IN THE SUPREME COURT OF NEW ZEALAND SC 124/2014

[2015] NZSC Trans 18

BETWEEN **JIAXI GUO**

First Appellant

JIAMING GUO

Second Appellant

AND **MINISTER OF IMMIGRATION**

Respondent

Hearing:	9 July 2015
Coram:	Elias CJ William Young J Glazebrook J Arnold J Blanchard J
Appearances:	R M Dillon for the Appellants C A Griffin and M F Clark for the Respondent

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CIVIL APPEAL

MR DILLON:

Dillon appearing for the appellants, Your Honour.

ELIAS CJ:

Yes, thank you, Mr Dillon.

MS GRIFFIN:

May it please, Your Honours, Ms Griffin and Ms Clark for the respondent.

ELIAS CJ:

Thank you, Ms Griffin, Ms Clark. Yes, Mr Dillon.

MR DILLON:

May it please the Court, the appellants' fundamental submission in this case is that it is unjust to punish the innocent. The appellants came before the Immigration Protection Tribunal seeking to appeal the facts regarding their liability for deportation under section 202 of the Immigration Act 2009, but also and separately a humanitarian appeal under section 207. These has to be brought together, by virtue of section 203 of that Act. We are now only concerned with the humanitarian appeal under section 207. A humanitarian appeal assumes –

ELIAS CJ:

So that means that even if you got leave you're not pursuing the 202 appeal?

MR DILLON:

The 202 issue has –

ELIAS CJ:

Gone, yes.

MR DILLON:

– well and truly gone, it is only the humanitarian appeals before the Court, it's only the humanitarian appeal because of the criteria of unjust and unduly harsh that is being challenged. The reason for that is that they're a three-stage test effectively: exceptional circumstances of a humanitarian nature, which was found in favour of the appellants; whether it was unjust or unduly harsh found against the appellants; and the IPT decided not then to bother with the third criteria, so they fell, if you like, at the second hurdle.

A humanitarian appeal assumes that the appellants are liable for deportation, it's a precondition under section 206 to be able to bring an appeal under 207. That has a consequence, and it is submitted the consequence is that an appeal under 207 can never be regarded as an attack on the integrity of the immigration regime. That

integrity is a given, in fact it is a precondition for the relief being sought. The effects of that concern are already spent when section 207 is before the Court or the IPT.

ELIAS CJ:

I know there are a number of decisions of the High Court which emphasise the integrity of the immigration system, but what's the statutory reference to that?

MR DILLON:

I don't belief there is one, Your Honour, that's fundamental to these submissions. It does come back when considering the issue of whether it is unjust, and I'll address you directly on that and distinguish that factor in these appellants' case from circumstances where it might be found to be not unjust.

Section 207 envisages relief from unlawful process. That is the significance of it being humanitarian relief, it's not some failure in the process, it's accepted that the process has been correct but whether humanitarian relief should nonetheless be granted. Therefore, it is submitted, it cannot be an answer to a claim for humanitarian relief that the process that gave rise to the claim is lawful. The right to claim humanitarian relief cannot arise unless the process was lawful.

ELIAS CJ:

Well, do you go as far as saying that the circumstances relevant to a 207 inquiry are only those relating to the person whose deportation is sought?

MR DILLON:

That is the nub of it. That is point of the fundamental submission that it is unjust to punish the innocent. It's not of course unjust to punish the guilty. And it is in this context of the claim for humanitarian relief arising from lawful process imposing liability for deportation that the appellants are making this fundamental submission, that it is unjust to punish the innocent. It is in the context of the humanitarian appeal that the appellants respectfully submit that innocence is determinative of whether deportation is unjust in this specific context, humanitarian relief.

ELIAS CJ:

Well, I just really question whether the reference to innocence and guilt is very helpful and wonder whether you should not be sticking to the statutory language.

MR DILLON:

The statutory –

ELIAS CJ:

What's the complaint that you have expressed in the statutory language?

MR DILLON:

The appellants fell at the hurdle of whether it was unjust or unduly harsh.

ELIAS CJ:

Yes.

MR DILLON:

The IPT extensively reviewed whether it was unduly harsh, it did not turn its mind to whether it was unjust, yet found as a fact that the appellants were innocent, and it is submitted that innocence is determinative of the criteria of whether it is unjust.

ARNOLD J:

But won't that mean in all of these cases where, say, children get residence on the basis of something untrue that their parents or sponsor have said? They will always be innocent, and are you saying then in all of those cases they meet the humanitarian criteria?

MR DILLON:

No, and that was my next submission. It is not the submission of the appellants that innocence answers the totality of the criteria under section 207, because it's a three-stage test.

ARNOLD J:

Right.

MR DILLON:

But it is submitted it is a complete answer to the criteria of whether deportation would be unjust to those specific appellants. The other two criteria must still be met in order to obtain relief, namely, that there exist exceptional circumstances of a humanitarian nature, which in this particular case the IPT did determine in favour of the appellants, and then finally that it would not be contrary to the public interest that these

appellants be allowed to remain, and that's section 207(2). And that in this case the IPT did not determine, because having fallen once you're out of the hurdle race.

This fundamental submission of the appellants works itself out in a particular manner and that is whether the criminal convictions of Mr Guo, and the implicit failure by him to declare material circumstances to the Immigration Department, can weigh at all in a consideration of the children's humanitarian appeals. Now in that regard, I'm making this submission in an expectation of my friend's submissions, the Crown is suggesting that it is merely an attack on the weighting of factors before the IPT. The appellants' submission is that this is not at all the correct characterisation of the submissions. It is not about how to weigh factors. It is about what factors can and cannot be weighed. In other words, not how the scales tip, but what can lawfully be loaded into the scales.

If the children cannot be discriminated against by virtue of their family relationship with Mr Guo, then the IPT decision at paragraphs 137, 156 and 162 cannot stand because in those paragraphs it's quite explicit that the IPT is putting Mr Guo's convictions and failures against these particular appellants.

GLAZEBROOK J:
Is that quite true in the context of how the case was put, which was either the family stayed or the family went. Now the case is now in a slightly different context but without the older girl, there'd be no possibility of the younger children staying without somebody to look after them, as I understand it as a factual matter, as well as a practical matter generally, and whether it would be in the best interests of children to be separated from their parents in that way in any event.

MR DILLON:
That takes us back into an interesting factual peculiarity of this case. There are two IPT decisions. One of them is then recalled when it becomes apparent that Mrs Guo, I will call her for ease of reference, had returned to China for family circumstances and had been served with a deportation notice in China prohibiting her return and as a matter of law that meant her part of the appeal was abandoned. Now obviously the mother is gone at that point. It fundamentally changes the issue of keeping the family together and the IPT then re-issues its decision taking account of that fact. But not re-examining the evidence or giving an opportunity for the family to address what happens now.

GLAZEBROOK J:

I do understand that. What I was really asking was just as a matter of your submission, you say innocence can't be weighed against a child. If, in this case, you didn't have the older girl, and there wasn't the complication of the mother back in China, are you suggesting that a young child will always meet that test even though practically the child could not stay in New Zealand, so it was a, it wasn't a question directed to this particular aspect.

MR DILLON:

Well if we can explore the practicalities, because I think that's what Your Honour is asking about, the practicalities –

ELIAS CJ:

Well are the practicalities on your argument determinative or are they even relevant? Is your argument simply that it's not a reason for deportation, or is it deportation, it's just –

GLAZEBROOK J:

It's called deportation now.

ELIAS CJ:

Yes, it's not a reason for deportation, the practicalities would then have to be sorted out by the family and the children may or may not return to China.

GLAZEBROOK J:

That was actually the point of my question, to ask whether that was the submission.

MR DILLON:

There is a legal outcome then there is a practical outcome. It is submitted the legal outcome is that the guilt of the father cannot be held against the innocent children and therefore it would be unjust for them to be deported. If the family decides, as they would then be freely able to decide, to return to China, that is not a matter before the IPT. That is for them to freely decide. The IPT must decide whether to grant humanitarian relief. That doesn't shackle them to New Zealand. That allows them to stay should they desire.

GLAZEBROOK J:

That was the, that was my question and it's answered, thank you. Is there anywhere that could take account of if the children stayed behind they might be, if you like, they'd have to be looked after by the State in some manner, can one take that into account under the public interest or not?

MR DILLON:

Well that is, if you like, the third hurdle.

GLAZEBROOK J:

All right so we haven't got to that stage as yet.

MR DILLON:

So if those issues arise on the facts, then that may be a factor under the third hurdle, and it just doesn't appear in this particular case. In this particular case the error of law that the appellants contend is this question of what are the admissible factors in the context of their humanitarian appeal. If the factors used are unlawful then of course the balance tips. Now where that balance may end up is, that is the weighing exercise, that is for the IPT. But the question of law is what can go into the balance and it is submitted that the father's offending is not permitted to go on the scales by virtue of the New Zealand Bill of Rights Act 1990 as it relates to the Human Rights Act 1993, and of course as both of those are part of New Zealand's international obligations under the International Convention on Civil and Political Rights.

WILLIAM YOUNG J:

I mean there's no dispute that the children are innocent. So there's no breach of the presumption of innocence, it's just it is seeking that because their residence was obtained by deception, they're eligible for deportation and should be deported. I don't really see where the Bill of Rights comes into it.

MR DILLON:

The –

WILLIAM YOUNG J:

But I've got other problems with what's proposed but that's not it.

MR DILLON:

The Bill of Rights is reinforcing the Human Rights Act issue of discrimination, and the discrimination at issue is a discrimination on the basis of relationship to another member of the family, which is precisely what has happened in this case. Because of Mr Guo's offending this is specifically held against the children and it is submitted that the Bill of Rights reinforcing the Human Rights Act on this point prohibits this type of discrimination.

ELIAS CJ:

In the 2009 Act what is the equivalent provision under which Mr Guo would have been deported? The offence provision? I just want to check it.

MR DILLON:

Mr Guo's position –

ELIAS CJ:

No, that was just an enquiry about the legislation.

MR DILLON:

Yes I'm trying to remember. His humanitarian appeal is under section 105 of the old Act and I will come to that –

ELIAS CJ:

Yes but what was the Minister's power to deport him on conviction? What is it under section, under the 2009 Act?

MR DILLON:

My friend advises it's 161 of the current Act.

ELIAS CJ:

Thank you.

MR DILLON:

But of course he was under the old Act.

ELIAS CJ:

Yes, but it's not materially different, as I understand it?

MR DILLON:

I think that one of the things that changed from the old Act to the new Act is that it's made more explicit that somebody in Mr Guo's position is being deported because of a breach of the Immigration Act, as opposed to under the order that he was served, which expressly said, "You have been convicted of a criminal offence and therefore you are being deported," which raised a double jeopardy issue which this Court has declined to grant me leave on. I don't think that becomes available under the new Act because of the way the Act makes it expressly because you've breached the Immigration Act in the failure of your duty to disclose which is a different offence and therefore a different penalty which allows deportation, not as a double jeopardy issue.

ELIAS CJ:

Well, is there any power under the Act to deport those secondary visa holders, people whose visa are parasitic on a principal visa applicant?

MR DILLON:

Indeed, that's exactly how these appellants come before this –

ELIAS CJ:

No, I mean for, under section 161 or its then equivalent. I'm just wondering why you're not arguing that the scheme of the Act is that if there is no ability to deport the children for, under the provision that the father is being deported, that the Act hasn't provided that power and that it's straining things to advance matters on the basis they been done here under section 105, was it – 108, was it? Anyway, don't worry about that, I will be asking Ms Griffin that.

MR DILLON:

Yes, the –

GLAZEBROOK J:

Would it more be your argument that, yes, of course you can take the criminal conviction into account in accordance with the father, because that's the provision he's being deported on, but in fact the scheme of the Act would say you don't take that into account again –

MR DILLON:

No, no –

GLAZEBROOK J:

– for the children?

MR DILLON:

– I believe that's going too far. I believe the scheme of the Act is that for the purposes of establishing liability the both –

GLAZEBROOK J:

No, once you're looking at the humanitarian appeal, certainly in terms of liability –

MR DILLON:

Yes.

GLAZEBROOK J:

– they don't have a permit and therefore are unlawfully in New Zealand and therefore –

MR DILLON:

Yes.

GLAZEBROOK J:

– are subject to deportation.

MR DILLON:

And then those lock in quite nicely, but that then still leaves the humanitarian relief. And it's submitted that the appellants are before the Court today because under the humanitarian relief, so it's assuming everything has happened correctly under the Act to issue the deportation liability notices to them, assuming that, it is nonetheless unjust when we face the criteria of "unjust" under section 207 for them to be deported, and if they jump that particular hurdle they don't have to worry about jumping the "unduly harsh" because that's an alternative hurdle, if you jump one of those two you can continue the race. In the present case it's submitted that it is an error of law to discriminate against the children in this context, the humanitarian appeal context, by virtue of the father's offending and/or that bringing the father's

offending into account is introducing an irrelevant consideration in relation to these specific appellants applying for humanitarian relief.

In this case the IPT did determine two relevant issues that aren't challenged and are findings of fact. The first is that there do exist exceptional circumstances of a humanitarian nature in favour of both appellants, and the second is that, as a matter of fact, the IPT has found that they were both innocent of any wrongdoing in relation to the reasons that they were liable for deportation. And having found that, that speaks directly to the question of whether it is unjust to deport them. Yet when dealing with "unjust" or "unduly harsh" the IPT for both of these children, appellants, both have Mr Guo's offending introduced and tip the scales, and I've already referred the Court to the relevant paragraphs 137 and 156, but also in relation to Ellen, who is a New Zealand citizen, at paragraph 162.

Now of course she's not an appellant, she wasn't before the IPT, but she was a member of the family so her circumstances were considered. In relation to her, this is a New Zealand citizen. Mr Guo's offending was held against her, which, it's submitted, is an extraordinary circumstance really. But the Court – the IPT, was trying to look at the entire family circumstances, so having found that against the other two innocent children they had to find it against the third innocent child, who happens also to be a New Zealand citizen. It is submitted that the element is inadmissible, and if it's inadmissible it would seem to resolve even the IPT's own assessment of what is unduly harsh in favour of the appellants, without even touching a consideration of whether the result is unjust. Because it is the only thing that the IPT identifies that would make it not unduly harsh that they be deported. In fact, my learned friend's submissions – again to pre-empt the defence – in her penultimate paragraph in effect supports that submission. Now paragraph 68 of my friend's submission, the penultimate sentence, it says, and I quote, "The IPT was entitled to conclude the very serious nature of Mr Guo's offending and deception in his residence application outweighed countervailing humanitarian concerns." There is only one thing on the negative side of the scales, and if that is inadmissible it is submitted it is quite clear where the scales must end up.

In the context of whether deportation is unjust, the appellants submit obviously that innocence is determinative of that criteria. Deportation is a penalty which the IPT itself accepts is harsh in its decision at paragraphs 144 and 156. The appellants are innocent, which the IPT has determined as a matter of fact at paragraph 137, which

leads us back to the fundamental submission that it is unjust to impose penalties on innocent parties, again, in the context of humanitarian relief. Rather cheekily, in the written submissions of the appellant, there's a reference to the Magna Carta, which is topical at the moment, it's the only footnote to the written submissions and quotes a longstanding principle that exile is a penalty and, as a consequence of the Magna Carta, of course, a finding of innocence is protection against the actions of State, that is what the Magna Carta, in effect, stands for. The written submissions also use the phrase, "the sins of the father" in order to find a biblical resonance to the application being made, recalling the times when tribes of Israel were first carving out nationhood. The Bible notes that while God may visit the sins of the father on the succeeding generations to the third and fourth generation, Deuteronomy chapter 5 verse 9 and Exodus chapter 20 verse 5, it is prohibited for man to do so; Deuteronomy 24 verse 16, that verse says, "The sins of the father shall be visited on the father, the sins of the children shall be visited on the children –

ELIAS CJ:
Is this a submission that it's unfair? Does it go further than that?

MR DILLON:
I'm saying that the concept of innocence providing protection is so fundamental a principle, it goes back so far in our history and culture, and that the Bill of Rights, Human Rights Act and the ICCPR are merely reinforcing this principle, it is not as if it comes as a surprise.

Now in relation to how the IPT came to this point, the appellants submit there may have been a bit of a trap. Under the 1987 Act the humanitarian appeals were brought under section 105 of that Act, and that is in the appellant's bundle at page 3. Subsection (2) of the 1987 Act sets out criteria for deciding whether or not it would be unjust or unduly harsh –

ARNOLD J:
Sorry, could you give me the section again?

MR DILLON:
Yes, Sir, it's section 105 of the 1987 Act.

ARNOLD J:

105, thank you.

MR DILLON:

And it's page 3 of the appellants' bundle.

ARNOLD J:

Yes, thank you.

MR DILLON:

And it directs the Tribunal to have regard to a list of factors, and subsection (2)(e) specifically requires the Tribunal to consider the nature of the offence or offences of which the appellant has been convicted and from which the liability for deportation arose –

ELIAS CJ:

Sorry, I'm lost too. I thought it was under divider 3 but it's not, it's under…

MR DILLON:

No, sorry, the appellants' submissions are just page-numbered –

ELIAS CJ:

Oh, sorry, your submissions.

GLAZEBROOK J:

No, no, the – this bundle here.

ARNOLD J:

It's also in the respondent's bundle.

MR DILLON:

Sorry, the bundle

ARNOLD J:

Under tab 2, the respondents –

ELIAS CJ:

Yes, tab 2, sorry, I was looking at tab 3.

MR DILLON:

Yes, I believe the section –

ELIAS CJ:

So, (2)(e).

MR DILLON:

This section appears in both bundles.

ELIAS CJ:

And it's section (2)(e)…

ARNOLD J:

No, no, 105, it's –

MR DILLON:

Section 105.

ELIAS CJ:

That's fine, thank you.

ARNOLD J:

And subsection (2)(e).

ELIAS CJ:

Yes, thank you.

MR DILLON:

So under the old Act it is expressly referred to as a consideration in deciding whether it is unjust or unduly harsh to deport the appellant, and the factor is the nature of the offence of which the appellant has been convicted. Now that's to be compared with section 207, which is what these appellants came before the Court under. First of all, there is no such criteria.

ELIAS CJ:

Well, it's in all the circumstances, and you're saying they don't include the father's offending?

MR DILLON:

Well, even under 105…

ELIAS CJ:

Of course they're not being deported for the father's offending, they're being deported for the father's deception, which tainted the application for their residence permits.

MR DILLON:

Well, this submission, Your Honour, is that section 105 was bringing the offences into the consideration of unjust or unduly harsh, but only the offences of the appellant. The children are separate appellants, they have no offences. So even under section 105, this criteria would not apply, and yet the whole issue of Mr Guo's offences and his failures under the Immigration Act have slid into a consideration of these specific appellants. And even under section 105 that does not appear to be part of the criteria the IPT should have been considering, and it is submitted section 207 is an amending Act, has no such criteria. But further, under section 207(2), which you'll find if you're looking at the appellants' bundle on page 8, there is one issue, and it is, "In determining whether it would be unjust or unduly harsh to deport from New Zealand an appellant who became liable for deportation under section 161 it would be contrary to the public interest to allow the appellant to remain in NZ, the Tribunal must have regard to any submissions of a victim." There are no victims in relation to the children inferentially, it is submitted, by virtue of section –

ELIAS CJ:

Well, there aren't any victims in relation to the father either. I'm just not sure really –

MR DILLON:

That rather depends on your philosophical view of whether importation of the largest quantity of methamphetamine in New Zealand's –

ELIAS CJ:

Well, there's no victim within the sense that it's used here, which is a right of, which requires the opportunity to be heard.

MR DILLON:

Indeed, and it is the victim's right to be heard in relation to whether the public interest would be served, which is the third criteria, so it isn't one of the criterias that the IPT got to in this particular case. But the inference to be drawn is that to the effect that if offences are relevant it's only the offences of the appellant, because it's the appellant's victim or victims that would come under subsection –

ELIAS CJ:

Well, it's not, they're not being deported for criminal offending, they're being deported because of the deception in the application.

MR DILLON:

Yes, Your Honour, and that means that if we're looking at whether they were properly liable for deportation notices the answer is, yes, they were, but in the context of a humanitarian appeal, relief against that legal outcome, it is submitted that section 207(2) would indicate that any offences by third parties are irrelevant –

ELIAS CJ:

Well –

MR DILLON:

– cannot be put into the scales.

ELIAS CJ:

– I'm just –

BLANCHARD J:

Well, how can they be irrelevant if it's the concealment of those offences which was the basis upon which, was the reason that they got their residency in the first place? They should not have got that residency.

MR DILLON:

That's accepted. So there's no question that they are liable for deportation. But that does not mean that humanitarian relief is not available to them, it is –

BLANCHARD J:

So you're not allowed to look at how it was that they became residents?

MR DILLON:

No, it's a precondition that they are properly liable for deportation.

