

IN THE SUPREME COURT OF NEW ZEALAND

**SC 53/2008
[2009] NZSC 76**

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

SC 56/2008

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

Hearing: 21-23 April 2009

Court: Elias CJ, Blanchard, Tipping, McGrath and Anderson JJ

Counsel: R E Harrison QC and M K Macnab for Appellants in SC 53/2008
A G Mahon, A E Ashmore and D E R Martin for Appellants in SC
56/2008
I C Carter, M C Coleman and M R L Silverwood for First Respondent
in each appeal
I C Bassett for Second Respondent in SC 53/2008

Judgment: 20 July 2009

JUDGMENT OF THE COURT

- A The appeals are allowed.**
- B The Minister or a designated immigration officer must reconsider whether the removal orders in each case should be cancelled under s 58 of the Immigration Act 1987 on the correct legal basis.**
- C Costs are reserved. Memoranda may be filed as indicated in para [73] of the reasons.**

REASONS

	Para No
Elias CJ	[1]
Blanchard, Tipping, McGrath and Anderson JJ	[9]

ELIAS CJ

[1] I agree with the result proposed by Tipping J and, with one reservation, with the reasons he gives. The reservation concerns the interpretation and scope of s 47(3) of the Immigration Act 1987.

[2] Section 47(3) sets out the basis upon which the Removal Review Authority can permit a person unlawfully in New Zealand to remain, on what is rather misleadingly referred to as an “appeal” to the Authority. Section 47(3) provides:

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

[3] The present appeal does not concern an appeal under s 47. Rather, it concerns judicial review of later stages in the immigration process, orders to remove under s 54 and cancellation of such orders under s 58. No criteria for the making of orders for removal or the cancellation of such orders are contained in ss 54 and 58.

The powers, like all statutory powers, must however be exercised for the purposes and to give effect to the policies described by the Act. They must also be exercised reasonably.

[4] The powers contained in ss 54 and 58 may come to be exercised following an unsuccessful appeal to the Removal Review Authority. They may also come to be exercised without any consideration by the Removal Review Authority, even in cases where the criteria in s 47(3) are met, because of the tight time limits for an appeal to the Authority.¹ A person unlawfully in New Zealand is under an obligation imposed by s 45 of the Act to leave New Zealand once the 42 day period for appeal has expired. In the case of someone whose appeal period has lapsed, the only opportunity to consider the humanitarian considerations which could have formed the basis for appeal may be at the time of the decisions under ss 54 and 58. In addition, if humanitarian considerations have arisen or changed since the determination of the Removal Review Authority, the decisions under ss 54 and 58 may provide the only opportunity to consider them. In such circumstances, the policy and purpose behind s 47(3) makes the humanitarian considerations or changed circumstances of a humanitarian nature relevant to the decisions to order removal and to cancel such an order.

[5] The Immigration Service rightly proceeds on that basis. Its manual sets out a procedure for considering humanitarian issues and includes a humanitarian questionnaire first adopted in response to the Court of Appeal determination in *Tavita v Ministry of Immigration*.² I am unable to agree with the views expressed by Chambers and Robertson JJ in the Court of Appeal (disagreeing on this point with the other members of that Court) that amendments to the Immigration Act in 1999, which streamlined the processes, excluded consideration of humanitarian criteria at removal stage.³ Where there may have been no consideration of humanitarian criteria at an earlier stage or where the circumstances earlier considered (by the Removal Review Authority or by the Minister of Immigration) have changed, it

¹ Section 47(2) provides that an appeal must be brought within 42 days of the person becoming unlawfully in New Zealand.

² [1994] 2 NZLR 25.

³ *Ye v Minister of Immigration* [2009] 2 NZLR 596 (Glazebrook, Hammond, Chambers, Robertson and Wilson JJ). Chambers and Robertson JJ at para [559].

would be an unaccountable gap in the legislation to deny any consideration of those humanitarian circumstances. Such gap would hardly conform to New Zealand's international obligations. Sections 54 and 58 properly construed in conformity with the legislative policy in s 47(3) require humanitarian considerations to be taken into account where they properly arise.

