We have no difficulty with any part of that. Relevant international instruments should be considered by the RRA on a s 47 appeal, the current equivalent of the ministerial appeal under consideration in *Tavita*: the Crown does not dispute that. Further, it is noteworthy that both the RSAA and the ministers expressly referred to New Zealand's international obligations when considering Ms Ding's and Mr Ye's cases. They were right so to do. But *Tavita* is not authority for the proposition those obligations must *again* be taken into account when an immigration officer is determining to effect a removal.

[551] Nothing in our opinion is inconsistent with *Tavita*. The implications of *Tavita* have been taken on board by both Parliament and the Immigration Service. What Parliament has done, by the 1999 amendment, is bring forward the humanitarian considerations so that, in the interests of streamlining the process, they are considered *before* the removal process gets underway, not as part of it.

[552] Glazebrook J suggests that our interpretation means that the 1999 amendment has overruled *Tavita* and *Puli'uvea*: at [203]. That is not the case. Both decisions remain good law. The difference between us is as to the correct point at which humanitarian considerations are taken into account.

Puli'uvea v Removal Review Authority

[553] We next want to comment on *Puli'uvea*. As we have said, this decision was concerned with the period 2 regime. An order for Mrs Puli'uvea's removal was served on her on 18 May 1992. She appealed to the RRA on humanitarian grounds. That is to say, it was a s 63B appeal: see above at [445]. The RRA dismissed the appeal. Mrs Puli'uvea did nothing for some time. When the authorities moved to

carry out the removal order, she brought an application for judicial review. It is not clear why she proceeded by way of judicial review, as there was an appeal right, although the time limit for such an appeal had passed. Probably judicial review was chosen on the basis that Mrs Puli'uvea's lawyers thought she might not get leave to appeal out of time; as well, she may have wanted to utilise the interim order procedure under s 8 of the Judicature Amendment Act 1972.

[554] The appeal came before the Court of Appeal following Temm J's refusal to grant interim relief to prevent immigration officials effecting her removal. Mrs Puli'uvea's principal complaint was with respect to the decision of the RRA. She complained that it had failed properly to apply the humanitarian criteria. In particular, she complained that the RRA had not adequately taken into account that her removal from New Zealand would result in her separation from her three New Zealand-born children. The case is, therefore, very similar on the facts, and, of course, a s 63B appeal is the equivalent of a s 47 appeal under the current legislation.

[555] This court held that the matter had been properly considered by the RRA and that the application for review had no chance of success on that basis. The court then went on to consider the second complaint Mrs Puli'uvea made, namely that the Immigration Service had "found material facts wrongly" when attempting to effect her removal in February 1995. The court noted, at 519, that "there was some disagreement between the parties about the statutory powers that were in question at this final stage". The court said:

> It is indeed not even clear that any particular exercises of statutory powers of decision occurred in February 1995: the 1992 order was simply to be executed.

[556] In the end, the court did not resolve that question definitively, because it was satisfied that, whether the immigration officers concerned were required to consider the matter afresh or not, they had had regard to "the position of the children, especially the New Zealand-born children, as a primary consideration": at 522. The court noted that the officers had "had regard to the impact of [Mr and Mrs Puli'uvea's] 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": at 522.

[557] One can understand why this court did not feel it had to resolve the legal question of immigration officers' obligations on a removal: the case was clear on the facts. The court may well not have had the benefit of the detailed submissions on the statutory framework that we received. We have attempted to grapple with the question this court left unanswered in *Puli'uvea*, and we have concluded that the making of a removal order, especially under the period 3 regime, does not involve a relitigation of whether humanitarian criteria are satisfied.

Linking ss 54 and 58 to s 47(3)

[558] Glazebrook J has, at [83], referred to Baragwanath J's suggestion that the test under ss 54 and 58 "should be linked to the exceptional circumstances test in s 47(3)". At [93] she rejects that linkage. She notes "that Parliament has made neither s 54 nor s 58 subject to the s 47(3) test". She goes on to say:

> This means that immigration officers have the power to cancel removal orders and/or give residence permits in circumstances that fall outside s 47(3). This is understandable. For example, there may be other factors that can be legitimately taken into account such as the fact that a person in fact meets residence criteria. It would place an inappropriate restriction on the powers of immigration officers should Baragwanath J's proposed test be adopted.

[559] It will be apparent, from the discussion above, that we agree with neither Baragwanath J nor Glazebrook J. Section 54 does not import humanitarian considerations at all: there is no linkage whatever between that section and s 47(3). The power conferred under s 58 is also not linked to s 47(3). To that extent, we agree with Glazebrook J. But where we disagree with her is that the removal process requires an immigration officer to consider not only s 47(3)-type considerations but much more besides. The true purpose of s 58, to our mind, is to empower immigration officers to cancel removal orders in circumstances where the Immigration Service or the minister has *independently* determined that an overstayer's status should be reconsidered. This power is needed, as otherwise the police would be required to take the person named in the removal order into custody and to proceed to execute the order in accordance with s 59: see s 55(1).