WILLIAM YOUNG J:

Well, isn't that a material consideration? In terms of whether it's unjust or unduly harsh isn't it a material consideration – how material may be in doubt – that they are eligible for deportation, they are the sort of people whom the legislature contemplates are likely to be deported?

MR DILLON:

But, well, section 206 makes that quite express, they only can bring one of these appeals if they are properly liable for deportation.

WILLIAM YOUNG J:

Yes, well, but isn't that something that's relevant to whether it's unjust or unduly harsh?

MR DILLON:

Only when it comes to looking at these particular appellants and looking at whether they are guilty of those issues. And when there's a finding of fact in considering that very issue, that they are innocent of those, that is determinative of that specific criteria, that is the submission of the appellants. It's not a complete answer to the section, it is just one of the hurdles that must be jumped as an alternative to the whether it's unduly harsh.

BLANCHARD J:

When you say they're innocent, what are you saying they're innocent of?

MR DILLON:

Of any wrongdoing in relation to how they come to be before the Tribunal seeking humanitarian leave.

BLANCHARD J:

But they've had the advantage of it.

MR DILLON:

Absolutely.

BLANCHARD J:

So to use the term "innocence" is a bit misleading. Certainly they're innocent of any fault of a personal nature, they didn't do any of these things, but they're not innocent in the sense that they haven't had an advantage from what was done.

MR DILLON:

They have certainly had an advantage of being in New Zealand, and they are in New Zealand but they are now liable for deportation. The question is whether these particular appellants, whether, and given that they have already established that there are exceptional circumstances of a humanitarian nature in favour of them remaining, whether these particular appellants, or in their circumstances, it would be unjust.

BLANCHARD J:

But the false statement was made on their behalf.

MR DILLON:

Certainly. And it was false, and that was the father who did that. It could have been an immigration advisor who did that.

BLANCHARD J:

So the nature of the false statement and what underlay it must be relevant.

MR DILLON:

If one was to consider that one and take it through to its logical conclusion, the nature of the false statement in effect in this case was that Mr Guo would not commit a criminal offence or, if he did, would disclose it to the Immigration Department.

WILLIAM YOUNG J:

Well, he's not – well, that wouldn't be much good, would it?

MR DILLON:

Well, one can see why that is not really practical, but that is the false statement, that is the underlying reason for the deportation.

ELIAS CJ:

But they're not being deported because of their complicity in it, they're being deported – and this is why I started by saying I don't think referring to guilt or innocence matters at all, you're much better to stick to the statutory language, and if you accept that they're liable for deportation the basis on which they're liable for deportation must be part of the circumstances to be considered by the Tribunal under section 207, surely?

MR DILLON:

When the Tribunal considers the criteria under section 207 there are three steps to jump through. The first one is whether there are humanitarian circumstances of, exceptional circumstances of a humanitarian nature, that's ticked. There are then two alternatives that can be jumped, such that it would be unjust that they be deported or such that it would be unduly harsh that they be deported, and you can jump one or other of those hurdles if they are true alternatives, and then you must face the last one, was whether there is something in the public interest that works against their continuation in the country –

ELIAS CJ:

Well, why is –

MR DILLON:

– those are the statutory language –

ELIAS CJ:

– not ground on which they are eligible for deportation and the circumstances of it, why is that not relevant under section 207(1)(b)?

MR DILLON:

The difficulty with that is that we never got to that point, and if we did get to that point it's still focusing on the appellants, these particular appellants – is there something in the public interest that these children would, something against the public interest to allow these children to remain in New Zealand? Now that is always going to come down heavily against Mr Guo, given his criminal convictions and failure to disclose. Why would it come down heavily against the children, looking at the children's specific circumstances?

ARNOLD J:

Well, that might be a matter of weight at the end of the day, but as it's been put to you it's very hard to see that it's irrelevant.

MR DILLON:

It's –

ARNOLD J:

Can I raise something, just to make sure I understand your position? The Tribunal seems to have treated the words "unjust or unduly harsh", those two concepts, unjust and unduly harsh, as synonymous. The discussion, I think, as you pointed out earlier in the Tribunal's determination is that it would be harsh to deport the two children who are liable for deportation but not unduly harsh, it doesn't say anything at all about unjustness until you get to the conclusion where it simply says, "We conclude that it would not be unjust or unduly harsh to deport." Now do you say these two concepts are alternatives and they're not synonyms?

MR DILLON:

That is the essence of the appellants' submission. The reason that the IPT took that approach is set out in the case of *Pal and Anor v Minister of Immigration* [2013] NZHC 2070 which, in the appellants' bundle at page 68, paragraphs actually 57 and, to 59, inclusive of that case, which start at page 82 of the appellants' submission. The Court in *Pal*, it's a High Court decision, says, "The juxtaposition of the words 'unjust' and 'unduly harsh', separated by the word 'or', creates a difficulty in the sense that the word 'or' would indicate a disjunctive separation –

WILLIAM YOUNG J:

So just pause there. What paragraph are you reading from?

MR DILLON:

Sorry, 57, Sir, it's at the foot of page 82 of the appellants, "The word 'or' would indicate a disjunctive separation between the two concepts. However they are, as a matter of fact, an application difficult to distinguish." This was recognised in *Esau (sub nom Manutai) v Minister of Immigration* HC Wellington AP320/98, 5 October 2000 where it was observed, "I think that the expression 'unjust or unduly harsh' is best regarded in a composite way. A deportation which is unjust is also likely to be regarded as unduly harsh and vice versa. No doubt 'unjust' has shades of meaning which differ from those of 'unduly harsh'. But it seems to me to be unreal to expect those administering this Act to approach the phrase as requiring discrete inquiries, first, whether the order is 'unjust' and, secondly, if it is not 'unjust' whether the order can be regarded as being 'unduly harsh'." This approach has been adopted in other cases, it was criticised by Doogue J in *Ansell v Minister of Immigration* [2011] NZAR 999 (HC), where it was suggested that the words could not be approached in a composite way. However he noted that it is, "Sufficient if the assessment has been made disjunctively and the Tribunal has objectively considered whether deportation would be unjust or unduly harsh."

WILLIAM YOUNG J:

But it can't – I mean, I think this is probably all my fault –

ELIAS CJ:

Yes.

MR DILLON:

That's the very next…

WILLIAM YOUNG J:

– because it all goes back to a case called, which I think was correctly called *Manutai*, which I decided in 2000, but I don't think I had in mind an approach under which you just it as though the words 'unjust' are ignored.

MR DILLON:

Yes, Sir. Well, the very next paragraph –

WILLIAM YOUNG J:

The possible complaint you have is that they have treated "unjust or unduly harsh" as meaning unduly harsh.

MR DILLON:

Indeed. And it is submitted that they are, that the *Esau* paragraph that's read into this judgment sets it quite correctly, it's difficult to distinguish these concepts, and one can understand that if it's unjust it's likely to be regarded as unduly harsh and vice versa. The difficulty with that approach though is that it assumes you've jumped one of the hurdles. If it is unjust then you would regard it also as unduly harsh. If it is unduly harsh then you would regard it as unjust. But it doesn't address the principle if you fall at one of the hurdles. If it is not unjust does that mean it is not unduly harsh? If it is not unduly harsh, does that mean that it is not unjust? It's submitted that if you fall at one you may still clear the other. It is conceivable, for instance –

ARNOLD J:

Well, I suppose there might be slightly different ideas at work. I mean, the idea of "unjust" may bring in the notion of deserts, just deserts, and it's there perhaps that your arguments about innocence might come into play, whereas the "unduly harsh" one one might interpret it as looking more at personal circumstances, living, separation from friends, things of that sort, so one might argue that the notion of "unjust" brings in, if you like, a slightly broader perspective possibly than "unduly harsh". But anyway, the Tribunal, certainly in its analysis, has talked only about "unduly harsh" and not about "justness" at all.

MR DILLON:

Yes, and you can see how they've come to that conclusion, looking at the *Pal* decision. It seems to say, "Well, you regard the two as a composite test," it's –

ARNOLD J:

Yes.

MR DILLON:

– it's actually one hurdle. It's submitted that that's not quite correct, that the examples that I'd draw to the Court's attention would be the instance of a guilty applicant, he's been convicted of serious criminal offending, he's humanitarian relief, it is not unjust to deport him, yet the place that he will be deported to is a place where

he will be persecuted, that may be unduly harsh even though it is not unjust. Equally, one could have appellants seeking humanitarian relief who, if they suffer deportation, they'll be going off to a first world country, it could hardly be regarded as unduly harsh, and yet they might be before the Tribunal because of, for instance, the fraud of their immigration advisor, nothing to do with them, and without that fraud they would still have been able to have gained valid immigration status in New Zealand. So they are not only innocent but worthy, if you like. So it would be unjust, even though it would not be unduly harsh in those circumstances. And of course in the instant case we're submitting that the appellants' here fall into that latter category, that it would be unjust because of their innocence, even if the IPT has determined that it is not unduly harsh.

It's further submitted, thinking that through, the distinction between the alternatives may be that the criteria of "unjust" does address why you are liable for deportation, whereas the criteria "unduly harsh" addresses the consequences to the appellant.

ELIAS CJ:

I don't know why that should necessarily follow because if something is disproportionate it may be unduly harsh to give effect to it.

MR DILLON:

One can certainly envisage circumstances where those two criteria just are in complete lockstep, you couldn't look at that without saying, "Well, that is both of these things." It's when one looks at circumstances where you can see them as separate.

ELIAS CJ:

So are you relying on "unduly harsh" as well as deportation would be "unjust" and, if so, what's the difference in reliance you place on both of those two?

MR DILLON:

In the present case, because of the fundamental submission that the innocence of the children is the only thing that should be looked at and that the guilt of the father should not be weighed in the scales at all, once the guilt of the father is taken off the scales it still ends up as unduly –

WILLIAM YOUNG J:

I don't think anyone's saying – yes, I don't think anyone is saying the guilt of the father's relevant. All they're saying is that an application made on behalf of your clients was false. Now that's, I mean, I think it's a confusion of ideas to keep on suggesting that the father's guilt is being attributed to the appellants. The Tribunal, and anyone else dealing with it, is entitled to have regard to the fact that they obtained representation – residence on a false representation. Now it's material also of course that it wasn't their false representation, and all sorts of things have happened since then. But I just think that you're sort of running into trouble by, you know, putting the argument higher than it can realistically be advanced.

MR DILLON:

Well, with respect, Sir, even Your Honour's explanation of the principle reinforces the appellants' submission. The appellants are here because a third party misrepresented their position to the immigration authorities. But they are innocent of that.

WILLIAM YOUNG J:

Yes, I think you've got to move on from that –

MR DILLON:

Therefore it is unjust.

WILLIAM YOUNG J:

– because we, we really understand that. I mean, for myself I'm more interested in perhaps a more textual analysis, along the lines of Justice Arnold's that the Court of Appeal – the Immigration and Protection Tribunal appears to have focused on "unduly harsh", not giving much weight to the words "unjust". I'm also interested in, as it were, the transition that occurred when Mrs Hong disappeared and it became apparent that the option of one family united wasn't realistic any more, and at that point it may be that the Tribunal should have engaged more directly with whether leaving the children in New Zealand was a realistic option that they had to address in terms of what was unjust or unduly harsh, which they didn't really address in any specific way in their decision, probably because that hadn't been seriously advanced as an option when Mrs Hong was still in New Zealand. So for myself I'd find a sort of a, a sort of a less high-blown, high-flown, argument more attractive.

GLAZEBROOK J:

Is there also a possibility of saying that the integrity of the immigration system should have come under the public interest and not actually in an assessment of "unduly harsh" and was, if it's relevant at all, I know you say it's not, or at least you certainly say it's not at that level.

MR DILLON:

The submission of the appellants would be that when they come before the IPT in addressing that third criteria, that there is nothing to be laid at their door in relation to public interest concerns, they're for others in a very different position when it comes to that third hurdle.

GLAZEBROOK J:

But in any event that stage was not reached by the Tribunal.

MR DILLON:

It wasn't. So that is not why leave is being sought to argue these points in front of the High Court if we are successful before this Court.

WILLIAM YOUNG J:

I mean, the question you've just been asked does raise a question that I sometimes wonder about, the idea of "unduly harsh" suggests that some sort of comparison is appropriate, harsh, but not unduly so, is an approach that the Tribunal takes. Now, "undue" by reference to what? By reference to other immigration cases where people go back, are sent back, or by reference to the proportionality of the deportation in terms of the cause, is there specific authority on that issue?

MR DILLON:

I couldn't put my finger on something that would address, if you like, the character of the analysis, but the practice appears to be to consider the consequences of deportation, and this decision, for instance, reviews in some detail what will happen to these appellants in China, to consider whether these consequences will be unduly harsh for them.

WILLIAM YOUNG J:

So it's by reference to, presumably, the way it might affect other people? I mean, that's one possible comparison, it's not one that has huge appeal to me but that is one possible comparison.

MR DILLON:

It seem – well…

GLAZEBROOK J:

Is just something can be harsh, just in terms of what they say about the boy, I think, it will be harsh for a little while then he'll get used to it, it will be harsh for a wee while for the older girl but she'll get a job in the end?

MR DILLON:

Yes, I think –

GLAZEBROOK J:

So it's "undue" in respect – apart from the issue of the consequences for the fraud in the first place, that seems to be the way they're looking at it, it's harsh but not badly so, which is a possible, "unduly" can mean that.

MR DILLON:

The analysis seems to be an acceptance that, first of all, deportation is always going to be harsh because New Zealand is paradise and anybody deported from New Zealand is going to suffer some harsh consequences. The question is just how harsh are those consequences, and in making that analysis the IPT determined that it was not unduly harsh. But in deference to the IPT, that is a matter of their specific expertise, and that is very much a weighing issue for –

WILLIAM YOUNG J:

That means, I mean, that would suggest that harshness is measured against the run of case people are sent back to other countries. It may leave a bigger role for the word "unjust" which is presumably referable to the, whether that measure of harshness is just to visit on this particular applicant or appellant. I mean, that's really what I'm, I suppose, interested in in this aspect of the case.

MR DILLON:

Yes, well, this seems to – in my earlier submission it was that the difference between these two criteria, "unjust" and "unduly harsh" do appear to raise different types of consideration, and the question of whether it is unjust does tend to raise issues around the circumstances relating to these appellants and the deportation liability imposed upon them in relation to these appellants, which takes us back to Your Honour's proposition that third parties' wrongdoing is why they are here, but they are innocent of it, and that is the question of whether it is unjust or not. And the example of that, well, there are two examples of that, one from the plaintiff's bundle, the *Pal* case that I've already referred to I think twice in these submissions, at paragraphs 16 to 31 of that case there is analysis of these types of issues in relation to that particular appellant, and it is an interesting factual issue, but the conclusion of that analysis is that, at paragraph 31, "On the balance of probabilities fraud on behalf of both of the applicants was established." So in terms of analysis of injustice these applicants in the *Pal* case were guilty. And in my friend's submission she has got the case of *Poulter v Minister of Immigration* [2013] NZHC 3287, which is at tab 12 of her bundle, and at paragraph 2 we have the answer to the question of injustice in Ms Poulter's case, Ms Poulter was sentenced to three years' imprisonment after pleading guilty of 17 charges of obtaining a pecuniary advantage by deception. In both those cases it is the applicant's own guilt which is on the scales.

WILLIAM YOUNG J:

Well, in a case where it's the applicants' guilt, the words "unjust or unduly harsh" probably are synonyms.

MR DILLON:

Probably.

WILLIAM YOUNG J:

I mean –

MR DILLON:

Well, perhaps not, but perhaps it focuses the mind on what is unduly harsh. Perhaps it is not unjust for somebody who had the benefit of residence and has failed to disclose in getting that grant that they have been committing criminal acts, it is not unjust that that grant be removed from them. But it still may be unduly harsh, and therefore the focus switches to what are the consequences to this particular appellant

in terms of what will happen to them, what is the likely outcome for them, if humanitarian relief isn't granted. But again, they would have to first have established that there were exception circumstances of a humanitarian nature in their favour before, given that they will not clear the "unjust" hurdle, whether they may clear the "unduly harsh" hurdle, in which case the final issue of public interest would be considered and of course their guilt again would come back into the scales in relation to that issue in a way that, in this case, the innocence of the children would be the answer, should that come before the IPT if leave is granted.

The next point I'd like to touch on is this question of discrimination. The short point is this, that no other applicant for humanitarian relief has Mr Guo's failures raised against them when it is considering whether it is unjust or unduly harsh that those applicants be deported. These applicants suffer that due to their family relationship. Certainly it was the reason that they were subject to deportation liability notices in the first place, so it is there. But those failures shouldn't continue over into a consideration of whether it was unjust or, indeed, unduly harsh. It is particularly notable that if Mr Guo's offending and failures are taken off the scales, even in relation to the IPT's assessment of what is unduly harsh the scales seem to tip back in favour of the appellants. So quite apart from whether it was unjust, if we take this factor off the scales they tip in favour of the appellants. But again, that is a weighting issue, fundamentally the error or law is whether they should have been in the scales in the first please.

BLANCHARD J:
Are you saying these people, these children, are being treated differently from other children in like situation?

MR DILLON:
Other children don't have Mr Guo's offences against them.

BLANCHARD J:
Well, there you get into a question of comparator. Surely the comparator would be other children whose parent has committed a serious offence, and perhaps the proper comparator is other parents whose children have made, whose parent has made a similar declaration on their behalf.

MR DILLON:

Yes, Sir, and that's why this is a matter of general and public importance. If the Crown's position is that they habitually discriminate in that way then they are systemically discriminating on the basis of a prohibited –

WILLIAM YOUNG J:

Well, but wouldn't, isn't it better to take another comparator: can children whose residence has been obtained by a false representation, for instance by an immigration agent or someone else? I mean isn't, I mean, it's got nothing, the fact that their, it was their father that made the false representation isn't really material to this aspect of the case.

MR DILLON:

But it – I take Your Honour's point, and that is really addressing the heart of what is unjust, and that is the specific criteria under section 207. If this is the act of a third party then it must be unjust that they be deported.

BLANCHARD J:

Well, that, you've gone back to another argument there.

MR DILLON:

Well, I'm responding to a question, Your Honour.

BLANCHARD J:

The point here is that it's not discrimination.

MR DILLON:

With respect, it must be discrimination to link the father to the children in this context.

BLANCHARD J:

That's not discrimination. Discrimination is treating people differently from others in a similar situation.

WILLIAM YOUNG J:

Yes. To postulate false, residence obtained by false representations made by someone who is not the father of those who obtained residence, wouldn't they be treated exactly the same way as these children?

MR DILLON:

It is unlikely that the question of injustice or whether it is unjust would be held in the same way. That is, we have addressed the reasons that they're here, that is a given, and it was something completely unrelated to them. It seem in this –

BLANCHARD J:

Have you got any evidence backing that proposition?

MR DILLON:

In terms of statistical analysis, no, Sir.

BLANCHARD J:

So it's a hard one to make, isn't it?

MR DILLON:

Except that it is explicit in the decision that's being appealed, Sir.

BLANCHARD J:

I don't follow that at all. It seems to me there's no discrimination here.

MR DILLON:

Sir, if –

BLANCHARD J:

You've really got to look at case law on discrimination, and you don't appear to have done any analysis based on that.

MR DILLON:

Certainly no statistical analysis on that basis. The question is simply whether the sins of the father can be held against the children.

BLANCHARD J:

Well, it's not as simple as that. Discrimination cases require a close analysis of the comparator that is being used. Without that, the case doesn't get off the ground.

MR DILLON:

The comparator –

BLANCHARD J:

It seems to me that this is not a very strong point.

MR DILLON:

The comparator, Sir, in this case is that family relationship.

BLANCHARD J:

It can't be. Far too narrow, as Justice Young was pointing out.

MR DILLON:

It's, if we take –

BLANCHARD J:

This is misconceived.

MR DILLON:

Sir, if we –

BLANCHARD J:

Have you looked at *David McAlister v Air New Zealand Ltd* [2009] NZSC 78 for example, the, I think is this Court's decision on discrimination? There there's close analysis of what the appropriate comparator should be, and that flows from the English case law. I just don't think this point's arguable.

MR DILLON:

Sir, I can see I'm butting my head against a brick wall.

BLANCHARD J:

Well, you are in my case. Others may be more malleable.

WILLIAM YOUNG J:

Yes, two brick walls actually.

GLAZEBROOK J:

I think it could be found there are a few others as well.

ARNOLD J:

Yes.

GLAZEBROOK J:

Just in terms of the discrimination aspect of it.

BLANCHARD J:

Yes.

MR DILLON:

If – the reason that it is presented in that way as discrimination is because it is so basic to this unjust criteria –

BLANCHARD J:

It's just a variant of your "unjust" argument, which I thought you'd moved on from.

MR DILLON:

It – yes, Sir, it's certainly an element. It's seen really as a reinforcement of this question of what is unjust in these particular circumstances. I think in my opening oral submissions put what the fundamental proposition was and that these issues reinforce the fundamental submission.