[6] Sections 54 and 58 permit other considerations to be taken into account, where they are relevant. In the Court of Appeal the judgments of Glazebrook J and Chambers and Robertson JJ give illustrations of non-humanitarian reasons why a removal order may not be made or may be cancelled.⁴ But where humanitarian considerations arise, the policy of the legislation is made explicit in s 47(3) and that standard must be met. If not, there would be lack of symmetry between the approach required of the Removal Review Authority and the immigration officer in relation to the same considerations. On this point, therefore, I respectfully disagree with the view expressed by Glazebrook J that the s 47(3) test does not apply to the determinations under ss 54 and 58.⁵ I prefer the view expressed by Baragwanath J in the High Court⁶ and adopted by the other members of this Court.

[7] In the interpretation of s 47(3), I differ from the view expressed by the other members of this Court in paragraphs [34] – [38]. I do not consider that s 47(3) describes a sequenced tripartite test in establishing the threshold against which the public interest is then to be balanced. I consider that the threshold (“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”) describes a composite standard. The circumstances which are relevant must be humanitarian circumstances, but the standard they are to reach (“exceptional”) is controlled by the defining clause: “that would make it unjust or unduly harsh for the person to be removed from New Zealand”. The clause is defining because “that” is used in its restrictive sense. If the humanitarian circumstances are such as to make it unjust or unduly harsh for a person to be removed, then the “exceptional” standard is reached. It should be noted that fulfilling the test is not the end of the matter, in application of

⁴ Glazebrook J at para [93] and Chambers and Robertson JJ at para [559].

⁵ At para [91].

⁶ *Ding v Minister of Immigration* (2006) FRNZ 568.

s 47(3). It will still be necessary for the decision-maker to be of the view that “it would not in all the circumstances be contrary to the public interest to allow the person to remain in New Zealand”.

[8] In the present case, the tripartite analysis does not cause any harm. The case is disposed of on the basis of failure to address the right humanitarian question, not application of the wrong standard.⁷ But in another case the approach may well lead to the unattractive result that although there are humanitarian circumstances which make it unjust or unduly harsh to remove a person, that effect is not “exceptional” when compared to similar cases. The interpretation of s 47(3) I prefer is I think the natural sense of the subsection and avoids a result I would regard as unfortunate.

BLANCHARD, TIPPING, McGRATH AND ANDERSON JJ

(Given by Tipping J)

Introduction

[9] These two appeals concern the legal basis upon which people colloquially known as overstayers may be permitted to remain in New Zealand on humanitarian grounds. An overstayer is a person who remains in New Zealand after their permit to be in the country has expired. More particularly, the cases involve overstayer parents of children born in New Zealand at a time when those children attained New Zealand citizenship at birth. The children themselves could not therefore be removed from New Zealand. One important issue is the extent to which the interests of such children should feature in the necessary decision-making.

[10] The appeals arise out of proceedings for judicial review of decisions made by immigration officers in the course of processes which led to the proposed removal of the overstayer parents. It is convenient to defer an examination of the facts of the individual cases until after the necessary matters of law have been addressed.

⁷ At paras [36] – [37].

[11] The judgment of the High Court,⁸ and the lead judgment in the Court of Appeal,⁹ are both very long and detailed. Some of the submissions in this Court were not models of the distiller's art. The Court of Appeal was not unanimous, either in result or reasoning. It is not practicable nor would it be helpful to narrate or discuss the manifold views and issues traversed in the Courts below. The best approach in this Court, both for the parties and for the law generally, is to concentrate on the essential points which must be addressed in order to resolve these particular cases. When that is done, it emerges that the immediately relevant legislative provisions and the international provisions against which they must be read are not particularly complicated or difficult of application. The crucial issues turn on relatively straightforward principles of judicial review.

[12] As we have said, the case is concerned with children born in New Zealand to overstayer parents at a time when children in that situation automatically became New Zealand citizens at birth. Since 1 January 2006 such children have not automatically attained New Zealand citizenship at birth.¹⁰ It is neither necessary nor appropriate to make any observations about children in these latter circumstances. The views expressed in these reasons are not necessarily applicable to cases involving children born in New Zealand after 1 January 2006. Whether and to what extent the earlier position is any guide to that obtaining after the change in the law, will require careful consideration in a case where the children have no right, as citizens, to remain in New Zealand.