Implying humanitarian criteria into s 54

[560] Glazebrook J, at [215] - [225] of her opinion, develops an attractive thesis that, notwithstanding the absence of any explicit humanitarian test in s 54, Parliament must have intended that such inquiry be made in order that New Zealand's international obligations are fulfilled. Notwithstanding the customary persuasiveness of Glazebrook J's reasoning, we are unable to accept that such inquiry can be implied into s 54. In brief, this is for the following reasons.

[561] First, s 54 sets out explicit criteria (cf s 72, which the Supreme Court considered in *Zaoui v Attorney-General (No 2)* [2006] 1 NZLR 289, to which Glazebrook J refers at [222]). It would be most unusual to draft a statute where certain criteria are explicit but other criteria – more important ones, indeed – are left completely unstated but must be inferred. Even though the explicit criteria are fulfilled, the power to remove does not apparently arise, on Glazebrook J's reasoning, because of non-fulfilment of the implied criteria.

[562] Secondly, what these implied criteria are is obviously not easy to state. For example, Glazebrook J and Hammond J do not agree on the nature of the test to be implied. Further, the kind of review required seems to hinge on what reviews there have been in the past: at [161]. It is a little difficult to see why Ms Ding should be entitled to a further review when her humanitarian case has already been considered on so many occasions.

[563] Thirdly, it is very difficult to see how this humanitarian review fits in with the humanitarian review mechanism which is *explicitly* provided, namely the right of appeal to the RRA.

[564] Fourthly, it seems grossly unfair that those who wait patiently overseas seeking permission to immigrate here and those who lawfully depart before their permits expire are much worse off than those who flout our law and remain as illegal overstayers. The latter group get not only a right of appeal to the RRA (about which no one could quibble) but also the right, apparently, to a further humanitarian review under s 54. What is more, the s 54 review is apparently far more wide-ranging than

the appeal to the RRA, particularly if the overstayer has chosen *not* to exercise his or her rights of appeal.

[565] Fifthly, Glazebrook J's approach requires implying not just criteria but also *an entire process*. She is not definitive as to how immigration officers must carry out the "final check" which she says s 54 requires. But it is clearly more favourable to overstayers than the statutory procedure for a s 47 appeal:

(a) On a s 47 appeal, the RRA proceeds "on the papers": s 50(1). Although Glazebrook J says the "right to be heard" she has identified is "not a right to be heard orally" (at [164]), it is almost impossible to envisage anything less than an oral hearing being satisfactory, given the nature of the inquiries Her Honour envisages the Immigration Service will need to make, particularly of any children of overstayers, who can scarcely be expected to put their views in writing.

(b) On a s 47 appeal, it is the appellant's responsibility "to ensure that all information, evidence, and submissions that the appellant wishes to have considered in support of the appeal are received by the Authority": s 50(2)(a). Under Glazebrook J's s 54 hearing, the Immigration Service has an obligation to seek out relevant information.

(c) Under Glazebrook J's s 54 hearing, the children's views should have been directly obtained: at [138] - [142]. It is unclear whether children must be heard on a s 47 appeal. (We expressly leave that open.)

[566] We simply cannot accept that s 54 can be read in this way.

[567] At [159] and [160], Glazebrook J suggests that, in circumstances where "there are (reasonable) concerns about flight risk", the immigration officer may defer the humanitarian consideration from the s 54 phase to "the s 58 stage". With respect, we consider this to be judicial law-making.

The interests of children

[568] Glazebrook J devotes a large part of her opinion to a discussion of how the welfare and best interests of children should be taken into account. Given the way we see this case, we do not need to comment on that. The matters she raises are, to our mind, not relevant to the removal process itself. They may be relevant to the development of policy within the department, to the work of the RRA, and to ministers exercising discretion under s 130. But that policy is not under review in this case; nor is the RRA or any decision of a Minister of Immigration. This matter is best left to a case where those bodies are before the court, defending relevant decisions. (The Minister of Immigration is a party, of course, to this appeal, but only in his capacity as employer of Messrs Zhou and Wang. He is not before the court defending Government policy or a personal s 130 decision of his own or a predecessor minister.)

Standard of review

[569] Glazebrook J, in her opinion, sets out her view as to the appropriate standard of review: at [303] - [305]. We express no opinion on this topic, as it does not arise.

Our view on some of the issues considered by Hammond and Wilson JJ

[570] We now comment briefly on the reasons prepared by Hammond J, to which Wilson J has subscribed. (For simplicity, we refer to their opinion as Hammond J's.) The difference between Hammond J and us is not particularly great.

The s 58 task

[571] Hammond J, unlike Glazebrook J, sees this case in terms of s 58 rather than s 54. Even then, he describes the procedure as "tacked on": at [397]. He acknowledges what we have referred to as the no rights clause: see his reasons at [402]. He appears to accept that, if an immigration officer refuses to consider a purported application under s 58, that refusal would not be reviewable. Clearly that

must be right. But, he says, "once an official decides to take a step under s 58 …, the subsequent decision is then reviewable". We have difficulty in accepting that conclusion in light of the no rights clause.