ELIAS CJ:

Mr Dillon, what stage of your submissions are you at?

MR DILLON:

Actually hopefully to the wrap-up, Your Honour.

ELIAS CJ:

Yes.

MR DILLON:

The proposition is that if the children are innocent of the failures that led to them being liable to deportation, that must be determinative in relation to the specific criteria of whether it would be unjust to deport them, that is only one of three criteria, but just as if they were guilty of the failures that led them being liable it would not be unjust in the cases of *Pal* and *Poulter* support that proposition.

In this particular appeal the issue is an application for leave under section 245 of the Immigration Act and the criteria are that there is an error of law on a question of general or public importance or for any other reason leave should be given. It's submitted that compliance with the Bill of Rights, Human Rights Act and New Zealand's international obligations meet that criteria, but as to a general concern for what in the context of a humanitarian appeal is address by the criteria of, quote, "unjust", end quote. That the IPT is willing to punish the innocent and decide such a result is not unduly harsh, without regard to whether or not it is unjust, is, it is submitted, also of general or public importance –

ELIAS CJ:

Well, we're really only concerned with whether there are errors of law which should be considered by the High Court. So perhaps you should, in wrapping up, concentrate on what are the errors in the decision of the Tribunal which justify leave.

MR DILLON:

The written submissions have set out those factors and do so as a cascade of issues in the sense that, if A, then B, and possibly if A then C but certainly if A and B then C and so on, so the factors relate –

ELIAS CJ:

Well, can we just state the propositions a little bit more succinctly? Your principal one is that the offending of the father was irrelevant under section 205, is that right?

MR DILLON:

Effectively, yes – under 207.

ELIAS CJ:

207, I'm sorry, yes.

MR DILLON:

Other than the fact that it gives the context as to why they are before the Tribunal seeking humanitarian relief.

ELIAS CJ:

Well, it makes them – well, it's not the offending that makes them eligible, it's the non-disclosure of the offending that makes them eligible for deportation. But you say once they're eligible for deportation these, those circumstances are irrelevant?

MR DILLON:

Yes, because they were innocent of that particular issue.

ELIAS CJ:

Yes.

MR DILLON:

It's certainly why they're there, but they are innocent of it. And that raises the question of what is unjust in the context of section 207.

ELIAS CJ:

So your first point is that they were in error in treating the offending as relevant, and the second is that they have not dealt with injustice as opposed to "unduly harsh"?

MR DILLON:

Indeed. Those are the two core factors, and the application for leave addresses that in as many ways as possible for the, in the expectation that one of them may resonant.

WILLIAM YOUNG J:

And perhaps some that are not possible.

MR DILLON:

That is always a prospect, but of course if they aren't proposed then they're never going to be considered, Your Honour.

WILLIAM YOUNG J:

Can I just – has Mr Guo gone back to China?

MR DILLON:

No, Sir, he is currently remaining in New Zealand. I understand the Immigration Department is awaiting the outcome of the applications in relation, for the children,

before taking any steps, but in the meantime he's filed a communication with the UN Human Rights Committee addressing his double jeopardy argument effect.

WILLIAM YOUNG J:
Well, good luck with that. Thank you.

ELIAS CJ:
So those are the two points of law essentially –

MR DILLON:
Those are the essential two points of law and they're expressed –

ELIAS CJ:
– which you say are matters of –

MR DILLON:
– in a number of alternatives.

ELIAS CJ:
– public importance because they concern the operation and interpretation of this piece of legislation?

MR DILLON:
Indeed.

WILLIAM YOUNG J:
And just can I – I take it that if the children are given leave to appeal he will presumably endeavour to leverage off that an application for residence himself?

MR DILLON:
This case has had such a Byzantine course through the IPT and the Courts that my clients actually find some difficulty in just understanding what their position is at any particular point in time.

WILLIAM YOUNG J:
So Mrs Hong is in China?

MR DILLON:

Mrs Hong is – she went to China because, I think it was her mother died –

WILLIAM YOUNG J:

Yes, I know it, but she's in China?

MR DILLON:

Yes, she is in China. The eldest of the two appellants before the Court has married and has a child so –

WILLIAM YOUNG J:

Yes, I know that too. I just really asked – I mean, when you look at, I suppose, the thing in the round, I have huge sympathy for your clients. I don't have much sympathy for Mr Guo.

MR DILLON:

And –

WILLIAM YOUNG J:

And in terms of, you know, a situation where he may get, seek to get some benefit out of the position for the children –

GLAZEBROOK J:

Well, I don't think he can because I think he's banned for a certain, Ms Griffin's –

WILLIAM YOUNG J:

No, but he's still in New Zealand.

MR DILLON:

Yes.

WILLIAM YOUNG J:

So, I mean, I'm just, in saying that, and I'll be interested to see what Ms Griffin has to say, but it does sort of detract slightly –

ELIAS CJ:

Well, your answer to that is that the children have to be considered on their own merits and on the law applicable to them?

MR DILLON:

Indeed. In fact, when we refer to Mr Guo you can see how his circumstances really cast an adverse gloss on the position of the appellants themselves who are, well, certainly the oldest girl is now actually making her own life, you know, quite separate from what may happen to her father.

ELIAS CJ:

Yes.

MR DILLON:

Those are the submissions for the appellant.

ELIAS CJ:

Thank you, Mr Dillon. Thank you, Ms Griffin.

WILLIAM YOUNG J:

Can you tell me why Mr Guo hasn't been deported?

MS GRIFFIN:

Yes, Sir. The primary reason of course is because Mrs Hong isn't here and we're dealing with minor children in New Zealand. While, yes, they have an elder sister, from Immigration New Zealand's perspective they're considering the best interests of those minor children and the need for them to have a parent in this, effectively interregnum point in time until it is finally determined what is to happen with particularly Jiaming's appeal, because he's the young minor child, Ellen of course is a New Zealander and what will happen to her will flow, what happens to her younger brother. So for that reason, essentially it's out of the good faith of the Immigration Department not to send Mr Guo away now, which they would be entitled to do.

WILLIAM YOUNG J:

So if the children were able to stay in New Zealand how would that affect Mr Guo's position?

MS GRIFFIN:

What would happen is that – it's difficult, because this is not an unlawful overstayer situation where there's always a humanitarian interview. The reality is that because you have minor children staying in New Zealand Immigration would want to look to who is caring for them. You'd have to ask what's happening to Jiaxi, of course, in that equation, if we're assuming that her appeal is granted, not just Jiaming's, and that potentially would mean that Immigration New Zealand would be able to move against Mr Guo because there would be an adult there. But they would certainly consider the situation of the children before making a final decision on the execution of the deportation order, but the reality is, as Your Honours will be well aware, that Mr Guo, once these appeals are determined, if they're determined against the children certainly, he's on the way to the plane. I guess, Your Honour, the point is, it's difficult to say at this point in time when we don't know what that outcome is, and Immigration New Zealand certainly wouldn't want to be closing its mind to whatever circumstances it could potentially face for these children, say there was an accident or – touch wood – something like that. You know, these are humanitarian circumstances and the Government is committed to ensuring that they are looked at. So at least for this point in time while we don't know what's happening with the children's appeal they're prepared to wait for Mr Guo's deportation.

ELIAS CJ:

If Mrs Hong had been let back in, presumably they could have moved on Mr Guo?

MS GRIFFIN:

Presumably, Ma'am, that would be a materially different situation, yes.

ELIAS CJ:

Yes.

MS GRIFFIN:

And that is, so that is critical, really, here, and in my submission quite appropriate and fair for the Immigration authorities to take that approach.

WILLIAM YOUNG J:

So what happens – and I'm not suggesting this would happen here – what happens if someone like Mr Guo says, "Well, I'm not going to Ellen back, she can stay here and I'm just leaving her and she, it's up to the New Zealand state to sort her future out"?

MS GRIFFIN:

Well, I think it would depend when he said that. If he said that before the IPT, for example, that may have quite a bearing on, on outcomes. If he said that after that was finally determined it would be a very difficult question, because she's a New Zealand citizen and she would most likely fall under the jurisdiction of the Ministry of Social Development, because she's a minor child and there must be a responsible adult, unless of course that could be Jiaxi, the older sister, and those things would be looked at, but that would be something for Social Welfare to work out, and that's why these cases are so difficult and why it's so important for the Tribunal, certainly, to ask what are the parents intentions here, when you're considering things like best interests of the children.

WILLIAM YOUNG J:

I suppose what troubles me a bit is that for reasons associated with the way events panned out, particularly Mrs Hong's departure to China, the possibility of the three children staying in New Zealand was never really addressed in a coherent way, and for that reason there's never been a determination addressed to whether it is unjust or unduly harsh to deport them as a stand-alone exercise. Now you say that's their fault because it wasn't argued in the Tribunal, but they didn't really, the circumstances changed between the argument and the final decision because Mrs Hong left.

MS GRIFFIN:

I don't mean it, Sir, in the sense that it's their fault, as such, I would say it's their choice, so, and that's what's very, very important in these types of immigration appeals, you know, what is the case that they are making? Now even when Mrs Hong left it was not the applicants who were telling the IPT that Mrs Hong had left, that was a sequence of events that arose when counsel for the Minister realised that had happened and spoke to counsel for the appellants. At that point in time the IPT was advised and counsel for the appellants knew that. Now counsel for the appellants did not make any further submissions, did not seek the right to make any further submissions that the situation was different in terms of how the children, the minor children that is, might live in New Zealand if their older sister was still here. So they didn't, they didn't make that case. Now I accept it's a short period of times between the recall decision and the subsequent decision, but it's important to think of it in the context of what's happening in 2013 compared to how Jiaxi might see her

ability to care for her younger children today as a married woman with another young child.

WILLIAM YOUNG J:
Well, two or three years have elapsed.

MS GRIFFIN:
Yes, Sir.

ELIAS CJ:
Well, why are the children not separately represented is…

WILLIAM YOUNG J:
Yes, the thought that occurred to me, that it's really, the case has been presented on a basis that was most favourable to Mr Guo and Mrs Hong, not particularly favourable, as it's turned out, to the children.

MS GRIFFIN:
Well, firstly, there's no independent requirement that children have, say, counsel for the child, for example, in immigration proceedings, and Your Honour's looked at this in *Ye v Minister of Immigration* [2009] NZSC 76, where of course there what had happened in the process of the High Court phases His Honour Justice Baragwanath had raised this issue that children should be separately represented in the balance. Now what was ultimately found there was that fundamentally in these cases the children's interests will ordinarily be best represented through their parents, through their custodial parents who have the power to decide where they live, as Mr Guo and Mrs Hong absolutely had, the State couldn't determine that. And so their interest then flowed through counsel for the appellants, which included him being counsel for the children as well, and he makes separate submissions with respect to the children. Now whether he did that job as well as could be expected, in my submission he did do a very good job and can't be criticised. But it's not, it's not an error law as such that there's no lawyer independently there for the children –

WILLIAM YOUNG J:
But you see, if you look at it, leave Mrs Hong out of it because she's in sort of an intermediate position.

MS GRIFFIN:

Yes, Sir.

WILLIAM YOUNG J:

Mr Guo's best case was that the children would have to go back to China with him if he was deported, and it was so unjust for them that it would be in effect unfair for him. Now that, whether that's ever articulated precisely in that way, I'm not sure, but that's the guts of what he was saying. Their best case is, Dad's the villain here, we want to stay, and if we can get citizenship we'll go back and see him in China in due course, but, I mean, they really were different cases, they had different – sorry, they weren't different cases, the problem is they weren't – but there were different lines of attack available to them depending on whether they went independently or went with Dad.

MS GRIFFIN:

I accept that, Sir, I accept that that could be a litigation strategy, for example, in these deportation appeals, but that was not –

GLAZEBROOK J:

Well, it's not so much a litigation strategy, is it, it's what is in the best interests of the children. To be frank, I've always thought that the children should be separately represented in many of these cases because their interest are different but…

MS GRIFFIN:

Well, Ma'am, I think, it depends how their interest are going to be characterised, and here, while of course Jiaming and Ellen, they're young children, they're not going to say anything more than, "I want to be with my Mum and Dad," that's the reality, so where the adults are going to come in in separate representation and say something different, yes, that's always possible, but in this case fundamentally this was a family unit wanting to stay together, and so what the IPT here did, and I say did very well, they set up early in their decision – this is at paragraph 11 – that – I'll let Your Honours find that in the bundle…

WILLIAM YOUNG J:

This is the, this is at tab F?

MS GRIFFIN:

Yes, Sir, the new decision, the second decision, paragraph 11. Now the point the Tribunal here says is notwithstanding that the appeals are to be addressed in this way, meaning in this sequential manner going through each one of them, "for the sake of clarity, it is important that we record that the decisions on all the appeals are made contemporaneously, so that the outcome in respect of each appeal is reached in the knowledge of, and in light of, the outcomes of all of the appeals". I point to this because it's relevant to Mr Guo's outcome – well, Mr Guo was never in a very good position, let's be frank – but when you turn then over to 161 when the children, the issue for children are coming into stark light, you see what the IPT here is signalling in its second sentence, "We have given specific consideration to the question of allowing all of the appeals, given that the outcome would be the only way in which Ellen could avoid either separation from part of her family (her father) or moving with her family to China." So they're looking here, in light of what Your Honour said in the decision in *Ye*, what is in the best interests of the children in terms of if it's to stay in New Zealand ought the parent stay, ought their appeal be allowed, and so that there applied to Mr Guo, despite the fact they had a separate section of their decision that dealt with him conclusively, the signal in paragraph 11 is to read the whole decision as a whole to show that in coming to that conclusion they were looking to the impact on the other appeals from the perspective of the other appellants.

WILLIAM YOUNG J:

Just look at the position of Jiaxi. I mean, she was actually a, even in 2012/2013, a credible immigrant to New Zealand. She was 22, she was –

MS GRIFFIN:

22.

WILLIAM YOUNG J:

– almost finished a degree, she was fluent in English and Japanese as well as, presumably, Chinese, perhaps more fluent than she was prepared to acknowledge in Chinese, Mandarin –

MS GRIFFIN:

Yes, Sir.

WILLIAM YOUNG J:

– so, I mean, for her to stay in New Zealand alone was always a viable option.

MS GRIFFIN:

Yes, Sir, alone, by herself, that's right, she could have succeeded.

WILLIAM YOUNG J:

And that's not really addressed, is it?

MS GRIFFIN:

Yes, Sir, absolutely, it is.

WILLIAM YOUNG J:

Well, whereabouts.

MS GRIFFIN:

So I would say if you, perhaps paragraph 29 of the IPT decision – sorry, page 29, I beg your pardon – after the appeals on facts have all been dispensed with, and so it commences its discussion of humanitarian appeals for Ms Guo, meaning Jiaxi and Master Guo, Jiaming, it sets up the principles of law there, and then the first, under the first part of the test on exception circumstances we deal with Jiaxi first, her circumstances, set out here –

WILLIAM YOUNG J:

Sorry, I've sort of slightly lost you actually.

MS GRIFFIN:

Oh, beg your pardon, Sir.

WILLIAM YOUNG J:

So that's at page 31?

MS GRIFFIN:

Page 30, you'll see there's the heading, "Whether there are exception circumstances of a humanitarian nature," and then next heading, "Ms Guo, Jiaxi."

WILLIAM YOUNG J:

But so, sorry, okay, can you just go back to 116, where they talk about family unity?

MS GRIFFIN:

Paragraph 116?

WILLIAM YOUNG J:

Yes, on page 29.

MS GRIFFIN:

"Family unity," Sir, is it 116 or is it…

GLAZEBROOK J:

Or do you mean 120, the bottom of the page?

MS GRIFFIN:

120, yes, Sir, just briefly there.

WILLIAM YOUNG J:

I saw 116 that they were looking in terms of a family unity argument.

ELIAS CJ:

116?

WILLIAM YOUNG J:

29? I may be looking at the wrong document.

GLAZEBROOK J:

I think you might be –

WILLIAM YOUNG J:

Oh, sorry.

GLAZEBROOK J:

I think you might – it's paragraph 120, where they are talking about family unity.

MS GRIFFIN:

They raise that as one of the, of the legal principles, that's dealt with later in the decision, that 120, Sir.

WILLIAM YOUNG J:

I just rather, I mean, I may have, I may just have read it differently from you. I rather thought that they were dealing with her in terms of staying with all the family in New Zealand or staying with all the family in China.

MS GRIFFIN:

Here, I think that's where, ultimately that's the outcome everyone wanted, so when the decision is presented you see all of that sort of commentary about whether they can all stay together or whether they're going to be separated or some are going back to China, certainly there's that discussion. But when looking at the decision closely here you see very individualised discussion about Jiaxi –

GLAZEBROOK J:

Well, isn't it individualised about her staying here with the family, I think that's what's being put to you, staying here –

MS GRIFFIN:

Yes.

GLAZEBROOK J:

– with all her family or going back to China with all her family. There's no consideration of her staying by herself either with or without her siblings in New Zealand, is there?

MS GRIFFIN:

Well, Ma'am –

GLAZEBROOK J:

Now, I think you say in your written submissions that's because that was never put, and I think you have a, that she was very unsure whether she would want, wanted to in any event –

MS GRIFFIN:

Yes, she wanted to.

GLAZEBROOK J:

– in, at least in the, well, she just said she was unsure, didn't she?

MS GRIFFIN:

Yes.

GLAZEBROOK J:

What's troubling me, Ms Griffin, is that in a sense all this argument about Jiaxi is a bit of a waste of time now, because things have moved on so far. Her situation now is rather different from the way it was when this decision was made.

MS GRIFFIN:

Absolutely, Ma'am.

GLAZEBROOK J:

I just wonder why the Ministry's bothering, because it screams out that it's got to be readdressed in light of the current circumstances.

MS GRIFFIN:

Well, the first point about it, Ma'am, is that there's a statutory process for this and it's invoked –

BLANCHARD J:

Well, maybe, but, you know, we've got a case here in the Supreme Court which is going to be argued out on a set of facts that's completely out of date.

MS GRIFFIN:

With respect to Jiaxi?

BLANCHARD J:

Yes. And then that will have flow-on effects for the others, presumably.

MS GRIFFIN:

It's certainly relevant to the suggestion that we would go forth on a substantive appeal on these points with respect to Jiaxi, because she has a separate basis on which she can apply to stay in New Zealand.

BLANCHARD J:

But it is all a bit of a waste of time.

MS GRIFFIN:

Well, it's a waste of time to undermine the IPT's decision on that basis, absolutely, Sir, I agree, and that's why the Minister has to defend that decision –

WILLIAM YOUNG J:

But it doesn't have to defend it, I mean, there are –

BLANCHARD J:

No, it doesn't have to defend it at all, it could just do something practical.

MS GRIFFIN:

Well, Sir, it – for a start, the Minister has to make this decision, so an immigration officer can't do it, that's the first proposition, because the power is an express power of the Minister, it's not one that's been delegated down to a delegated decision-maker.

BLANCHARD J:

Does the Minister not get advice from his officials these days?

MS GRIFFIN:

Yes, oh, certainly, Sir, certainly, Sir, and that advice can certainly be put up and it would be put up.

BLANCHARD J:

Well, why is it not being put up?

MS GRIFFIN:

Well, Sir, there's, one, there's no, there's no guarantee that Jiaxi here would succeed on such an application to suspend or cancel liability for deportation. Now –

BLANCHARD J:

Well, she, look, she's married to a New Zealand citizen, she's now got her own New Zealand citizen child, she was, to use Mr Dillon's expression, even thought I don't completely agree with it, "innocent", you're not going to deport her.

MS GRIFFIN:

Yes, Sir. Well, Sir –

BLANCHARD J:

It would be an irrational decision.

MS GRIFFIN:

Sir, the question might be posed to Mr Dillon, why has she not sought that? Now, I, she's –

BLANCHARD J:

Well, maybe it has. But why isn't the Ministry talking to the other side about this, rather than pursuing litigation or allowing litigation to be pursued at huge public expense?

WILLIAM YOUNG J:

I must confess, I'm entirely with Justice Blanchard on this –

MS GRIFFIN:

I –

WILLIAM YOUNG J:

– I think the prospect –

MS GRIFFIN:

– understand the point, Sir –

WILLIAM YOUNG J:

Yes.

MS GRIFFIN:

– and certainly –

ELIAS CJ:

And it's then that –

MS GRIFFIN:

– immigration decisions are made every day, I'm not saying it can't be made. But Jiaxi's not the only person in this equation, so –

BLANCHARD J:

Yes, but there's going to be flow-on effects –

ELIAS CJ:

Yes.

BLANCHARD J:

– depending upon what happens with her.

MS GRIFFIN:

Well, Sir, this is where I'm not sure it is so clear. Because if Jiaxi was able to succeed in having her deportation liability cancelled, for example, that doesn't necessarily mean that things change for Jiaming, she –

BLANCHARD J:

Exactly, but you can then get on look at things in light of that and decide whether it does or does not change things for Jiaming, instead of what we're doing here which is a lot of shadow-boxing.