Removal of overstayers – statutory provisions

[13] Entry into New Zealand is governed by the Immigration Act 1987. So too is the removal of those unlawfully in the country. The starting point is that those who overstay their permits are unlawfully in New Zealand and legally obliged under s 45 to leave the country. A person unlawfully in New Zealand may, however, appeal¹¹

⁸ *Ding v Minister of Immigration* (2006) 25 FRNZ 568.

⁹ *Ye v Minister of Immigration* [2009] 2 NZLR 596 (Glazebrook, Hammond, Chambers, Robertson and Wilson JJ).

¹⁰ See s 6 of the Citizenship Act 1977, as amended by s 5(1) of the Citizenship Amendment Act 2005.

¹¹ This is not an appeal in the normal sense. It is a first instance decision on what is, in reality, an application to be allowed to remain in New Zealand on humanitarian grounds.

to the Removal Review Authority (RRA) against the requirement to leave New Zealand. Provision is made to that effect in s 47. The appeal must be brought within 42 days after the later of an appellant becoming unlawfully in New Zealand or receiving notice that their application for a permit has been declined. A consequence of this relatively tight limitation of the right to apply to the RRA is that many overstayers no longer enjoy that right when removal action is taken against them. Nevertheless, as will emerge, the approach required to be taken under s 47 also applies in those circumstances.

[14] The key provision in s 47 for present purposes is subs (3) which provides:

- (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 in New Zealand.

[15] We will return to the ingredients of s 47(3) after completing this survey of the relevant statutory provisions. Section 47(4) provides that for the purposes of s 47(3) the mere fact that a person's circumstances are such that the person would meet any applicable Government residence policy requirements for the grant of a residence permit does not, in itself, constitute exceptional circumstances of a humanitarian nature. Section 47(5) states that certain persons may not appeal under s 47. It is unnecessary to list them here as the subsection does not apply to the present cases.

[16] Section 53 states that, subject to the conditions set out in the section, a person who is unlawfully in New Zealand may be the subject of a removal order and is liable to be removed from New Zealand. The presently relevant conditions are that the person must have been unlawfully in New Zealand for a period of 42 consecutive days and must not have an appeal under s 47 pending.¹² Section 54 empowers any designated immigration officer who is not disqualified¹³ to make a removal order if satisfied the conditions for the making of the order are established. Section 58 empowers designated immigration officers to cancel a removal order at any time while the person named in the order is still in New Zealand.

¹² Or s 115A, which allows appeals to the High Court and is not relevant in the present cases.

¹³ Any officer who has had previous involvement with the person concerned is disqualified (s 54(2)).

[17] Because of the short time limit for appeal under s 47, and other factors, it is not uncommon, as we have said, for the removal process to be undertaken without the matter having been considered by the RRA. Overstayers may be unaware of the s 47 right or the time limit or they may choose not to appeal to the RRA because they are worried about the effect a negative RRA decision will have on any application they may make to the Minister of Immigration to have their case reviewed.¹⁴ It is nevertheless inherent in the scheme and policy of the Act that when the officer considers, either under s 54 or under s 58, whether the overstayer should be allowed to remain in New Zealand on humanitarian grounds, the officer should consider the matter on the same basis as the RRA would have done had the matter been the subject of an appeal under s 47. It cannot have been intended that a lower threshold than that set out in s 47(3) should operate outside the RRA regime. That would simply encourage those concerned to by-pass the specified statutory process and the applicable test.

[18] We recognise that immigration officers will quite often face the practical difficulty of having to make a removal order before any interview with the overstayer can take place. A removal order enables the overstayer to be taken into custody. If the overstayer has disappeared or is unwilling to co-operate, the making of a removal order will be a necessary preliminary to the making of appropriate inquiries. In this situation the power to cancel a removal order will, in practical terms, be the vehicle by means of which humanitarian considerations are brought to account, if appropriate, against ultimate removal. The decisions under challenge in these appeals were decisions made under s 58 declining to cancel removal orders.

[19] The powers given to designated immigration officers under ss 54 and 58 to make and cancel removal orders are discretionary in nature. Those powers and the discretion inherent in them must be exercised in accordance with the purposes of the Act. Although, by virtue of s 58(5), no person has any right to apply for the cancellation of a removal order, the Act envisages that in some circumstances an immigration officer may and will exercise the power of cancellation contained in

¹⁴ Section 130 empowers the Minister of Immigration to issue special directions in respect of any person, permit, visa or document.

s 58. It is implicit that there is an obligation to exercise that power, if s 47(3) circumstances are present.