[572] Hammond J sees the s 58 task as being a last check and requiring (albeit limited) reconsideration of "a lawful decision which [has] already been made under s 54": at [402]. For the reasons we have earlier given, we do not accept that is the way in which ss 54 and 58 interrelate. Section 58 is not there as the means of checking a s 54 decision. It would be extremely odd for Parliament to provide that an immigration officer should make a decision to remove, and then *reconsider it* with a view to cancelling it. Surely, if humanitarian considerations must be taken into account, one would have expected Parliament to write that into the statutory criteria which must be considered before the removal order is made. The function of s 58, as we have explained, is simply to empower immigration officers to cancel removal orders if, independently, the minister, say, or the chief executive or the service were to decide the overstayer should, for whatever reason, be granted residency. There has to be some power, in those circumstances, to cancel the removal order, as otherwise the police are bound to continue actioning it.

Practical implications

[573] It is unclear to us whence Hammond J derives the proper question to be asked, namely, whether the "children or any of them had a present need for Ms Ding to stay in New Zealand – at least for the foreseeable future": see [406]. If it is right, however, that such a question must be asked of any overstayer with children born here, then it is clear that the best advice any lawyer or immigration consultant could give to an overstayer who was desperate to stay is: hide for as long as you can and have as many children as you can.

[574] Further, if this is a compulsory inquiry of overstayers with children, then it would behove every parent who is here on a permit not to comply with the law but rather to stay until the service activates the removal process. Those who comply with the law and who leave voluntarily in good time get no humanitarian interview before they depart. Those who break the law and await the removal process will get

the benefit of a humanitarian evaluation, even in circumstances apparently where statutory humanitarian appeals have failed. This is directly contrary to a fundamental premise of the Immigration Act, namely "that persons who do not comply with immigration procedures and rules are not advantaged in comparison with persons who do comply".

Joining the Ye children as parties

[575] When this case came first before Harrison J, on an application for an interim order under s 8 of the Judicature Amendment Act 1972, he made procedural orders: *Ding v Minister of Immigration* HC AK CIV2005-404-4900 1 September 2005. Among those orders was a direction to the registry "to appoint Mr Rodney Harrison QC as counsel for the children": at [6]. Dr Harrison accepted appointment. It appears that subsequently he sought leave to have the Ye children joined as second plaintiffs. Harrison J dealt with that matter on 14 September 2005. He held:

> I grant Mr Harrison leave, in his capacity as counsel for the children, to file, if necessary, a separate application for leave to join the children as second plaintiffs. I trust that course of action will not be necessary. Mr Neil [then counsel for the Minister of Immigration] has yet to take instructions. The interests of expedition would be served by the Crown consenting to the joinder of the children as second plaintiffs in the proceeding filed by Mrs Ding.

[576] Subsequently, on 3 October 2005 the Ye children were given "leave to file an amended statement of claim". Harrison J noted that the Crown reserved its rights "fully to argue that the children have no standing, whether under the Care of Children Act 2004, any other statutory provision, or at common law": at [3].

[577] There is little point in investigating whether Harrison J was right to join the Ye children. The crucial question, which the Crown raises on its appeal, is whether children should be joined as parties in future challenges to removal orders or so-called decisions under s 58.

[578] Given our view of the role of ss 54 and 58 in the current statutory scheme, there would, of course, be no scope for judicial review applications of the kind we had here. The issue as to joinder of children would accordingly not arise.

[579] We express no view as to whether children should be heard on a s 47 appeal. That has not been argued before us as, of course, Ms Ding abandoned her appeal under that section.

[580] We also find it unnecessary to consider the Crown's argument as to whether litigation guardians should have been appointed for the children. That is not a point that would arise in the future if our views on the removal process were to prevail.

[581] Since we are in the minority on this topic, there is little point in a detailed analysis. We would not allow the Crown's appeal and cross-appeal on these procedural points solely because this has developed as a major test case on which this court is very divided. Almost inevitably this case will find its way to the Supreme Court. It is important that the Ye children and the Qiu children, and their skilled advocates, should be able to argue this case at a higher level. The Supreme Court will then provide the definitive answer. Once the role of ss 54 and 58 has been definitively determined, these minor procedural points will all fall into place.

Baragwanath J's declaration

[582] We agree with Glazebrook J on this question: at [351].

Result we would have given

[583] We would dismiss the Ye children's appeal (CA184/06) and the Qiu children's appeal (CA192/06).

[584] We would dismiss the minister's cross-appeal in CA184/06, save that we would quash the declaration made by Baragwanath J (order F).

[585] We would dismiss the minister's appeal from Harrison J's judgment of 1 September 2005 (CA205/05).

[586] There is a majority in favour of allowing the Ye children's appeal. By order of this court, the matter is remitted to the Immigration Service to be reconsidered, *if*

it sees fit. This is, with respect, a most unusual "order", as it is not mandatory in its nature. Of course, it reflects s 58(5) – the no rights clause. But, in our view, the fact the "order" is in these voluntary terms simply confirms in our minds that, with respect, Glazebrook and Hammond JJ's interpretations of the legislation are wrong.

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