MS GRIFFIN:

Yes, Sir, I potentially can't take it any further in the sense that I have no, I have no instructions to put this before the Minister, it's not –

BLANCHARD J:

And you can't get instructions?

MS GRIFFIN:

Well, I, if Your Honours wanted to adjourn I could certainly ask the question and come back. But all I say is that it's not, it has to be, the question has to be asked why has not Jiaxi asked, there has been no approach on that basis either. So it's not

that the Minister or Immigration New Zealand is stopping this in any way, the family who are pursuing this appeal and have kept pursuing this appeal –

BLANCHARD J:
I understand that, but I would have thought good lawyering would have been an approach to the other side to ask what they were intending to do in this respect, rather than just letting things come up through the Court system when circumstances have obviously changed.

MS GRIFFIN:
But, Sir, I would say for example, on that point, this issue about section 172 for Jiaxi, I raised this in the High Court, I raised this in the Court of Appeal, I've raised, I've made this very clear that this is an option for her, that it's an application she needs to make, because obviously information needs to be gleaned from Jiaxi personally what her current circumstances are, Immigration New Zealand has no information about that whatsoever, it has to come from her.

ARNOLD J:
Well, is that quite right? Before I thought there was an application to adduce additional evidence before Justice Gendall and the Crown opposed that?

MS GRIFFIN:
Yes, that's correct, Sir.

ARNOLD J:
And that additional information covered her marriage, didn't it?

MS GRIFFIN:
It's, that she had just married, there is no child, for example, Sir, financial information or that material.

ARNOLD J:
No, but I mean, so, the change of circumstance was known?

MS GRIFFIN:
Yes, Sir, it was opposed in the High Court because it was being used as a basis to overturn the IPT case, yes.

ARNOLD J:

Yes, no, I'm not disputing that, I'm just saying that you have said, I understood you to say, that the Crown wasn't aware of all this information, but it was –

MS GRIFFIN:

Oh, no, no, Sir, I don't mean –

ARNOLD J:

– because it came up earlier.

MS GRIFFIN:

Aware that, certainly, that she's married, at that time in the High Court, not that she had a child, aware that she's married. But that's not the only information of course that's relevant to that, her entire circumstances as they are today would need to be before the Minister, and no doubt there's lots of favourable information she could put forward. The point of myself, as counsel, raising it there in the High Court and the Court of Appeal was to say there is this option, it's not to send this case back to the IPT, it's that there is this option, and it's not an option that has ever been taken up, for whatever reason, and I would say Your Honour's point to good lawyering, the point of raising it is to make it clear that there is this option. Is the Minister to invite an application? Well, I suppose that is possible and it's something that can be looked at, but I still raise the point, why has it not be pursued, from their perspective?

WILLIAM YOUNG J:

Well, possibly because Mr Guo, it wouldn't necessarily suit Mr Guo's long-term interests.

MS GRIFFIN:

Well, this is the thing, Sir, this is why I mean it's very attractive to look at Jiaxi independently as a unit in terms of her changed circumstances now, but this is a whole family, and for Immigration New Zealand to –

GLAZEBROOK J:

Well, it isn't now though, is it? Because presumably she's not going to go anywhere if she's married with a child here.

MS GRIFFIN:

Ma'am –

GLAZEBROOK J:

So it's not a whole family, it was maybe at the time.

ELIAS CJ:

Your point is that that's the way it's been run throughout –

MS GRIFFIN:

Yes, Ma'am.

ELIAS CJ:

– and that you're entitled to respond on that basis?

MS GRIFFIN:

Yes, Ma'am

WILLIAM YOUNG J:

And I have some sympathy with that actually.

ELIAS CJ:

Yes.

Shall we take the morning adjournment now?

MS GRIFFIN:

Yes, Ma'am.

COURT ADJOURNS: 11.38 AM

COURT RESUMES: 12.01 PM

MS GRIFFIN:

Your Honours, if we could stay with Jiaxi for a moment if you're happy to do that and on this point about the Minster's discretion under section 172 of the Act. I don't want to dwell for a long time, just one more point on this. The reason I caution the Court from going there in this way is because there may be, and Mr Dillon will be able to

speak to this, very specific reasons why the family has not asked for the exercise of this discretion. One of the most fundamental reasons –

ELIAS CJ:
Sorry, what discretion?

GLAZEBROOK J:
Could we perhaps look at the legislation because to be honest I'm finding it difficult doing this without some –

MS GRIFFIN:
Absolutely. Are you happy for me to go straight to that or did you have a question Ma'am?

ELIAS CJ:
I am also –

GLAZEBROOK J:
Well now I just want you to tell me where the legislation is in the material we've got in front of us.

MS GRIFFIN:
I beg your pardon, about section 172?

GLAZEBROOK J:
Yes.

MS GRIFFIN:
Is that what you mean, certainly Ma'am. So if you – sorry in the respondent's bundle of authorities, dated 3rd of July, if you turn to tab 3, and it's section 172 which within tab 3 I can tell you the page of the report, it's at page –

WILLIAM YOUNG J:
54.

MS GRIFFIN:
That's right Sir.

ELIAS CJ:

You're just taking us to, because I'm looking at the Act, so it's just 172 is it, that you're taking us to.

MS GRIFFIN:

Yes, section 172 of the Immigration Act 2009 at tab 3 of the respondent's bundle. This is Jiaxi's alternative option to this appeal, the point we've been talking about, with His Honour Justice Blanchard. Now this is a discretion vested with the Minister to either cancel a person's liability for deportation or to suspend. My assumption is that Jiaxi would look to cancel. That's what she would seek if she went under this. It is a discretion that is said to be in the absolute discretion of the Minister which is at paragraph 5. Absolute discretion sounds like a horrible term. It's a defined term in the Act under section 11 of the Act.

WILLIAM YOUNG J:

Well it means it's not appealable.

MS GRIFFIN:

Very narrow scope for – not appeal but judicial review certainly, but limited strict judicial review is what you would find given the nature of the discretion. There's no statutory appeal, that's correct Sir.

So if you turn to section 11 for example, that's on page 45 there of the report, you'll see it's something, "The matter or decision may not be applied for," and that means in terms of a formal application process so –

ELIAS CJ:

But I thought you had been saying that she shouldn't apply.

MS GRIFFIN:

I'm using the word "apply" in a loose sense there. She can request, and that's what commonly happens, that's the process –

ELIAS CJ:

Okay.

MS GRIFFIN:

– they make a request but there's no application form, like an application for a residence for example, that has a number of things the person must do.

ELIAS CJ:

There's no right to be considered.

MS GRIFFIN:

Correct, correct, that's right Ma'am.

ELIAS CJ:

Yes.

MS GRIFFIN:

So it's a highly discretionary immigration space and it's what you would say is a final check on a system, particularly for humanitarian interests.

ARNOLD J:

So does that also mean the Minister can do it off his or her own bat? There doesn't have to be a request or an application?

MS GRIFFIN:

Yes, theoretically sir that is possible because what happens when the submission goes up to the Minister for the deportation liability notice, the Minister is advised of his or hers powers under section 172. So you can assume clearly in this case the Minister signed the deportation liability notice regardless and chose not to go there. Now that's well beyond Jiaxi's change in circumstances. Now that's the common process when Immigration New Zealand puts up the DLN to the Minister to do. So, yes, the Minister could do it him or herself.

ELIAS CJ:

Is there a general change in circumstances during the course of, you know, consideration of immigration status? Is there a provision that permits change of circumstances to be considered?

MS GRIFFIN:

Now there's certainly a very strict obligation to advise of change in circumstances, particularly where it would affect the outcome of a visa decision, and that's what Mr Guo was falling foul of in the appeal, and you'll see that in the appeal on facts. Where you're talking about someone who's gone, say, through the IPT process and then tried to –

ELIAS CJ:

Well I'm just really thinking about your submission that you're here upholding the IPT decision and I wondered whether there is any ability to re-open that simply for change of circumstances?

MS GRIFFIN:

Not the IPT decision as such because there's no ability for the IPT to have a second hearing of an appeal that's been determined other than where it's been found to fall foul for error of law, for example, and it gets referred back. There's no process to have a second appeal on the same facts in this humanitarian space. There is for refugee matters where it's a subsequent claim for example. What would happen here is you then fall past the IPT process, almost like the situation in *Ye*, where it was beyond the RRA, the Removal Review Authority, at that point in time and you dip into the humanitarian interview discretionary powers of Immigration officers. So that –

ELIAS CJ:

Could you also judicially review the decision on the basis that its substratum has been removed.

MS GRIFFIN:

Which decision Ma'am?

ELIAS CJ:

The IPT.

MS GRIFFIN:

The IPT decision?

ELIAS CJ:

I'm just thinking out loud on that. Because there is review as well as appeal that's available.

MS GRIFFIN:

That's correct Ma'am and the applicants here attempted to review the IPT decision when they first filed and then that was unsuccessful and then they withdrew that review. They didn't get leave. So the problem they'd have now, of course, is it's well out of time and –

ELIAS CJ:

But these are matters of status and they, it seems unsatisfactory that there isn't a way to cut through and re-open.

MS GRIFFIN:

Well what I would say Ma'am is that is what section 172 is there for. It's to address that if that arises, because the IPT doesn't have a statutory jurisdiction to go back, other than if you've found an error in their decision for example, you've got this process here built into the Act as these final checks. It's like in some of the cases in the High Court they called it the last throw of the dice, these last ditch attempts, but will be generally much better chances where something is completely different I can hold my hand up and say absolutely about that. So that's something that needs to be worked through. The reason I raise it is to why in my submission it hasn't happened here is because it's far better to win the IPT appeal for these appellants because their resident status, as it was at the time of grant, remains as it was. Their ability to seek citizenship, all of the time periods that apply for that. They're in a far more advantageous decision to overturn the IPT decision and certainly for Mr Guo the forward leave was finally declined for him far more advantageous to not have Jiaxi out there considered by herself. That would be my submission. She's better as part of this family unit, it helps his appeal, and that's why I caution the suggestion here that the Minister needs to take all of this on himself because there are reasons behind this and –

GLAZEBROOK J:

Well, they're reasons – I think that was the point that was being made to you, that they're reasons that are, that help the father but don't necessarily help the daughter.

MS GRIFFIN:

If the daughter wants, if the daughter wants to stay here on her own, yes, Ma'am, I guess that would be true. My point comes back to –

WILLIAM YOUNG J:

You could have –

MS GRIFFIN:

– I don't think she does, based on the evidence.

WILLIAM YOUNG J:

Well, you could have flushed this out simply by deporting the father, and then that would have put to the test whether the children want to stay here or not.

MS GRIFFIN:

Bet you'd say we were really mean if we did that.

WILLIAM YOUNG J:

No, well, no, I wouldn't, because I actually anticipated that that was the message that would have been given by the leave decision, leave to client and Mr Guo, he's got to go, the children can stay if they want to, subject to the leave being, subject to the appeal being allowed.

MS GRIFFIN:

Certainly Immigration New Zealand had the power to do that, that's right, Sir. All I can say in this case is they, with the best will in the world here, considered here were two children that didn't have their mother and on the evidence is, she is the primary caregiver, she is – I can, the devastation of the children to not have her here, I'm sure, is great, and so here Immigration are saying, "Well, their custodial parent that remains, we can allow him to stay, because what if the Court now grants these appeals to the children and circumstances change again?"

WILLIAM YOUNG J:

Of course you'd, it's rather – yes.

MS GRIFFIN:

So all, it's just Immigration New Zealand thinking, "Well, we do have discretion and we're not always the bad guys," I put it as simply as that really, Sir.

ELIAS CJ:

I –

WILLIAM YOUNG J:

I mean, it would be a judgment of Solomon, I suppose, what I'm proposing, but it would make it pretty clear what their true, what their actual position was.

MS GRIFFIN:

For the children?

WILLIAM YOUNG J:

Yes, if the father, if Mr Guo were just, was sent home.

MS GRIFFIN:

Well, if the children win on their appeal, for example, say it goes all the way through the High Court, that will be a decision that Immigration New Zealand will have to face, and chances are Mr Guo will have to go home and you'll get exactly where Your Honour is heading, not just chances are, extremely likely that's what would happen, barring something extraordinary coming about, I can't, never say never. I guess all Immigration New Zealand has done is just call time on that for the moment while things are uncertain, so they can consider it in the round.

ELIAS CJ:

I wonder whether you can help me with the scheme of the Act?

MS GRIFFIN:

Yes, Ma'am.

ELIAS CJ:

These parasitic permits, it's, I think it's striking that the power to deport for criminal offending doesn't apparently – or point out if I'm wrong – there doesn't seem to be a power to deport dependants as part of that, which seems to be some sort of legislative choice –

MS GRIFFIN:

Yes, Ma'am.

ELIAS CJ:

– and so we're driven back on this slightly contrived ground, it seems to me, that this is akin to forgery and so on because the father committing the criminal offending didn't say, "Oh, and by the way my circumstances are changing because I'm committing a criminal offence at the moment." I wanted to know if there's any other powers in the scheme of the Act which could have been used in these circumstances and I would also like to know if there's any other authority where the fraud provision has been used in this way, for dependants.

MS GRIFFIN:

Yes, yes, there's a number of answers to that.

ELIAS CJ:

Which is connected to their circumstances in terms of the application.

MS GRIFFIN:

Sorry, I beg your pardon, which isn't connected…?

ELIAS CJ:

Which isn't connected with their circumstances. I mean, I suppose, if you say you haven't got tuberculosis and you have, or something like that…

MS GRIFFIN:

So you mean innocent secondary parties, secondary applicants?

ELIAS CJ:

Yes, I just really dislike using the word "innocence" and "guilt" here, but anyway, carry on.

MS GRIFFIN:

I understand, I understand. Firstly, Your Honour is quite right about section 161 and the previous section 105 of 1987 Act, that is about the criminal offending of the person who's fallen foul there of the immigration scheme and they are the ones subject to deportation process for their own offending, it's not about their dependants

or their wife or children or husband. Now that is the normal situation, 99% of cases are going to be like this because what happens, as Your Honours will have seen in other cases before you, that the criminal offender offends after the grant of residence and after the family has been granted residence, for example, or other visa, and their offending has absolutely nothing to do with the family's immigration status. So you would never then move against the children or the wife or the husband in those circumstances, because it's not connected at all, their immigration status, because the offending has occurred after the immigration decision has been made about their visa status. So that's the normal situation.

Now the reason why this case is so unusual and why it's so complex is that Mr Guo could also have been made liable for deportation under the previous section 22 of the 1987 Act, and I can, I'll show you this –

ELIAS CJ:
Sorry, which one's that? That's the fraud one, is it?

MS GRIFFIN:
Yes, it's the equivalent of the new section 158, so I think we should look at that. And that's unusual that you could have a dual type of liability.

ELIAS CJ:
Well, I would imagine he would have had to have been in order for there to be some basis for the action that's been taken against the dependants here.

MS GRIFFIN:
Precisely, Ma'am.

ELIAS CJ:
Yes.

MS GRIFFIN:
So if we look, I'll just show you section 22 while we're here, because I want to come back to it when we think about –

ELIAS CJ:
So where do we find this?

MS GRIFFIN:

So this is in tab 2 of the respondent's bundle.

ELIAS CJ:

Respondent, yes.

MS GRIFFIN:

And I know I do want to come back to this when we look at 207 as well. Now this would be – so Mr Guo of course he had, has a humanitarian appeal under section 105 of the old Act, purely on the basis that he'd committed a qualifying criminal offence. What he could have also had was a humanitarian appeal on the basis that he had himself concealed relevant information or made a false declaration in his application for residence as the primary applicant and the Minister could have revoked his permit on those grounds, and that would be here, if you just move over to just earlier on section 20, that's the first revocation of power, you have here at 20(1), "The Minister may at any time revoke a resident's permit on any of the following ground but no other, (b) that the permit was procured by fraud, forgery, false or misleading representation or concealment of relevant information." So this is his failure in the residence application to declare his involvement in the illicit drug trade if he was involved in it at the time of the application, or to advise of his material change in circumstances, ie, he'd become involved in it and committed, the actual offending had completed before the residence application was granted in September of that year.

ELIAS CJ:

Now just pause.

ARNOLD J:

So does it – sorry, you go ahead.

ELIAS CJ:

Well, I know it's not before us, in the sense that eligibility for deportation is not being challenged, but is there any authority interpreting section 20(1)(b) to apply to this sort of situation? Because if you're just –

MS GRIFFIN:

How do you mean –

ELIAS CJ:

– if you're construing, I mean, I can see that there would be an argument that this doesn't extend to a change of circumstances in the current situation, because it's not comparable to fraud, forgery, misleading representation…

MS GRIFFIN:

It's the concealment of relevant information. So in the application for residence –

ELIAS CJ:

Yes.

MS GRIFFIN:

– which isn't in the bundle – would you like me to hand it out to you so you can see –

WILLIAM YOUNG J:

But he says, "I'm not a drug dealer," when he was.

MS GRIFFIN:

Yes, and –

ELIAS CJ:

Well, he was about to become one –

WILLIAM YOUNG J:

No, he was engaged in it.

ELIAS CJ:

– when he did it, and then it comes –

WILLIAM YOUNG J:

No, he was engaged in it at the time.

MS GRIFFIN:

This, yes, the factual findings were either/or, whichever way, because he's never going to say exactly when he started the importation process, so the Tribunal would never get the right answer on that.

WILLIAM YOUNG J:

But he had started to put in train the arrangements that result, that were part and parcel of the importation.

ELIAS CJ:

In about May 2006.

WILLIAM YOUNG J:

Yes.

MS GRIFFIN:

That was the Crown case –

ELIAS CJ:

That's when he was, they did charge on it.

MS GRIFFIN:

– yes, Sir, and the Court of Appeal judgment talks through these things in terms of his criminal convictions. Now would you like the application for residence, I can show you what you mean, how these –

ARNOLD J:

Can I just ask the question that's slightly puzzling me, that on this approach if the failure to advise, while you're in New Zealand, the failure to advise of a change in circumstances, that is that you take, commenced on criminal activities, is a ground under the sort of section 20 type approach. Doesn't that run the risk of putting it in the context of the 2009 Act, undermining the time limits set out in section 161 in relation to liability for deportation of people who commit offences?

MS GRIFFIN:

The time limits, how do you mean Sir?

ARNOLD J:

Well –

MS GRIFFIN:

In terms of the imprisonment periods?

ARNOLD J:

No, no, but it says that you're liable for deportation if you commit a qualifying offence–

MS GRIFFIN:

Yes Sir.

ARNOLD J:

– within particular periods and it seems to me you can just, on this analysis that you've put to us, that if you don't advise of a change in circumstances, that is that you commenced criminal activities, that would provide a mechanism to get around all these time limits.

MS GRIFFIN:

You mean to not pursue the section 161 –

ARNOLD J:

Yes.

MS GRIFFIN:

– deportation liability? See what –

ARNOLD J:

But don't they – isn't their attempt to say that you're liable for deportation if this offence was committed not later than five years after you first held the visa.

MS GRIFFIN:

The visa. Now –

ARNOLD J:

What I'm trying to ask is does the analysis you're offering us give the ability to get around that, those timeframes?

MS GRIFFIN:

I suppose I don't like characterising it as "getting around" because it's so heavily factually based. What are the qualifying circumstances that you're faced with, so for an order to become liable for deportation under the old section 91 and the new

section 161 for criminal offending, there must be an offence, it must have happened, and you must have been convicted and sentenced. So you couldn't possibly make Mr Guo liable for deportation under the old section 91/new section 161 until such time as those facts are established by a court of competent jurisdiction, being the criminal courts. So –

ARNOLD J:
Which is what happened to him.

MS GRIFFIN:
Yes it did, that's right.

ARNOLD J:
Yes.

MS GRIFFIN:
And it's the more certain way in terms of deportation liability, if you think about it, the process that Immigration would follow. They've got an absolute set of facts, really, that are impenetrable once it's gone through the Court of Appeal and the conviction is upheld so it's –

ARNOLD J:
But to be qualifying it has to be a particular type of offence and it has to occur within a particular period.

MS GRIFFIN:
Yes Sir.

ARNOLD J:
Yes.

MS GRIFFIN:
But they can't, the point I'm making is they couldn't issue at that time a deportation order within that qualifying period for that type of offence because as you'll see in the record the deportation order doesn't actually come until much later in 2009 after the conclusion of all the criminal processes and that establishes as a fact when the offending happened. In comparison to when you're dealing with revocation of

residence under the old Act for fraud, misrepresentation, concealment of relevant information, these, it's not based on any conviction. It can be, that's one of our grounds under the new Act, but it doesn't have to be. The Minister there can determine based on the evidence there, which doesn't require criminal evidence based on what's actually happened, and that –

ELIAS CJ:
No well they cover different –

ARNOLD J:
But then –

ELIAS CJ:
– sorry, things but –

MS GRIFFIN:
Different types of liability, that's right.

ELIAS CJ:
– but on your argument the duty to disclose, that finishes when a residence permit is granted, but any failure to disclose before the residence permit is granted would be capable of bounding deportation under section 20(1)(b).

MS GRIFFIN:
Yes, and I can show you, I'll show you exactly why. It's both in the residence application and in the statute, the 1987 Act. Now unfortunately I haven't –

ELIAS CJ:
Sorry, can you just, where's the continuing disclosure provision?

MS GRIFFIN:
I'll show you that Ma'am. I haven't got section 34G in the bundle here but it is quoted in the IPT decision, and if I just take you to the page.

BLANCHARD J:
Page 24.

MS GRIFFIN:

That sounds about right Sir on the appeal on facts. So this is the provision that applied at the time for Mr Guo, this is 34G, and if you look here at (1), "Every person who" – Ma'am, have you got that in front of you?

ELIAS CJ:

Yes, I have.

MS GRIFFIN:

"Every person who applies for any type of visa, permit, or exemption … has the obligation to inform an immigration officer of any relevant fact, including any material change in circumstances that occurs after the application is made, if that fact or change in circumstances – (a) may affect the decision on the application: or (b) may affect a decision to grant a permit in reliance on the visa for which the application is made."

Now if you go down to (3), "Failure to comply with the obligation set out in subsection (1)… amounts to concealment of relevant information for the purposes of sections 20(1)(b) and (c) and 20A(1)(b)," 20A is permanent residence, "And (c)." So there's the connection back into deportation liability for revocation of residence under the old Act. Now that's the same under the new Act too, there's the corresponding obligations. I believe it's section 50, I haven't got that in front of me, it might be section 55, I can confirm that for you.

WILLIAM YOUNG J:

It all looks slightly – because in the Court, the Tribunal found it was most probably in March to May that the –

MS GRIFFIN:

On the trip to China, yes.

WILLIAM YOUNG J:

Yes, and his whole defence wasn't – sorry, his whole line of argument at the Tribunal was, I didn't have to declare anything because I was, it would have required me to disclose that I was committing an offence.

MS GRIFFIN:

Yes, exactly.

WILLIAM YOUNG J:

And so that was basically tantamount to an admission –

MS GRIFFIN:

Exactly.

WILLIAM YOUNG J:

– that he was, the game was afoot by June 2006.

MS GRIFFIN:

Yes Sir, and so the residence application form it has this, it doesn't rely on any conviction for illicit drug trade, for example, it just says are you involved, tick.

WILLIAM YOUNG J:

Are you involved in the illicit drug trade.

MS GRIFFIN:

Precisely, and then of course it goes on to say in the declaration section there you must declare that you will advise Immigration New Zealand of any change in circumstances that will affect the decision on the application.

WILLIAM YOUNG J:

Right, so that if you become engaged in the illicit drug trade after –

MS GRIFFIN:

Hold your hand up.

WILLIAM YOUNG J:

Yes and –

MS GRIFFIN:

Now no one's going to, are they Sir, that's what I said before, of course they're not, and that's why you have these mechanisms to claw back when they don't declare that they're one of the worst of the worst ultimately in terms of – I mean no one

would, no Immigration officer would grant residence to Mr Guo knowing that, that is the truth of it, the practical reality, and that's why this fact is a really important fact in this decision. And it's also why this case is unusual because while yes section 105 and the new section 161 deportation liability for criminal offending is about the individual person. Here the grounds on which the children become caught by it are for failure to dis – conceal relevant information and the relevant information is the offending. Now that's what's unusual because usually you find secondary applicants are caught up in, you know, various fraud type matters where it's been false passports or false birth certificates, those types of things. It's not caught up in the fact that the mechanism has been to conceal criminal offending, and that's why I say when you look at this decision as a whole the Tribunal is not in any way forgetting that this is about his failure to disclose, concealment of relevant information, but what was it that he failed to disclose, and that's the –

ELIAS CJ:

I would like to see the application by the way. Do we have it in front of us?

MS GRIFFIN:

I beg your pardon?

ELIAS CJ:

The application, I think you were suggesting –

MS GRIFFIN:

The residence application yes Ma'am.

ELIAS CJ:

Sorry, the other question I had, or you might, if we finish it, is the other answer, is whether there's any authority indicating, perhaps it's just a matter of necessary inference, that this consequence of cancellation or revocation, which is only a discretion too, attaches to –

MS GRIFFIN:

Secondary application.

ELIAS CJ:

– the secondary application. In fact where is this concept of secondary applicants?

MS GRIFFIN:

It's in the Act, it's in the Act as well –

ELIAS CJ:

Yes, where?

MS GRIFFIN:

– so it's there, so we should look at the section that applies to the children for that. So look at section 158 and then we'll look at the residence application and that's at tab 2 – tab 3 beg your pardon, 158.

ELIAS CJ:

Is this of the 2009 Act?

MS GRIFFIN:

Of the 2009 Act, that's correct. Now the basis upon which the children have been liable, found liable for deportation, now remember before I said you could be convicted of an offence for fraud, misleading representation, that's 158(1)(a), that's those circumstances, the immigration offence, for example. That's not what's happened here for the children. It's 158(1)(b), "The Minister determines that," and it's (ii) "The person," meaning one of the children, "holds a residence-class visa granted on the basis of a visa procured through fraud, forgery, false or misleading representation or concealment of relevant information." That reference to "a visa", that's Mr Guo's visa as the principal applicant, because everything flows from the principal applicant, so they procure their visa from the grant to him, because it's Mr Guo that qualified and they get the benefit as family members to join in on the application. Now this helpfully, if you look at the decision in *Pal* you –

ELIAS CJ:

Now is this all you're relying on in terms of, when you say, "The secondary parties," is this all you're relying on?

MS GRIFFIN:

Yes, this is how secondary parties are made liable for deportation, if they haven't themselves – well, I don't want to use the "innocent" term again – but if them haven't themselves procured the visa, they haven't done something themselves, they're caught up here in (ii) because their visa flows from the fraudulent procurement of a visa higher up the food chain, which is the principal applicant's. Now it doesn't mention "principal secondary", I take that point definitely, Ma'am, and I love statutory drafting for that reason, but if I show you the decision in *Pal* –

ELIAS CJ:

Well – all right, yes.

MS GRIFFIN:

And you can stay – I've got it in the respondent's bundle here.

ELIAS CJ:

It's just that one would think that these echo bases for deportation are not uncommon, and one would have thought really the Act might have spelt things out a bit better.

MS GRIFFIN:

Oh, look, I agree, it would be so much easier if it said that. But the point Your Honour just made, that it's not uncommon, is absolutely bang on, you know, this is, the fraud is usually the principal applicant with the minor children born a little bit later and these things happen. So that's why I say the Immigration Act has contemplated this scenario, it needs to, otherwise we'd have a whole lot of minor children here with no basis in order for them to be removed, they're not citizen children, like Ellen, for example, and that's the issue, that these otherwise have no right to be here, they would never have got the visa.

ELIAS CJ:

Do we have a copy of the Minister's determination?

MS GRIFFIN:

Not, not in this bundle.

ELIAS CJ:

No, but there is a determination, presumably?

MS GRIFFIN:

Yes, Ma'am, I can provide that to the Court.

ELIAS CJ:

I'm just slightly curious about the way it all pans out, because presumably the fact that it is – so this is expressed in the passive so that if it's procured you might have an agent who's done something wrong –

MS GRIFFIN:

Yes, and that is common.

ELIAS CJ:

– and that's the sort of thing that the Minister presumably would take into account in deciding whether - well, first of all, he'd have to decide whether it was material, wouldn't he, to the granting of the visa?

MS GRIFFIN:

Well –

ELIAS CJ:

Because it has to be procured.

MS GRIFFIN:

– it's worth doing a parallel here between –

ELIAS CJ:

It has to be procured through this.

MS GRIFFIN:

Yes, yes, of course, it's if there's a, there's a subjective – well, not subjective, that's the wrong word – that's why it's the Minister determines, it's that he has to look at those underlying events, you know, what has happened. Now when I say a determination by the Minister, effectively that is the, in the case on appeal, that is the deportation liability notice, and if you look in tab A you'll see the facts that have been

relied on, where it's set out, there's a submission that sits behind that from Immigration New Zealand –

GLAZEBROOK J:

Tab A of the case on appeal, is it?

MS GRIFFIN:

Tab A, case on appeal, yes, Ma'am. So first page is Mr Guo's. If you just look at Mrs Hong's, for example, second page of tab A, and this is the notice issued under section 158, the grounds are, "That you are a residence class visa holder, I have determined that your residence permit visa entry permission was procured through fraud," et cetera, et cetera, "it was declared in the application for residence of Mr Jianyong Guo that neither he nor any of his family members included in the application had ever been involved in the illicit drug trade, Mr Guo's convictions indicate he was involved in the illicit drug trade prior to the determination of your application for residence, the fact that Mr Guo is involved in the illicit drug trade was a material change in circumstances, that occurred after your residence application was submitted on 16 June," so here's an assumption that it didn't happen earlier, they've gone on that basis. "Had Mr Guo informed the Minister of Immigration or an immigration officer of that fact he would not have satisfied relevant character requirements for applicants for permanent residence and so would not have been granted residence. Because you were included as a secondary applicant in the residence application you would also not have been granted residence. Your residence visa was therefore procured through fraud, forgery, false or misleading representation or concealment of relevant information. You are therefore liable for deportation under section 158(1)(b)(ii)," so that's the specific one relied on that I referred to before.

ELIAS CJ:

So it's, but where does this secondary applicant concept –

MS GRIFFIN:

Well, it –

ELIAS CJ

It's got no –

GLAZEBROOK J:

Is it –

ELIAS CJ:

It's just, is it, just the facts?

MS GRIFFIN:

It's just the terminology, yes, it's the fact. It says here, "Because you were included as a secondary applicant." Now there's, in immigration instructions when you apply for –

GLAZEBROOK J:

That's what I was going to ask you. I'm assuming that all of this is set out in the immigration instructions which now have a statutory basis, don't they?

MS GRIFFIN:

Yes, Ma'am. So someone like Mr Guo, you know, he's applying under business entrepreneur, I think it was there, there's a whole lot of instructions.

GLAZEBROOK J:

It might be worth having that, because presumably that explains the secondary status, does it?

MS GRIFFIN:

Who can be a second applicant, it certainly – well, it won't be necessarily the business entrepreneur category. Anyone who, a principal applicant who qualifies for a visa on a particular basis can, at the, if it's within one of the categories where more than just the principal applicant can come, and there are those, can then apply for family members to be included in the residence application, but they are secondary applicants because they're not the ones who are being assessed in terms of eligibility criteria, so that's for Mr Guo.

GLAZEBROOK J:

Can you just remind me, because I think there's a statutory basis now for those instructions, isn't there? And then perhaps we can then look at the instructions. They presumably are on the website are they?

MS GRIFFIN:

The instructions are, yes. Now there is a statutory –

GLAZEBROOK J:

And presumably the secondary application is explained in those instructions somewhere which then will give some more content to the section we're looking at?

MS GRIFFIN:

I don't want to say categorically, Ma'am, that it explains all the things that you're looking for in terms of this particular section, 158, do you mean? It won't talk about that.

GLAZEBROOK J:

Sorry, no, all I was saying is that it would give context to the fact that you're getting a residence visa based on another visa. That seems to be the concern at the moment, but I would have thought it is explained how you get a secondary visa, is explained in the instructions, is that –

MS GRIFFIN:

Yes, it would say who can, so your principal applicant applies, and who else can apply on the basis of that, assuming the principal applicant ticks all the boxes, in terms of there might be a points system, for example, that applies, and so for example the wife might –

GLAZEBROOK J:

But then it will explain –

MS GRIFFIN:

Yes.

GLAZEBROOK J:

That will then give context to what's meant in section 158(1)(b)(ii) is all I was suggesting.

ELIAS CJ:

Yes.

MS GRIFFIN:

Yes, Ma'am, yes, Ma'am. Now I haven't got that with me here. I can source that and I could amend that to a memorandum to the Court if that would assist.

ELIAS CJ:

No, no, that's…

GLAZEBROOK J:

Do you – would that assist if there was a memorandum actually setting out how the secondary applicant were –

ELIAS CJ:

Well, I'm sort of satisfied, I must say. I think it would have been better if it was more, better addressed under the Act, but…

MS GRIFFIN:

If you look at the residence form I see you…

ELIAS CJ:

And the matter's not before us because eligibility for –

MS GRIFFIN:

It's not challenged.

ELIAS CJ:

– deportation has not been challenged. It was really just a bit of a loose thread. But I can see how the dots do join up –

MS GRIFFIN:

Yes.

ELIAS CJ:

– with the explanation that you've given, so I'm happy with that.

MS GRIFFIN:

Yes, Ma'am, and even just on a basic level, if you look at the residence applicant here on this, I believe it is, it is the entrepreneurial category that's ticked on the front page and you see “principal applicant” so everything is based on Mr Guo –

ELIAS CJ:

Yes.

MS GRIFFIN:

– and then underneath, skip over two pages, we have “dependent children” and so these are people coming into Mr Guo’s application.

ELIAS CJ:

Yes.

MS GRIFFIN:

Those are, that's the secondary terminology. And then the declarations are on, it’s at, “character requirements” at A86, if you turn over, and at A87, this is where the “illicit drug trade” comment is, if Your Honours have that, section A87, “Have you or any of your family members,” so they’re asking about the secondaries, “included in the application every been,” if you scroll down about 10, “involved in the illicit drug trade,” and then turn over again, you will see the declarations at section F, and these are the important ones for section 158, this is how everything hooks back. So the first one, “I understand that if I make any false statements or provide any false or misleading information, or have changed or altered this form in any way, my application may be declined, and that I may also be committing an offence and liable to prosecution.” And down, fourth one down, “I declare that I will inform the New Zealand Immigration Service of any relevant factor, any change of circumstances that may affect the decision on my application for a permit or to affect the decision to grant a permit in reliance on the visa for which I am applying.” So that’s what I referred to before, section 34G, that’s that statutory requirement. And that’s where of course the IPT and everyone else said Mr Guo fell right foul of and the children get caught up on that. Now the decision, Your Honour asked for some authority to show essentially that this is what happens to secondary applicants, the clearest statement is the decision of *Pal*. I’ll just show you that quickly, and that’s at tab 9 of the respondent’s bundle. I’ve put the reported version in for you. And I would recommend Your Honours do look at *Pal* in more detail because it was also a

case about an appeal on facts and a humanitarian appeal backed up behind it for misleading, false, fraud, innocent, concealment of relevant info.

Now if you look at paragraph 50, this is after the issue had been discussed by His Honour Justice Asher about whether knowledge of the fraud is required –

ELIAS CJ:
And the fraud in this case was not declaring that they had six children, was it?

MS GRIFFIN:
It was about, yes, exactly, the details of the residence application, not about offending like Mr Guo, it was about, they were trying to get within the instructions improperly is the point, where they get in trouble. Now at 50, after His Honour Justice Asher has gone through why knowledge of the fraud is not required for a secondary applicant, says it is, second sentence, "It is generally the case that the exact circumstances of the completion of an application for a residence visa are known only to the applicant. Such applications would often occur within the context of a family situation. A senior member of the family would take over the running of a fraudulent application and the others will follow. For this reason, no doubt, the legislature has chosen the wording in section 158(1)(b) which precludes the mental element of knowing misrepresentation. It would be most surprising for Parliament to leave the section in the identical form in Immigration Act 2009 if it considered the interpretation given in 1993 was wrong." And that's the interpretation from the Courts about knowledge of the fraud. So who are the ones that primarily won't have knowledge, it's the secondary applicants.

ELIAS CJ:
Yes, thank you.

MS GRIFFIN:
Now I'm just wondering where we're up to Your Honours, what would be most helpful for me to go to next for you. So if you're happy for me to…

ELIAS CJ:
Well I think the questions of law ultimately identified were the submission that the offending was irrelevant on the basis of the Act and the second one is the difference

between injustice and what's unduly harsh. I think those were the only two points of law pressed at the end.

MS GRIFFIN:
Yes Ma'am.

ELIAS CJ:
So it's really –

GLAZEBROOK J:
There was no procedural aspect as to what happened when the mother, when it was clear the mother was not part of the appeal?

ELIAS CJ:
Yes, yes.

MS GRIFFIN:
In terms of the impact on what the outcome might have been for the children?

ELIAS CJ:
Yes.

GLAZEBROOK J:
Yes.

BLANCHARD J:
Well whether there should have been an opportunity of making sure the submissions in light of that change of circumstance, before the IPT issued its decision. It's second decision.

MS GRIFFIN:
Now I absolutely agree with Your Honour that that is possible. The IPT could have asked for that. It can receive submissions right up until the date of its decision and it commonly does so. Here it was advised to the parties that this has happened. The parties didn't seek any further opportunity to be heard as a starting point. On that assumption the Guos themselves had no different submission to make other than it

would be very tragic that the mother is not there, that's the first thing that I would say –

BLANCHARD J:
Were they asked whether they had any further submissions to make? How was all that done?

ELIAS CJ:
They recall just recalled their determination didn't they?

MS GRIFFIN:
They were advised – the problem was is that Mrs Hong had left before the first decision, and it didn't tell the Tribunal, so the Tribunal then issues its first decision assuming she's still here but the legal position was the appeal was withdrawn so it was functus on her appeal essentially and needed to correct that obviously. Now it's advised when counsel for the Minister becomes, at the IPT level, becomes aware that Mrs Hong has left through the alerts, through the Immigration computer system, that she's, and she had also spoken with counsel for the appellants. I am conscious I am giving evidence from the Bar here. She'd spoken to counsel for the appellants who had talked about the fact that the mother had left, it wasn't seen to be an issue. The decision was taken the IPT needed to know because of the impact on the appeal –

ELIAS CJ:
Well because their –

MS GRIFFIN:
– and the IPT was advised by memorandum.

ELIAS CJ:
Because their decision was wrong.

MS GRIFFIN:
Plainly wrong, yes. Needed to be corrected.

ELIAS CJ:
Yes.

MS GRIFFIN:

So both parties advised the IPT and said the mother has left, the decision, her appeal is deemed withdrawn. The decision, obviously, needs to reflect that is essentially what the memorandum said. No one seeking an opportunity to be heard on it. Now as far as I'm aware the IPT didn't come back and say expressly would anyone like to be heard within a period of time. My understanding is that process didn't happen. My only assumption I can make, now I don't want to make assumptions before Your Honours, is that its understanding was that wasn't what the parties wanted and proceeded on that basis. Now I could totally see how that could be problematic in decisions. Errors could arise as a result of something like that. The question is, did an error arise as a result of that here and what the –

ELIAS CJ:

It really doesn't seem to be the most, considered as that, because the Tribunal says at the beginning of its decision what it has done. It was informed by counsel for the Minister that she had left.

MS GRIFFIN:

Yes.

ELIAS CJ:

And so the Tribunal then took it on itself to recall the decision to correct the material mistake in description.

MS GRIFFIN:

Yes or counsel for the Minister said that needed to happen so set out the statutory problem for the Tribunal.

ELIAS CJ:

But it doesn't seem that the Tribunal considered whether that might affect the substance of its decision at all.

MS GRIFFIN:

Well I think, Ma'am, that it certainly believed it affected the substance of the decision and it, here it talks about at four, the Tribunal leaves unchanged the summary of evidence given by them because it does represent, by the mother, because it does represent her evidence to the Tribunal should however be read with her subsequent

departure and withdrawal of her appeal in mind and then it talks about how the decisions relate to each other and I guess it helps to look at the recall decision and this decision to see how the decision changes without the Tribunal actually setting out very clearly exactly what it did.

ELIAS CJ:

I thought it hadn't changed it at all apart from saying paras 1 to 4.

MS GRIFFIN:

Well no Ma'am, it certainly has changed. So the mother's evidence is in there as background evidence for the three appeals now rather than evidence in her own appeal. So in the first recalled decision there was Mrs Hong's section about what the outcome for her appeal was, and then, and if you look at that for example, it talks about why it looked at her appeal last, because her appeal was fundamentally linked to what was going happen to the children and based on their decision for the children that had a significant impact on the outcome for Mrs Hong. Now that scenario of how they analysed it completely goes with her withdrawal of her appeal and then when they come to the end of the decision they weave in, instead of that separate discussion about Mrs Hong and the impact of her appeal, they weave into particularly about Ellen and particularly about Jiaxi and Jiaming, the impact of their mother now not being here, and ultimately, this is where it gets a little bit awkward, at 161 for Ellen, "The only way in which Ellen could avoid either separation from part of her family," here being her father as opposed to her mother, because her mother's already gone, "or moving with her family to China, we have weighed carefully the significance of that outcome against the factors that have brought the family to this position. They are the departure of Mrs Hong for China from where she cannot now return." And there's a number of comments throughout the discussion for Jiaxi and Jiaming about the mother's departure to China, they say, for example, that the ground has significantly shifted for Jiaxi now with her mother having left, so I say it certainly has changed, they certainly considered what impact that had on these intersecting appeals for this otherwise close family that never wanted to be separated in this manner.

BLANCHARD J:

But they didn't ever ask her what her reaction was to that change in, the significant shift in the ground.

MS GRIFFIN:

Sorry, Sir, do you mean Jiaxi or the mother?

BLANCHARD J:

Mmm, Jiaxi.

MS GRIFFIN:

Jiaxi. You mean directly, a question to her?

BLANCHARD J:

Yes.

MS GRIFFIN:

No, that is fair.

BLANCHARD J:

I mean, here they are issuing a decision which says the ground has significantly shifted for Ms Guo, one of the applicants, but they don't give her any opportunity of responding to that.

MS GRIFFIN:

That is, as I said, Sir, that is fair. They didn't expressly come back to Jiaxi and say –

BLANCHARD J:

Well, is it fair?

MS GRIFFIN:

– would it – oh, your comment is fair that they didn't do it.

BLANCHARD J:

Yes.

MS GRIFFIN:

That's right. What I have to say is, well, what is the impact of them not doing that? What they're looking at here is, say, if we turn to paragraph 125(a), and this is the "exceptional circumstances" part of the test…

BLANCHARD J:

That's what I'm looking at.

MS GRIFFIN:

Yes. And so they say here, in the second sentence –

ELIAS CJ:

Sorry, which para, 1…

BLANCHARD J:

125.

ELIAS CJ:

Oh, yes.

MS GRIFFIN:

125(a).

BLANCHARD J:

Preceded by 124.

MS GRIFFIN:

So in those earlier paragraphs of course talk about, you know, Jiaxi the young woman and her circumstances.

BLANCHARD J:

Well –

MS GRIFFIN:

A little bit, yes.

BLANCHARD J:

– 124, "We're also mindful that as the extra parent to her two younger siblings Ms Guo has assumed a significant burden."

MS GRIFFIN:

Yes, Sir, and I have things to say about those sorts of statements definitely, you know, one of the reasons why they call her the extra parent at that time is because when the father is in prison Jiaxi takes on a greater role to help her mother that otherwise it would necessarily have been there, so there's context behind that, you know, she is a young woman, to bear in mind here, rather than Mr Guo and Mrs Hong, their role as the two parents as such.

BLANCHARD J:

But might there not have been something that she could have said in relation to herself and in relation to her younger siblings at the time before the second judgment was issued?

MS GRIFFIN:

Theoretically, Sir, yes, anything's possible, she could have given a view. The question is what, on the evidence that's there, what are we to assume that view might have otherwise been? The evidence certainly hadn't changed about Jiaxi the young woman and her role within this family and them being together, she wasn't at any time saying –

ELIAS CJ:

But we don't assume it. I mean, nobody should be assuming it. There's a, is there not a natural justice point here that, the ground having shifted significantly, the Tribunal should have considered whether it should deliver itself of its decision or whether it should make some enquiry?

MS GRIFFIN:

That's certainly one available approach. The first thing I'd say, the second sentence they say here is, "If Ms Guo stays she will not have either parent in New Zealand," statement of fact, Mr Guo's going and this Court's upheld Mr Guo's going, irrespective of what they talk to her about, they're talking about her staying alone rather than alone but with her two siblings, no natural justice procedure would change that, they are aware if she stays she stays alone. The secondary question is whether might they have asked her could she stay with the two little children, and that's where I part company with Your Honours on this point, because the evidence had been so clear right up until the point of the recall decision three weeks earlier that never postulated that Jiaxi would put herself in that position or that her mother

would ever allow it, and I think that's really important. As I say, they did have the opportunity to put something in if they wanted to, they might not have been expressly asked, it most certainly would have been received had they done so. But no one's ever signalling to this Tribunal at any point in this lengthy appeal procedure, a process that had gone on for years with this family from the first decision, that there was ever going to be a scenario where the minor children wouldn't be with one or other parent and that Jiaxi would take, and I think it is really important when we're looking to unpick the Tribunal's decision here and taking it in context based on this point in time, I would submit Jiaxi wasn't saying then and never was going to say, "I'll stay here by myself with the little kids," I think she knows full well her mother wants her children back. And that's what I mean, that's what the evidence shows, the evidence from the mother, certainly in her brief to the Tribunal and in her oral evidence, was that she was their mother, she was the fundamental primary caregiver in their life, she did everything for them, she was a housewife and a stay-at-home mother, and there was no change in that circumstance by the fact her leaving other than the tragedy that she can't be with them and the, so what the Tribunal here is looking at, their findings clearly are because of the fact that this is a close family and these children are close to their mother, and when I say "children" I mean Ellen and Jiaming, of course Jiaxi is too, but particularly Ellen and Jiaming, that their best interests are to be with their mother and their father, irrespective of where the parents live, whether it's New Zealand or China, their best interests are not be separated from those two parents, who are good, strong parents in their lives, and that's how they approach it on the basis of evidence that they were going to be with the parents, not with Jiaxi. Now, yes, I accept there may have been a more perfect process to ask expressly, "Is there anything more you want to say?" and in my submission it's not enough here to undermine on the balance of this evidence the Tribunal still had available to it to give this outcome.

The clock is close to 1 o'clock, Your Honours may be…

ELIAS CJ:

Can I just ask, well, how far, how much longer do you think that you might be?

MS GRIFFIN:

I'm in Your Honour's hands. I could get through the things that I want to get through relatively, relatively quickly, I think, other, and any questions that Your Honours

would have. Perhaps another, if I was doing it all by myself with no questions from the Bench it might take me 30, 40 minutes.

ELIAS CJ:

All right, yes. Can I – oh, perhaps we can – well, I have some difficulties with para 162 of the Tribunal's decision.

MS GRIFFIN:

162. Yes, Ma'am.

ELIAS CJ:

First of all, the emphasis on the scale of the father's offending when the basis for deportation is the deception rather than the scale of the offending, it seems, I'm just slightly puzzled by that. And, secondly, the suggestion that it could be without consequences. Well, that's a, might be right, I mean, nobody's suggesting it can be without consequences, so is that an adequate way to determine whether deportation is disproportionate?

MS GRIFFIN:

The first thing I'd say to that, Ma'am, is we need to be careful lifting out one paragraph. So if we come to –

ELIAS CJ:

Yes, I understand that but…

MS GRIFFIN:

Yes, absolutely, Your Honour. If you come to the earlier sections where they build up to this ultimate finding and the earlier provisions that my friend, Mr Dillon, impugns, they certainly talk about Mr Guo's deception in the residence application, they're not just talking about his offending, and so while in that sentence they've only said the father's offending, the reason why –

WILLIAM YOUNG J:

Yes, pause there. The not deporting element.

ELIAS CJ:

No.

MS GRIFFIN:

The not deporting – yes.

WILLIAM YOUNG J:

So this is actually a reference to the father.

ELIAS CJ:

Yes.

WILLIAM YOUNG J:

Because the father's trying to say, "It's pretty tough deporting me, look at Ellen," and they're saying –

MS GRIFFIN:

Yes, and that's why they, that's 161, where they say, "We've considered allowing all the appeals to keep Ellen here" and "all the appeals" means the father's. So there's, that is absolutely correct, Sir, in terms of the contextual part of that paragraph. But also I want to just caution where, here they've only said, "the father's offending", if that's what they've done throughout the entire decision then, yes, we'd have a problem, but if you look to the other sections they're clearly linking offending in the deception, in the residence application they refer to them both together, and that's why I submitted earlier on it's unusual here because the deception is about the offending, so it's understandable why the Tribunal are talking about the offending in the context of the children's appeal rather than purely deception in the residence application, they're looking at what was the deception, because that's what's important in terms of a disproportionality for a balancing, what are you balancing against, how serious is this deception, compared to others.

ELIAS CJ:

Well, I would have thought you're looking at the humanitarian factors and making an assessment as to whether, against those humanitarian factors, which is the purpose of this inquiry –

MS GRIFFIN:

Yes, Ma'am.

ELIAS CJ:

– deportation is disproportionate.

MS GRIFFIN:

Yes, Ma'am, and that's why I would like to make some submissions on the first limb here and how you do it and how that works in light of how the old Act was and what the new Act is and whether there's any magic in 207(1)(a). I say there's not, compared to the old Act, and I think it's important to work through that to see why it's okay in terms of "unjust and unduly harsh", indeed, required to look to these countervailing factors, and particularly after, the only point I make before lunch, particularly because we have this three-phase inquiry, we start with exceptional circumstances, and that is solely here the personal, all this stuff, it's talking about what is it that's qualified here, and then you come to look at "unjust or unduly harsh" and how do you analyse that, you've already found these exceptional humanitarian circumstances, and what is it you're balancing them against, in terms of you've already got a qualifying factor, and in *Ye* it said, it looks at how compelling or persuasive those circumstances are, but against what, what makes them compelling to say it makes it unjust and unduly harsh, and that's the circumstances, what are the personal circumstances here of this draw, this deception, as opposed to the public interest side of it which is going to go broader, it's going to go wider about immigration system, offending, fraud, et cetera, et cetera, risk of re-offending in a criminal case.

ELIAS CJ:

All right. We'll take the adjournment now, thank you.

COURT ADJOURNS: 1.01 PM

COURT RESUMES: 2.16 PM

MS GRIFFIN:

Thank you Ma'am. Is it okay with Your Honours if we look now at the statutory test under 207 and how it's got there for the first limb on this issue of "unjust" versus "unduly harsh"?

ELIAS CJ:

Yes.

MS GRIFFIN:

The first submission I want to make, I think it helps just start with the test for Mr Guo under 105 and what it is under 207, the father, because it's simpler there and then I'll show you the children because they would be otherwise under a different section under the old Act to the new Act and the logic in me doing this I hope will become apparent. If you look at the respondent's bundle at tab 2 and go to section 105. Of course this is the section Your Honours considered in your recent judgment in *Helu v Minister of Immigration* [2015] NZSC 28 and it's 105(2) and this is particularly about the question of whether a deportation is unjust or unduly harsh under the old Act and this was the section applying to Mr Guo under the transitional provisions of the new Act. Now specially here, under 105(2)(a) you see as a relevant mandatory consideration to the question of whether Mr Guo's deportation was unjust or unduly harsh is the nature of the offence or offences of which the appellant has been convicted and from which the liability for deportation arose. So the reason for his deportation liability, and in my submission that is commonly looked at under this limb from that personal Mr Guo perspective what did you do and why. How bad was it, what was the nature of this offence, what are the facts behind it, the circumstances of the offending, and this is one of the factors here balanced against classically personal and humanitarian things such as work record, personal and domestic circumstances, appellant's age, and that's the proportionality type assessment Your Honour Justice Glazebrook referred to earlier today.

So that stock standard, very normal under the old Act for a deportation for a criminal offender when considering what is unjust or unduly harsh. Now similarly, this is why I wanted to look at this first, for section 22, which is the revocation of residence and the humanitarian appeal that flows from it, if you turn back through, still in tab 2, to section 22. Now this is a slightly different test in the sense that it doesn't have a public interest limb as well. It's potentially an easier test that used to apply for residence, for revocation of residence, because it only had the unjust and unduly harsh limb. So it's 22(5) is the important bit for the test. "The Tribunal shall not confirm the revocation of a residence permit under the section if it is satisfied that it would be unjust or unduly harsh for the appellants to lose their right to be in New Zealand indefinitely." Then the fact is, if you look at 6, "In determining any appeal under the section the Tribunal shall have regard to the following matters." Similarly here to 105, age et cetera, and then you'll see here at 22(6)(e) the grounds on which the permit was revoked. So all the cases under the old section 22 when dealing with innocent, secondary applicants affected by a fraud, they were looking at

the reason for the deportation, normal, in order to balance whether this is unjust and unduly harsh. And then of course catch-alls like such other matters as the Tribunal considers relevant, and what you would find in those cases is that the Tribunal would look at public-interest type matters under that catch-all. But the mandatory consideration was the reason for deportation.

Now section 47(3), which is the one which section 207 is almost the direct copy of, of course –

ELIAS CJ:
Sorry, the new provision?

MS GRIFFIN:
Section 47(3) of the old Act, the 1987 Act, which is the parent basically of the new 207, and that's in page 118 of the statute, there in tab 2. 47(3) was the only one of these three tests that didn't have a mandatory list of factors, it had the phrase in the second, the middle, "the circumstances", for example, so that's at 47(3), "An appeal may be brought only on the grounds that there are exceptional circumstances of a humanitarian nature that would make it unjust or unduly harsh for the person to be removed from New Zealand and that it would not in all the circumstances be contrary to the public interest to allow the person to remain." Now, if Your Honours traverse back through cases under the old 47(3) for those unlawfully in New Zealand, what you would find in every one of those RRA decisions was a consideration of issues such as the integrity of the immigration system under that balancing of "unjust and unduly harsh" from the perspective of, what is it that these unlawful migrants have done in that personal space, how long have they been in New Zealand unlawfully for and did they slip under the gate in a very elaborate sort of way, all sorts of things like that, as opposed to someone who might become unlawful by accident, by not realising the impact of certain actions or decisions they might take in New Zealand that would affect immigration status, they might be your more, your less culpable unlawfuls, for example, under the old scheme, and you'll find in those decisions they have that balancing about what is it here that's happened in terms of the reason for this person becoming liable for removal under the old 47(3) on the same basis, that being separate to the wider public interest consideration.

Now in cases under these, under this 47(3) provision, one of the more substantive judgments in the High Court is the decision of *Zanzoul v Removal Review Authority*

HC Wellington CIV-2007-485-1333, and at that point in time – I apologise, Your Honour, I haven't got that in the bundle – but at that point in time the Minister took a cross-appeal there in those cases in order to try and get some authority around the separation of the two limbs. What the Minister was hoping to achieve was that there wouldn't be cross-fertilisation between the two limbs and you'd have consideration of humanitarian circumstances in one limb and consideration of public interest factors in the second, and the two wouldn't blend over into each side so it would be, in theory, an easier test to apply. That was not favoured at all by the High Court in *Zanzoul,* and of course in subsequent decisions following that, and hasn't been pursued since. So in *Ye*, for example, this Court's decision, it talks about the interwoven concepts of exceptional circumstances, unjust or unduly harsh and the public interest, and how it's important to ensure that there's, particularly the first limb, is not defeated by generic concerns about the integrity of the immigration system. And of course in *Helu*, which I accept is under section 105, the Court talks about the fact that some factors on either one or other of the limbs may be relevant to the other and there shouldn't be essentially, my interpretation of the Court's judgment, was that there shouldn't be bright-line rules here. So on the same analysis, when we look to the new 207, which is essential section 47(3) of the old act, it now covers every type of deportation, all of these previous ones –

ELIAS CJ:
Which section is this?

MS GRIFFIN:
Section 207 of the 2009 Act, so that's our current, this is the section that applies to the children, compared to Mr Guo, who would still have his appeal determined under 105 because of the transitional arrangements. Now the questions that I'd posit here is that, say, Mr Guo was being, instead of being considered under 105 he also was considered under 207 just by dint of when these occurred, if the new Act had been in force. To follow my friend's submission to its logical conclusion, it would mean that the nature of Mr Guo's offending, the circumstances of it, his personal involvement and actions he took, would not be considered under the first limb as to whether it was unjust or unduly harsh, despite under 105(2)(g), I believe it was, it being absolutely mandatory that it would be considered there and perfectly relevant to a question as to whether or not something is unjust or unduly harsh. Now in my submission the change to section 207, there's nothing very exciting about that in terms of this test, the question is still whether it's unjust or unduly harsh, and under the old 105 there

was still a separate public interest requirement, we're talking about deportation of criminal offenders. So what magic is there in removing the mandatory consideration from the old 105, so it's not, you don't have this list of things any more, and just keeping it one question, whether deportation is unjust or unduly harsh. You still have to balance in the same way that you did before, when you think about Mr Guo's appeal. And that's why you see, of course, in these decisions from the IPT, that's exactly what they're doing, they're continuing doing that same analytical approach by looking at the circumstances of that offending.

ELIAS CJ:
Well, it's contextual, isn't it, it's less –

MS GRIFFIN:
Yes, Ma'am.

ELIAS CJ:
– prescriptive.

MS GRIFFIN:
Yes, Ma'am, that's correct. Whereas to bring in my friend's approach, it actually would become prescriptive. You're saying, "Here are the things that apply in the first limb and here are the things that apply on the second."

ELIAS CJ:
Well, I'm not sure that he's really quite that extreme, because I thought it was that this circumstance was not one that attached to the children, it only attached to Mr Guo, so what would be wrong about taking it into account in respect of Mr Guo?

MS GRIFFIN:
Taking which into account, his offending, you mean?

ELIAS CJ:
His offending.

MS GRIFFIN:
And for the children – I see where Your Honour's going – the point, the fundamental point in the children's one is about Mr Guo's misrepresentation in the –

ELIAS CJ:

Yes, yes.

MS GRIFFIN:

– residence application, and that's the reason for the deportation. So, in my submission, on the children's appeal it's perfectly appropriate for the Court to look at what is the reason for these children being liable for deportation and how did that come about, in a factual sense, from that personal sense, and in the public interest it's obviously going to mean something there in a different way. But it's still relevant to balance it here –

ELIAS CJ:

But how does it really enter into the scales once it is the occasion for removal under the scheme of the Act, what comes in in that?

MS GRIFFIN:

Well, and this is one of –

WILLIAM YOUNG J:

You shouldn't be able to get residence on the basis of a false representation, I mean, that's a bit far to go.

ELIAS CJ:

Well, yes, yes, but that's a given.

MS GRIFFIN:

It's the underlying policy, yes.

ELIAS CJ:

But that's a given.

WILLIAM YOUNG J:

Yes.

MS GRIFFIN:

Yes.

ELIAS CJ:

I mean, otherwise they wouldn't be eligible.

WILLIAM YOUNG J:

But it's also material to whether the, the assessment, though it may not be a very big factor.

ELIAS CJ:

No.

MS GRIFFIN:

Yes, Sir.

ELIAS CJ:

That's what I'm –

MS GRIFFIN:

And that's my submission. This is the disproportionality thing, if you're looking at that on a "just and unduly harsh" you can't close your eyes to how this arose because you've got to look at what are the effects of deportation on these children in light of the circumstances of their deportation liability.

WILLIAM YOUNG J:

Well, if this had arisen in October 2006 then wouldn't have been any reason why they shouldn't have gone straight back.

MS GRIFFIN:

I beg your pardon, Sir, in what sense?

WILLIAM YOUNG J:

Well, say, on the 6th of September 2006 Mr Guo's arrested.

MS GRIFFIN:

Yes.

WILLIAM YOUNG J:

So the Minister had said, okay, Mr Guo, you're going to go to jail, but the rest of you, you all got in on a false representation and you're going back to China, and we propose to get on with this right now and you'll be home by Christmas. Now –

ELIAS CJ:

They'd have to prove it though.

WILLIAM YOUNG J:

Yes, they'd have to prove it.

MS GRIFFIN:

Yes, potentially, yes.

WILLIAM YOUNG J:

Yes, but it was pretty –

ELIAS CJ:

Easier to wait for the verdict.

WILLIAM YOUNG J:

But he's –

MS GRIFFIN:

Yes, it's a tough job for Immigration.

WILLIAM YOUNG J:

Well, true, true, but that did mean that the circumstances moved on while they were waiting for the verdict. I mean, they don't serve the notices until about five years after…

MS GRIFFIN:

On the children, yes.

WILLIAM YOUNG J:

On the children, for about five years, and quite a lot's happened since then.

MS GRIFFIN:

So initially in the first appeal, of course, it was absolutely only about Mr Guo and the children were staying, they weren't liable for – same with the mother, they weren't liable for deportation at that stage, and they hadn't proceeded against them. Now there certainly could be an argument where they could have at the same then under the old Act and that decision hadn't yet by made.

ELIAS CJ:

How is that – I suppose that lag is taken into account in a way by looking at their circumstances and whether they would reintegrate into Chinese society –

MS GRIFFIN:

Yes, Ma'am.

ELIAS CJ:

– but there's also, there really is a delay.

MS GRIFFIN:

There is a delay, yes, and they become more settled as a consequence.

ELIAS CJ:

Yes, and there's no suggestion that that should be a factor to be taken into account, the fact that the Immigration Service hasn't moved to notify them that they're in jeopardy.

MS GRIFFIN:

Well, on that I'd say, one, they get the benefit of the consequence of the delay, which is that they are more established in New Zealand as result of it, so there's that.

ELIAS CJ:

Well, it's certainly not a benefit if they are removed. So are they –

MS GRIFFIN:

It's harder to them, but it helps them make out the humanitarian appeal, if you see, that's my logic, that they are able to say in terms of their personal circumstances, "We've been here for X-many years longer, ipso facto my humanitarian circumstances are more up here now perhaps than I might have been able to argue

five years ago," so be that on Immigration New Zealand's head for taking that long for that reason. But what I would say, Ma'am, is that this, as you will have seen from this decision, it is a difficult decision with respect to the children, and it was a discretionary decision, and that took some time. Now perhaps it took longer than it ought to have. In my submission ultimately that's not relevant to what the Tribunal there is looking at, because it's taking the appellants as it finds them on the day and it's that they in this space, they're well settled, and it is, I mean, it is years after of course when they hear the appeal than when they were first served with a deportation liability notice, we're two years later by the time the appeal is heard as well. So that's notice in that sense.

WILLIAM YOUNG J:
So presumably if Mr Guo had just gone after his first appeal was dismissed, that would have been it?

MS GRIFFIN:
If he just decided to leave?

WILLIAM YOUNG J:
Yes, because he appeals that the – he appeals against the deportation order and it's dismissed, and then for some reason or other that's set aside in the High Court.

MS GRIFFIN:
Yes, I remember signing consent orders for that, there's not judgment, and it was sent back and that was, the reason why that happened was – I mean, it's not in the consent orders – fundamentally it was how Ellen's as a New Zealand citizen daughter's interests were regarded in that decision, and the IPT had made a mistake about the impact on her going to China and whether she could get citizenship or not, in China, and then further work was done to clarify what her citizenship status would be, and that was one of the reasons why the decision went back to the Tribunal to re-look at it in light of what the more sophisticated understanding was about the impact of her being a New Zealand citizen and having to live in China, they hadn't quite got that right in the first decision.

WILLIAM YOUNG J:
So just as a matter of – I mean, I'm just looking at page 24 of your submissions where you've got the chronology…

MS GRIFFIN:

Yes, Sir, I'll be two ticks. Yes, Sir.

WILLIAM YOUNG J:

Mr Guo brings judicial review proceedings against the first IPT decision –

MS GRIFFIN:

Yes.

WILLIAM YOUNG J:

– that's in May, in August the Minister signs, makes deportation liability, signs the deportation liability notice, and in September the first decision is set aside?

MS GRIFFIN:

Yes, it's happening quite close together, isn't it.

WILLIAM YOUNG J:

And then those notices aren't actually served until December.

MS GRIFFIN:

That is correct, Sir. I don't have a reason for you why there's a time delay in the service of the notices, and there might very well be an explanation but I can't answer that for you right now.

WILLIAM YOUNG J:

And if it's just a matter of interest, would they have got deportation liability notices if Mr Guo had simply accepted the decision of the IPT first time round?

MS GRIFFIN:

Oh, yes, Sir, it was certainly in train, the process of considering them for deportation was in train while his appeal was going on.

WILLIAM YOUNG J:

I see.

MS GRIFFIN:

And then certainly, you know, within Immigration, the ideal situation was to deal with them all at the same time, and that's preferable, but it couldn't be done for various administrative reasons. So that, certainly, by the fact that Mr Guo was in the High Court bringing his judicial review proceedings in May but in August the Minister is considering the children in that, you can see it's a simultaneous process not actually connected to the outcome or not of Mr Guo's appeal. But I take Your Honour's – I mean, if he had just left maybe that might have been a circuit-breaker in the decision-making process, but that didn't happen so it didn't have a bearing on the decision-making process, who knows.

WILLIAM YOUNG J:

And so your position really is that from that point on the Guo family effectively treated themselves as a single entity –

MS GRIFFIN:

Yes.

WILLIAM YOUNG J:

– they are either all going or all staying.

MS GRIFFIN:

Yes. And so in the first decision they were very much a single entity in the sense the mother's position was that she couldn't be separated from her husband and if he was deported she would go and everyone was coming too, that was the family's position. By the time they come to the second hearing when everyone, everyone's deportation liability is able to be considered in the one hearing, the mother is wavering on what she's going to do. She says in her brief of evidence that she's decided now she will stay so that the children can have the benefit of New Zealand health and education, et cetera, and in her oral evidence to the IPT she can't nail it down, she's equivocal there, she says, "I don't know, it's very difficult for me, my husband is my heart," these sorts of comments she says in the transcript. So in a sense the mother's not certain what she's doing. But the assumption the IPT takes when you read through its decision is that they are going on the assumption that the mother is looking like she's going to decide to stay now with the children if she is not made liable for deportation, that's in the recall decision that's what they're looking at, and they take her evidence as that, at its highest point, that she will decide to stay, which this family

was clearly struggling with, and the same with Jiaxi when she's asked here, "Will you stay by yourself?" and she can't commit to that position because of the impact on this close family unit. So the whole case was about being together.

Now coming back, in terms of when you're looking at the test under "unjust and unduly harsh" we were talking about before, as I said in terms of section 22 this reason for deportation was always something balanced for revocation of residence, the fraud case, in terms of whether it's unjust or unduly harsh. Now I say it's still absolutely going to be balanced under 207(1)(a), this reason for deportation, and I part with my friend, Mr Dillon's analysis on this where he says the only negative factor, the only countervailing factor here, was the fact of the father's fraudulent misrepresentation or however we want to describe it, concealment of relevant information, that wasn't the only thing balanced against them. Significant discussion is in the decision about the effect of deportation on the children going back to China and what they would face, and what's acknowledged there are, yes, there will be difficulties, but actually, no, they're going to be okay.

And this is what you find in a lot of these cases, certainly the China cases, these are also countervailing factors taken into account for them, that the circumstances weren't, for example, Ellen having a terrible medical condition that couldn't be treated in China and hence her best interest irretrievably would be staying in New Zealand to access that medical treatment for the condition, and we've had cases like that in the past, (inaudible) is one of them, it wasn't that scenario. The evidence was that the children with their parents' support and their, and also Jiaxi, because she'd spent half her life there, would be able to assimilate back into the living situation in China, and this is the proportionality assessment: while they can say it's harsh because they love their life in New Zealand and they're used to it here, it's not, the fact that they lose that because, as Your Honour Justice Young said, Jiaxi's a good citizen, she's great, why can't she stay? It's that the impact on her on going back to China is actually not that harsh; well, it's harsh but it's not sufficiently unduly harsh when looked at here in the balance, she's not going to suffer terrible adverse consequences, and it's important in the –

ELIAS CJ:
Well, the balance being…?

MS GRIFFIN:

I beg your pardon, Ma'am?

ELIAS CJ:

What is the balance?

MS GRIFFIN:

Well, if –

ELIAS CJ:

Just articulate it for me.

MS GRIFFIN:

Yes. So if there was, about Jiaxi, if there was –

ELIAS CJ:

No, no, you said, "It's not that hard, weighed in the balance."

MS GRIFFIN:

Yes, so –

ELIAS CJ:

So what do you weigh against that in the balance?

MS GRIFFIN:

The factual finding is that deportation for Jiaxi would be harsh, same for Jiaming, would be harsh. In determining whether that fact means it's transmutes into "unduly harsh" they're not just looking at this reason for deportation, what the father did, they're looking at what is it about her returning to China in itself, living there and being there for however many years to come, will be unduly harsh for her. Yes, it's harsh, is it bad enough to be unduly harsh –

ELIAS CJ:

Well –

MS GRIFFIN:

– and they look particularly at what she'll face.

WILLIAM YOUNG J:

But, sorry, what does “unduly” mean? Does it mean “very” or does it mean “harsh, disproportionately harsh, compared to something”.

MS GRIFFIN:

Yes, so let’s look, I can show you a great case on this. If we look at, in the respondent’s bundle, and this is why immigration gets so complication, because deportation is harsh just by the very nature of the beast, and so there’s, trying to draw these differences between when does it tip over the scales where the deportation shouldn't occur. So if you turn to, I believe it’s tab 10, the decision of His Honour Justice Lang in *Prasad v Deportation Review Tribunal* HC Auckland CIV-2007-404-8059, 19 February 2008, and this one’s a oft-cited decision because of the extent His Honour Justice Lang goes to to talk about what is harsh in this immigration context, and this is very helpfully an old section 22 case of revocation of residence where there has been misleading information et cetera, et cetera.

Now if you turn to paragraph 50 of the decision, and there’s some great statements in here from His Honour Justice Lang. At paragraph 50 he, “The words used in s 22 are therefore important” this is “unjust and unduly harsh” language, “Notions of justice and injustice in this area must be applied within the context of the Act. The section clearly recognises an element of harshness will inevitably surround any decision to require a person to leave New Zealand. That person will be forced to abandon a life that he or she has chosen in substitution for that in his or her country of origin. This will involve the severing of relationships, not only with family members but also with other persons that the appellant may have formed over many years. It may also require the person to leave behind family members to whom they are very close. Assets accumulated in this country have to be sold or abandoned, medical, educational and employment facilities and prospects may also be much more limited, or even non-existent, in the country to which the person is required to return. In addition, the person will often have to make the difficult decisions regarding the future of children who are New Zealand residents,” so these are the ones not liable for deportation, “by virtue of the fact that they were born in this country.” Now so there, that's the stock-in-trade for “harsh”.

WILLIAM YOUNG J:

Okay, so what he’s saying is the comparator is a notional person who’s being deported.

MS GRIFFIN:

Everyone faces this.

WILLIAM YOUNG J:

Yes. So it's got to be worse than for someone you'd expect in a deportation case. Now that's not an obvious approach to the section so that…

MS GRIFFIN:

Well, Sir, I'd say it's not that it has to be worse, it's that there's something in the particular circumstances of the appellant that stands out, for whatever reason. So all of these you're going to expect to see relatively commonly, but it might be –

WILLIAM YOUNG J:

Well, can I just give you an example? Say it was Jiaxi who had filed a false representation herself and it was, she was the one who'd been doing the drug dealing.

MS GRIFFIN:

Yes.

WILLIAM YOUNG J:

Well, harshness in that situation might not be thought to be undue or unjust because really she'd brought it on herself.

MS GRIFFIN:

Well –

WILLIAM YOUNG J:

On the other hand, the same level of harshness might seem unjust if it's not really her fault.

MS GRIFFIN:

And so, Sir, if you look at –

WILLIAM YOUNG J:

But that's not really what he's talking about, is it?

MS GRIFFIN:

Well, if you look at paragraph 55, this is for Ms Prasad, this is exactly what happens to her. So he says, at paragraph 55, "First, it could not be said to be unjust because Ms Prasad would never have obtained her residence permit if she had disclosed her true marital status at the time that she received the permit.

WILLIAM YOUNG J:

But what he –

MS GRIFFIN:

So he's doing what Your Honour's saying there.

WILLIAM YOUNG J:

Well, I'm not so sure actually. Because I think in 52 and around that he's just saying, "Well, we take as a given it's going to be tough to deport someone, for that person, but it's got to go beyond that."

MS GRIFFIN:

Yes, and I support that. So, "Effects that go beyond those that such an act may be anticipated to produce," so these, you have the baseline concepts that you've got to go through all of this pain when you're deported, you've got to give up everything, but –

WILLIAM YOUNG J:

But there are two things, you're mixing two things together, which I'm finding sort of was driving me bonkers actually.

MS GRIFFIN:

I'm sorry, Sir.

WILLIAM YOUNG J:

One is, is this worse than it would, is it tougher than it would normally be for someone who's being deported, that seems to be para 52. Alternatively, is it inappropriately tough, given what this person has done? And I thought, doesn't the Court, this Court in *Ye*, say something about that?

MS GRIFFIN:

Is it inappropriately tough, given what the Court has done?

BLANCHARD J:

I think it's in paragraph 35 of *Ye.*

ARNOLD J:

Yes, 55, that first sentence.

ELIAS CJ:

35.

WILLIAM YOUNG J:

Of *Ye*?

ARNOLD J:

35.

ELIAS CJ:

That's what I disagreed with.

ARNOLD J:

Oh, I was looking at – well, 55 –

MS GRIFFIN:

Let's just check that.

ARNOLD J:

– of this case we're just looking at.

WILLIAM YOUNG J:

Oh, yes.

GLAZEBROOK J:

No, but that's the exceptional circumstances, isn't it, that's slightly different.

MS GRIFFIN:

I think, Sir, it is both, what you're saying, I think both of things are going to be, you've got to weigh, you've got to look at both of those aspects to it. The simple concept of harshness and undue harshness about what is the actual effects in the country of origin where you're returning to, what factually is going to happen to them, putting to one side this reasons for deportation side and how it came about, the what actually are they going to face. And there'll be many appeals that live or die there and ones that will be one because the circumstances certainly could point to something that is just going to create some terrible effect for the person that that shouldn't stand on a humanitarian appeal. The other side in the disproportionality, proportionality balancing, will be what Your Honour Justice Young is saying, you know, is it harsh simply because of how this person's come to be in this position, and that's the personal focus to the reasons for deportation, it's not necessarily the public interest side of it, which is about what is the consequence of a fraud on the immigration system, it's about how that person came to be liable and are they wholly innocent of it, were they completely duped of it, ought it never to have happened to them for other X, Y, Z reasons, and I absolutely say you should look at that on the first limb when you're balancing it, that's why I say Mr Dillon can't say it's relevant to look at the innocence of the children to establish exceptional circumstances of a humanitarian nature but somehow say because of that factor you can't look at anything more in terms of their reasons for deportation, what's behind it, how they came to be residents and got the benefit, as His Honour Justice Blanchard talked earlier of it, when they ought never to have been residents in the first place.

ELIAS CJ:

I'm wondering really whether there's been over-refinement –

MS GRIFFIN:

Probably.

ELIAS CJ:

– in here, and that again we should look at the structure of the Act and the way the section is structured, and if "unjust" is, as I would have thought it is, an absolute standard, it's not, it doesn't necessarily require a comparator at all, even excepting that all circumstances have to be taken into account in deciding whether something is unjust, why isn't that also true of the way "unduly harsh" is used, so that it is simply just a statement of the Tribunal must consider that it's unduly harsh, it's very harsh,

too harsh to countenance here. Because then those two words are used in a similar sense, and really I just, I'm not sure that there's anything much more scientific to it all.

MS GRIFFIN:

Conceptually, Ma'am, I don't have a difficulty with that, I think how it will happen practically on the ground is there's always going to need to be things that the appellant and the Tribunal can bolt onto in order to make that assessment, so they've got to look at –

ELIAS CJ:

Well, but I accept that everything's relevant really, anything that's connected with it is relevant and is able to be assessed in coming to that judgment.

MS GRIFFIN:

Yes.

ELIAS CJ:

But I'm not sure that "unduly harsh" requires you to decide in comparison with what, because of its coupling with "unjust", I think that both can simply be seen as requiring a standard that the Tribunal must satisfy itself as to.

MS GRIFFIN:

And I think, Ma'am, I think the Tribunal would agree with that, that it is a standard that it must satisfy itself as to, and it's trying to find a methodology by which it can reach that conclusion, because it's a difficult assessment to make, categorically, and they're trying to do it in a very individualised way which, in my submission, is appropriate, they're trying to, while there are these concepts that everyone faces this harshness, they are trying to analyse it –

ELIAS CJ:

Well, you see, I'm not even sure that I accept that. I don't think that it can be characterised in many cases that a deportation will be harsh.

MS GRIFFIN:

Well, it's a value judgement, Ma'am, isn't it? I suppose, you know, if I had to be deported –

ELIAS CJ:

Well, someone who might prefer to be here, they'd have to put up something more before you'd say it was harsh to deport them, given the fact that they were eligible for deportation.

MS GRIFFIN:

Absolutely, absolutely. But what they'll say is, "It's still harsh for me personally because I have to leave my boyfriend," or something, "and that's harsh," in a human sense, and I think that's what the Tribunal's trying to do it's trying to move beyond those concepts of –

ELIAS CJ:

Well, that will be something that the Tribunal will have to make an assessment of.

MS GRIFFIN:

It will be, it's relevant.

ELIAS CJ:

Because it is about human bonds and interests.

MS GRIFFIN:

It is, it is.

ELIAS CJ:

Yes.

MS GRIFFIN:

And that's what this first limb very much is about. So when they're looking at, as I come back to, reasons for deportation, they're looking at it from this person lens, "What did you do or what didn't you do and why did it happen?" directly for you, the individual, because another person who did the same things, the outcome could be completely different for other types of variant reasons. And so they do look very closely at that, and in my submission there's nothing wrong with that. Like you say, they're looking at everything to make that evaluative assessment, and it is very evaluative. And that's why, moving into Mr Dillon's point about whether there's some disjunct between "unjust" versus "unduly harsh". In my submission the High Court in *Pal* has got this right following on from Your Honour Justice Young's decision in *Esau*

that it's too much to ask to separate it out into perfect categories because I'm attracted to Mr Dillon's argument that where it is unjust it's going to be unduly harsh and vice versa. But then what happens when it's neither one of those, does it have an impact on the other. On the surface that seems like a good conceptual model but then when the Tribunal has to apply it, how do you neatly separate out which goes into what pile, and in the end we have the specialist Tribunal which is tasked with making this evaluative exercise and what the High Court has said in *Pal*, and I think their conclusion is really important.

If I can just read what they say at tab 9 of the bundle at paragraph 59, tab 9 of the respondent's bundle, and in my submission this is an accurate statement of the law, half way through paragraph 59 after referring to the various cases that had tried to grapple with this. It says, "It is artificial and unhelpful to a coherent process of evaluation to try to deal disjunctively with criteria that cannot be distinguished in any practical way," as opposed to a conceptual yes you might be able to see a difference. "A deportation that is unjust is likely to be unduly harsh, and vice versa. A more nuanced analysis of each concept is likely to produce a strained result. Insofar as the Tribunal did not attempt to distinguish in a formal way between the two concepts, I do not think it was an error."

And here I think it's important because how did the Tribunal look at this question of innocence when looking at this. And it's very clearly that they know absolutely they're innocent, as we've said today, and they say that upfront and in bright lights, and if that's the factor that goes to unjustness, as a singular concept, you can't say it's a factor that hasn't been considered and that's an error of law simply because they didn't tag it to unjust, and then they, my submission at least, and then they make their conclusion, their finding on it, in a composite way and therefore not unjust and unduly harsh, but they're not ignoring in this balancing the factor of innocence. What they're saying is innocence under this limb is not the complete answer. We're going to look to, if we forget reasons for deportation liability, we're going to look to what's going to happen to you in China and that's a big part of why they also fail. They get over, I would say generously, on the exceptional circumstances side of it pretty much solely because of the innocence, and then they come into this bit and say so what does that mean in the round. Is innocence enough for someone in this circumstance to always win on the first limb. Is that what we're saying, that it's going to be such a compelling factor alone, irrespective of the ease with which Your Honour pointed out someone might be able to return to their home country, and in my submission well

with the ease in which they might return, the fact that they were never entitled to residence in the first place, here we look to a policy act and I indicate actually know that they should return despite the fact that you're going to face difficulties in doing so and innocence doesn't save you from that necessarily.

GLAZEBROOK J:
Can I just say, I have some sympathy with that if you're just looking at what was unjust and harsh. It's just the 137 which basically says, well there have be consequences, which is different, it seems to me, from saying – it's effectively saying despite your innocence there has to be consequences for somebody else's action.

MS GRIFFIN:
Okay –

WILLIAM YOUNG J:
Aren't they talking there about Mr Guo though? Because this is really relating to Ellen –

MS GRIFFIN:
This is the children's appeal Sir.

WILLIAM YOUNG J:
– who isn't eligible for deportation. I thought that was…

GLAZEBROOK J:
No, this is whether –

MS GRIFFIN:
This is the 137.

GLAZEBROOK J:
– it's unjust or unduly harsh.

MS GRIFFIN:
And it's on the children's appeal after they've found exceptional circumstances.

WILLIAM YOUNG J:
I better find it, I'm sorry.

MS GRIFFIN:
137.

ELIAS CJ:
It's a constant refrain throughout the whole decision.

MS GRIFFIN:
Yes.

GLAZEBROOK J:
It can't be the case that no consequences to the children flow from his conduct, that's what that says.

MS GRIFFIN:
Okay and –

GLAZEBROOK J:
Solely because they're innocent, consequences have to flow from Mr Guo's conduct, and they have to flow to the children.

MS GRIFFIN:
Well I think if we just take this, if we break this down a little bit. Ultimately I say looking at this paragraph as a whole, what they, it's the very last bit that they say at the end, "Solely because the beneficiaries are innocent." In my submission what the Tribunal is saying is it's just because they're innocent, doesn't get you home. That's it's real point. What the counsel for the appellants here are landing on is that it's innocence, it's innocence, it's innocence, that's my complete answer. They're saying, look, this is –

GLAZEBROOK J:
Well, no they're not. They were saying it's going to be very harsh for us to be in China and we're innocent parties and we shouldn't go there. They were certainly not saying it's going to be a walk in the park for us in China but we just don't want to go and we shouldn't because we're innocent.

MS GRIFFIN:

Oh, no, no, I don't mean to suggest that it's going to be a walk in the park in China, but – and you haven't got the submissions before you but innocence – sorry?

BLANCHARD J:

Aren't they just saying there, innocence alone doesn't carry the day?

MS GRIFFIN:

Yes Sir and that I think is the most important point.

ELIAS CJ:

But they're saying it because there must be consequences –

GLAZEBROOK J:

Yes, it can be read that way too.

ELIAS CJ:

– flowing from Mr Guo's conduct.

GLAZEBROOK J:

It had to be visited on the children.

MS GRIFFIN:

Well I think it depends what do they actually mean by "consequences"? Are they here – now Mr Dillon I'm sure will say, and rightfully so, that this is about punishing the children, visiting the sins of the father onto the children. I say that's not what they mean. This is not about punishing the children and making them pay. That's not what they're saying. This is kind of the integrity of the Immigration system point. This is upholding the policy of the Act, that the underlying policy here is in these circumstances you get deported.

GLAZEBROOK J:

But that would have to be under, surely that has to be under the public interest.

BLANCHARD J:

But the operative word in that contentious sentence is "solely".

MS GRIFFIN:

That is my submission Sir.

GLAZEBROOK J:

But what's the other bit, what's the other bit?

BLANCHARD J:

Quite clearly the –

ARNOLD J:

But the trouble is –

MS GRIFFIN:

Well to me that's what it means, and I agree with you, "consequences" is an unfortunate word, I accept that Ma'am. What they're really saying here is that, and they're going to do all this analysis about circumstances in China, is that you can't tell me that this factor of innocence is going to get you home because of the reality of the reasons for deportation here. It's relevant but that's not it. It's that point that it's solely, if that was the only thing, for example, if that was the only thing, there was no other problems in China or whatever, they would say, well we're going to balance this against how bad this is and we think that's too simplistic. Ultimately I think that's what the Tribunal here is trying to say. It's saying don't come at me, as Mr Dillon is now, about it being all about innocence.

ARNOLD J:

But I mean at 162, that paragraph we looked at before –

MS GRIFFIN:

Yes Sir.

ARNOLD J:

– it's very much in terms of the father's offending must have consequences and so it maybe that linguistically at 137 "solely" is important but it isn't at 162, they are saying the offending, we don't accept that it can be without consequences.

MS GRIFFIN:

Well on that point Sir I say actually you could intersperse "solely" into this between the word "consequences" and "because", or you could replace "because" with "solely" because the point again is there, in light of this serious set of reasons for deportation, the fact alone of the existence of a New Zealand citizen child, or innocent family members, again this is the point, that factor alone doesn't get you over the line. It's a factor, but it's not a trump card, just like all the point about –

ELIAS CJ:

I have no trouble with that. I have no trouble with the view that solely because they didn't participate in the deception is not a complete answer. The part that I have problems with is the view that the Tribunal seems to be taking throughout, and it is a refrain through its judgment, that there has to be a consequence because of the – there's already a consequences, they're eligible, and they're meant to be looking at the humanitarian reasons which would justify not deporting and they say, well, sorry, there have got to be consequences. It just seems a bit odd.

MS GRIFFIN:

I absolutely take your point Ma'am and if the Tribunal's decision, with those statements in mind, was also talking about, and these four bad things will happen in China to these children as well, and there must be consequences, and therefore out you go, that would be bad.

ELIAS CJ:

Well they do, they do identify –

MS GRIFFIN:

But no they don't. My submission –

ELIAS CJ:

They identify a lot of hardship that these children are going to encounter and they say, but look, they'll be okay.

MS GRIFFIN:

Well Ma'am I –

WILLIAM YOUNG J:

Can I just come to your rescue.

MS GRIFFIN:

Yes Sir, please.

WILLIAM YOUNG J:

Isn't perhaps the best explanation for this unhappy language that the Tribunal was dealing with what was being offered to them as a job lot, that Mr Guo may say, well I'm a big bad pseudoephedrine smoker, but it's unfair to send me back to China because look at the impact it will have on my children who I've brought here under false pretences, and what they're saying is, and that's really the case that's being advanced, we all stay or we all go, and it's, and they're saying, well no Mr Guo, you can't get away with it that easily, you are, you get residency by fraud, you're a criminal and you can't avoid deportation by pointing to the consequences – the effects on the children. Now I suspect that's what they meant. I don't know that they entirely –

GLAZEBROOK J:

I think they probably did, if you look at 162 they probably are looking at that.

MS GRIFFIN:

I think, on that point I think certainly in terms of Mr Guo that's what they would have been thinking. I also think, to be fair to this Tribunal, they have tried very hard to look at the three appeals, the two fact appeals, the fact appeals for the family members, and the humanitarian appeals. In their light, despite all this terrible stuff about Mr Guo, how rare is it in Immigration that really the principal, it's so bad for that first one and for it not to have a taint. Now if you read this decision as a whole, in my submission, they have actually, they have really done a lot of work here in setting out what will happen to Jiaming, what will happen to Jiaxi, what will happen to Ellen. They look at the expert evidence of Dr Brady. They weigh it up, not because of the negative consequences of the offending and the fraudulent resident application, but they look at it critically in terms of how they will survive, will they be able to access proper education services et cetera, et cetera, and yes it's not as free-living as in New Zealand, certainly, they acknowledge that, but they go through how they consider the children will be okay, and that in my submission, to pick up Your Honour Justice Elias' point, it's not then coming back to this consequences point, but actually

their assessment of that evidence is that that is not unduly harsh for these children, for these children the situation they will face again in China. It's not great but, you know, look at the fantastically educated children that come out of China. How clever and smart they are. What they're looking at here is that this is a country, yes it's not like New Zealand schools certainly, but they believe these children will get a good standard of education as Jiaxi did, and they look at that closely, and I don't, in my submission, it's not a fair reading to say they dismiss all of that by this notion of consequences. They have actually looked personally at that.

I wonder, Ma'am, I'm conscious of the time too. There's one other point, if Your Honours are happy to hear from me on that one other point?

ELIAS CJ:
Yes.

MS GRIFFIN:
And this is about this concept of best interests for these children and I think it's, because this case is so unusual it's really important here. Fundamentally we have to look at this decision now on the basis of the rightness of the IPT's decision with respect to Mr Guo. That's been upheld, no error of law. The situation the IPT is then faced with is that correct decision, what is happening to these children, and what is in their best interests in light of the fact they're going to have no parent, either Mr Guo or Mrs Hong, in New Zealand with them. Now in my submission this is fundamental to the notion of best interests in this case. Now while it maybe where the family's all together –

ELIAS CJ:
Sorry, I'm just trying to think what this is directed at, this submission?

MS GRIFFIN:
In terms of, for example, the criticism earlier of why Jiaxi's views might not have been sought on whether she could look after the children in New Zealand or why the children might not have otherwise been able to stay without their parents, and why didn't the IPT think about this. So I'm getting at it from the perspective that if the best interests of the children, if the IPT's evaluation of that concept led it to the conclusion that their best interests was to stay in New Zealand without their parents for all the benefits that New Zealand would give and Jiaxi could look after them. If that was the

proper answer on best interests then yes I'm with you. That would be a flaw in this decision. The true and genuine analysis that IPT here has done is that the best interests of these children, in light of their particular family, is to be with fundamentally their mother and father, but particularly their mother. It's not to be in New Zealand without them. They can't find that factually when looking at this evaluation that these young minor children would ever want to be alone in New Zealand with Jiaxi there or not.

GLAZEBROOK J:
Where does this come out in the decision? Where do you say this comes in the decision?

MS GRIFFIN:
So, for example, if you look at paragraph 145, for Guo Jiaming, and they say here, "He is seven years of age. He was born in New Zealand and has spent his entire life here. In a general sense it is in his best interests to remain with his family in New Zealand." That's the pot of gold at the end of the rainbow. That's the best case, best interests outcome. And they talk about, if we move down the decision.

WILLIAM YOUNG J:
Have they ever addressed whether it's in his best interests to remain in New Zealand with his big sister but without his parents?

MS GRIFFIN:
No, not in that specific way, because for the reasons I say, that it's not –

WILLIAM YOUNG J:
No, I understand that, I understand that.

MS GRIFFIN:
Yes.

WILLIAM YOUNG J:
I mean the fact, it's possibly the way the case was presented, but it took a bit of a funny turn when Mrs Hong left New Zealand and couldn't get back in because –

MS GRIFFIN:

Yes.

WILLIAM YOUNG J:

– the staying behind and leaving Mr Guo to go option which was sort of there before the Tribunal was removed.

MS GRIFFIN:

Yes. For Jiaming, Your Honour is quite right, they don't say, would it be in his best interests to at least stay in New Zealand with Jiaxi. They don't say that.

GLAZEBROOK J:

But I think you were making the submission that they found it was positively in his best interests to be with his mother. I was asking you where that was.

MS GRIFFIN:

So for, and there's the two decisions, obviously the early one, another paragraph at 156, and it's probably not the best example, it talks about here in the third line they say –

GLAZEBROOK J:

I just haven't seen anything that looked at is as specifically as you have put it.

MS GRIFFIN:

Well another one, beg your pardon Ma'am, if we just look at Ellen Guo, and I'll show you there's some early passages in the recall decision 2 and I think there's a problem where the two decisions got changed. In paragraph –

ELIAS CJ:

But we only have to go off this one. This is the only decision.

MS GRIFFIN:

Yes Ma'am, yes Ma'am, it's the point is about how things changed when the mother left that affected the way the structure of the decision changed, that's all I mean.

ELIAS CJ:

Yes, I see.

MS GRIFFIN:

To help you see, if it helps, to see where the Tribunal's thinking went to, that's all.

ELIAS CJ:

Well I'm not sure we really should go behind what they've expressed in the final decision.

MS GRIFFIN:

No, I mean you might take judicial notice of things they left out, for good or bad perhaps. I don't know why they would –

ELIAS CJ:

Ah –

MS GRIFFIN:

Yes, I leave that certainly to Your Honour, I take the point. One other example here at 159, "The Tribunal is also mindful that as a nine year old child, her best interests are served by being in the care and protection of her parents and her older sister, who described herself as being like a second mother to the younger two children. As we have already recorded, Mrs Hong, Mr Guo and Ms Guo all described the family unit as a very close and harmonious one."

My point is there, is the best interests of the children changing two weeks later from a position that their best interests are served by being with the family together, particularly the parents, because they've always been in the care of the parents. Two weeks later, or two and a half weeks later when the new decision comes out to that their best interests are to remain in New Zealand without their parents. Was that that something that the Tribunal could actually realistically find on this evidence. That, not only just would their parents even allow that, but that for these minor children should they –

BLANCHARD J:

Well, wait a minute. Wouldn't just be no this evidence because the whole question is whether there should have been further evidence, or the opportunity for further evidence, before that second decision came out, so that there could be a response to the change in position.

MS GRIFFIN:

Yes Sir and I can't cure that, no matter what I can say today, I can't cure that, and that maybe an answer. The only submission I can make is that is it really something that was going to change. Was there anything to suggest Jiaxi would say, I'll stay here on my own with them in light of what she submitted to the Tribunal. Was there anything to suggest that the Tribunal would make a finding in terms of best interests, that with two loving parents, which indisputably these two parents are, that the children's best interests are, just so long as they can stay in New Zealand, that's the guiding factor. Best interests are determined by you can stay in New Zealand but – for this non-citizen child, potentially, as opposed to being with your parents.

WILLIAM YOUNG J:

But for Jiaxi they seem to have just assumed that she wouldn't want to stay if her parents couldn't stay.

MS GRIFFIN:

Well one that's part, based on her evidence in the Tribunal, but they look at, that's the point that I made earlier at 125, it's not so much about what she wanted. They say here, "If she stays she will not have either parent in New Zealand," so she's going to stay alone, and they look directly, this is where I talk about, it's not just about Jiaxi, the good citizen, could she stay alone and would she survive. It's about actually, is deportation unjust or unduly harsh on her circumstances in light of what she's going to face in China and for Jiaxi the grown woman they actually talk about she's such a competent grown woman that she'll find her way back in China, just as she did as a young girl spending half of her life there. She's not going to return to dire circumstances. That's me going into paragraph (b) and then they look specifically under unjust and unduly harsh for Jiaxi too, from paragraph 139 onwards, her language abilities, her education, her hard work and determination and drive, and her ability to get on with life and that, they find this factually as a finding that –

WILLIAM YOUNG J:

Yes, no, I understand that, it's just what was the hypothesis they were considering?

MS GRIFFIN:

But if, say the hypothesis, say she said that I want to stay alone, that doesn't meant she can stay, you know, that's not the answer. She has no right to stay. She's liable

for deportation. The only basis upon which she can stay is a humanitarian exception under section 207 so she has to meet this test –

BLANCHARD J:
What if –

MS GRIFFIN:
– fundamentally in order to stay.

BLANCHARD J:
What is she says, I want to stay, not just for myself, but so I can look after Ellen who is a New Zealand citizen.

MS GRIFFIN:
The what if –

ELIAS CJ:
And my baby who is a New Zealand citizen.

MS GRIFFIN:
Well she didn't have the baby then though, at that point.

ELIAS CJ:
No but she does now.

MS GRIFFIN:
No but she couldn't have, the Tribunal, she couldn't have given that evidence to the Tribunal at that time. She couldn't have said she was married either. So if the Tribunal sought those submissions they wouldn't have got that. The Tribunal might then say, but what does Mrs Hong say and Mr Guo say, are they saying that you can stay here with our children.

BLANCHARD J:
Well we don't know.

MS GRIFFIN:
Yes.

BLANCHARD J:

That's the problem when you have a breach of natural justice.

MS GRIFFIN:

All I can say Sir is that certainly the evidence up until that point in time was that that wasn't what the parents were going to be saying and was the Tribunal –

GLAZEBROOK J:

Well they wanted to stay here with their children so of course they weren't going to say that.

MS GRIFFIN:

Of course. Of course, that is true Ma'am, I can't deny that.

GLAZEBROOK J:

And you can understand why people are equivocal about their evidence, I want my parents to stay here with me, that's what I'm focusing on at the moment, and of course I don't know what would happen if they had to go and I got the opportunity to stay because I want them to stay.

MS GRIFFIN:

And, but in the end Jiaxi is a grown woman too. She's 22 years old at this point in time and they don't, yes they could have asked for further submissions. No doubt they could have asked, that was a possible thing the Tribunal could have done. Did it have to? I mean in answer to one of those questions you need to look at the statutory scheme in terms of the responsibility of appellants to make their own case. This wasn't a scenario where that's under section 226 and the Tribunal's power to decide it based on the case put forward to it by the appellants.

BLANCHARD J:

Yes but they have to make their own case. But after they've made their case, suddenly there's a major shift which significantly affects the ground –

MS GRIFFIN:

Yes Sir.

BLANCHARD J:

– in relation to Jiaxi, to use the phrase –

MS GRIFFIN:

Yes Sir but –

BLANCHARD J:

– but at that point they're not given any opportunity of making a further submission.

MS GRIFFIN:

Well I think you first have to say, have they been denied the opportunity. Now the obligation –

BLANCHARD J:

Well it all happened rather quickly, didn't it?

MS GRIFFIN:

Within three weeks I think is the timeframe. But they knew, they knew it was happening. For a start, they weren't the ones telling the Tribunal in the first place that this had happened, that had to be an intervening event. Secondly, so they knew, their counsel knew this was going to happen and they were saying the decision obviously now needs to be recalled mea culpa. So there, there was the chance to put your hand up and say I want to make further submissions. The obligation under section 226 of the Act is to put all evidence, submissions and information before the Tribunal relevant to the determination of the appeal, before the appeal is determined of course, and ultimately I say they could have done that. They could have said things were different, and they did choose not to. Yes, it's a short period of time, I accept that. I probably can't take the point any further, unless Your Honours have any further questions on that, but that ultimately is the position for the Minister on that point. Unless Your Honour's have any further questions, I think that probably covers the ground.

ELIAS CJ:

Thank you Ms Griffin. Yes Mr Dillon.

MR DILLON:

Thank you Your Honours. The peculiarities of this case arise really from the constantly shifting ground that the IPT in the first instance, and the Courts since, have faced in this case. At the start of my friend's submissions the Crown was effectively being criticised in relation to Jiaxi in the context of a ministerial intervention and the ability for the Minister to regularise Jiaxi's circumstances where the Court's view today is that she is somebody that simply won't be deported and the Minister should exercise his discretion.

In that regard, of course, those identify at least two changes. Jiaxi's personal changes, becoming first of all a wife and now a mother, but there is another change that is far more recent and in fairness to the Crown does change how the case has developed to date. That, of course, was this Court's decision not to allow Mr Guo personally leave to appeal because it's only at that point that these appellants' position are fully and completely separated from his. And one can understand that the appellants' position as a family now being sundered and just these appellants now before the Court, that really does change things, and so in fairness to my friend I don't think any criticism can be aimed at the Minister because frankly and quite clearly Mr Guo was hoping to coat-tail on his children's application. Now it's only very recently that that has not become available to him.

The scheme of the Act in the context of how the application and secondary applicants arises was also addressed and without giving the legal answer, and pointing to the sections, it's quite clear that Mr Guo's application is the umbrella which covers these particular appellants, and the analogy is somebody walking across the river on the backs of the primary appellant. The primary appellant has stumbled and unless humanitarian relief is provided to the secondary appellants, they also get wet. But that also points to the fact that this is a humanitarian appeal. The fact that the stumble has occurred is a given and as this Court has noted the –

ELIAS CJ:

Sorry, what is the submission? I'm just not quite following it.

MR DILLON:

The submission is that in the context of humanitarian relief, why do the consequences of Mr Guo's offending have to be borne by the children. I think that was Your Honour's point. Because that is a consistent refrain through the decision

looking at humanitarian relief. The appellants' submission is that it shouldn't be in the balance. It is a pre-condition to being able to ask for humanitarian relief and given that they personally were not responsible for that stumble, it should simply be out of the scales. We know why they are here, but it is not relevant as to whether they should be provided with relief. Now it is relevant when Mr Guo is making the same application for humanitarian relief. He is the one that stumbled. It is relevant for him. It is respectfully submitted it is not relevant for the children.

The only other submission is in relation to the change of circumstances between the two decisions. I am not able to advance what happened in fact. Counsel appearing before the IPT was Mr Chan who is now in Hong Kong and it was a different firm, it was McVeagh Fleming, but he was employed by at that time, so what actually happened in fact is lost as far as counsel for the appellants is concerned. I can't advance that any further. What is clear from the decision of the Tribunal itself in the first four paragraphs is that the hearing, the evidence took place in December. Mrs Hong left for China on the 4th of July. The first decision was released on the 10th of July. Counsel for the Crown advised the Court on the 16th of July and the amended decision, or the recall decision was released on the 25th of July. No further evidence was addressed. The evidence from Jiaxi, being the second mother, is recorded in the second decision and the relevant paragraphs in this regard are at paragraphs 53, 54 and 55, and it is quite clear that, I think the words were "a package lot" or a "job lot" that was the basis on which it was being advanced at the time. It was advanced back in December because at that time it was a job lot. The comments that really resonate is that in 53 Jiaxi says, "She has never been separated from her parents." As a matter of fact, but the time the recall decision is released, she has been. Her mother is prohibited from returning to New Zealand. In 54 she says, "she wants all of them to stay here and she does not want to think about the alternative." That was her evidence in December. By July it has happened to her and it is a matter of evidence then, not just a matter of submission, but a matter of evidence then as to what happens in these changed circumstances.

So to the extent that this is bearing on the Court's consideration, it is clearly a very significant change, and it does not appear from the record that that has been addressed as a matter of evidence by the appellants.

ELIAS CJ:

Well what do you suggest though we do with it? What we have here is an appeal against a refusal of leave to appeal on a question of law.

MR DILLON:

Indeed.

ELIAS CJ:

How do you, how does this submission impact on the decision we have to make?

MR DILLON:

The difficulty the appellants have is it's not one of the issues they were seeking leave to appeal on. It doesn't appear in the application. It is something that has developed through discussion in the course of seeking leave to come before this Court, and as a result of this Court's decision for leave, raised that as an issue of concern for the Court. And at a procedural level that causes the appellants some difficulty so it's not easy to answer that question Your Honour. I can only say that it is not in the application but it does appear to arise as a matter of fact and does raise issues of whether effectively the parties have been properly heard in the first instance decision given the change of circumstances is so significant.

ELIAS CJ:

Well what's the question of law that we should authorise the High Court to entertain?

MR DILLON:

Whether the IPT failed to effectively provide an opportunity to address a significant change of facts…

BLANCHARD J:

Whether there's been a breach of natural justice –

ELIAS CJ:

Yes.

BLANCHARD J:

– by the IPT.

ELIAS CJ:

Yes.

BLANCHARD J:

Which is a question of law.

MR DILLON:

Yes, which leads to that, yes. I'm trying to comprehensively frame that question but the essence of it is that it, yes, it is failure of natural justice, by not giving the opportunity to address these changed facts in evidence as opposed to perhaps some submission. But it is a matter of evidence, given the evidence that was before the IPT, anticipating a family unit being before the IPT. And that would be then an error of law for which leave is respectfully sought. Unless the Court has any further questions, there is no further submission of the appellants.

ELIAS CJ:

Thank you Mr Dillon. Thank you counsel. We will reserve our decision.

COURT ADJOURNS: 3.25 PM