[20] It is appropriate at this point to set out in full the terms of s 58(5):

- (5) Nothing in this section gives any person a right to apply to an immigration officer for the cancellation of a removal order, and where any person purports to so apply—
 - (a) The immigration officer is under no obligation to consider the application; and
 - (b) Whether the application is considered or not,—
 - (i) The immigration officer is under no obligation to give reasons for any decision relating to the application, other than the reason that this subsection applies; and
 - (ii) Section 23 of the Official Information Act 1982 does not apply in respect of the application.

This provision must be read against the fact that, for the reasons indicated above, immigration officers, in cases which have not been to the RRA, may have their first and only opportunity to give consideration to humanitarian issues at the cancellation stage, following the making of a removal order. That state of affairs may similarly apply to the need to give consideration to whether there have been material changes since the RRA considered the matter, if the case has been through the RRA. It is necessary therefore to construe s 58, and in particular s 58(5), in this light.

[21] We have already observed that it is implicit in s 58, read in its statutory context, that there is an obligation to exercise the power to cancel when s 47(3) circumstances are present. We do not read s 58(5) as removing that implicit obligation. It cannot have been Parliament's purpose, when enacting s 58(5), to jeopardise fulfilment of New Zealand's international commitment to treat the interests of children lawfully in New Zealand as an important consideration. This commitment is discussed more fully below. The power of cancellation and the implicit obligation to cancel, when humanitarian considerations require it in terms of s 47(3), are not ousted by s 58(5). The purpose and reach of s 58(5) is to remove any obligation that might otherwise have rested on immigration officers to give consideration to cancellation of a removal order simply because there has been an

application or request that they do so. But that cannot, in context, be read as absolving immigration officers from their implicit statutory obligation to consider whether a removal order should be cancelled on account of s 47(3) circumstances, and their obligation to cancel the order if those circumstances are present.

[22] We accept that quite often, especially if an overstayer parent who is the subject of a removal order has been imprisoned pending compulsory removal, there will be a need for urgency. Section 59(3) effectively requires that the overstayer be removed within 72 hours of a removal order being served on them. However, in circumstances of the present kind, where the immigration officer needs to enter into an assessment of whether the removal order should be cancelled, it may be necessary for the officer to issue a temporary or other permit¹⁵ to enable the question to be examined properly. This will usually be a more appropriate course than applying under s 60, which allows the District Court to extend the 72 hour time limit on imprisonment if transport is unavailable or for some other reason.

[23] We recognise that an appeal to the RRA has time and other constraints attached to it, but the humanitarian purposes demonstrated in s 47(3) must be recognised and respected when other decisions are made regarding the removal from New Zealand of persons generally, and particularly when the case involves a parent who has one or more children who are New Zealand citizens. Their interests require the immigration officer, in cases which have not been considered by the RRA, to apply the same approach as the RRA is required to take under s 47(3). That is one basis upon which the discretionary powers contained in ss 54 and 58 must have been intended to be exercised. If an appeal has been rejected by the RRA, the immigration officer does not have to re-examine the matters which were put before the RRA or revisit its findings. The officer must, however, consider anything that has arisen since the RRA determination which has a bearing on the s 47(3) criteria, and anything pre-dating the RRA determination which could not reasonably have been put before the RRA.

¹⁵ For example, an immigration officer could issue a limited purpose permit under ss 34A – 34F of the Act, or under s 35A, which allows the grant of a permit in special cases.

[24] This approach is supported by the principle that the Act should be interpreted in a way that is consistent with New Zealand's obligation to observe the requirements of applicable international instruments and, in particular, in present circumstances, those of the United Nations Convention on the Rights of the Child (UNCROC).¹⁶ New Zealand is a party to this Convention, albeit having entered a reservation concerning children unlawfully in New Zealand.¹⁷ Article 3(1) provides that in all actions concerning children, by public and administrative authorities, the best interests of the child shall be "a primary consideration". A primary consideration does not mean *the* primary consideration, much less the paramount consideration. There is no basis for reading in, as the appellants argued, the Care of Children Act 2004 standard of "first and paramount consideration". That would not be consistent with the policy objectives which must be reconciled in cases of the present kind, as evident, in particular, from the terms of s 47(3). The Care of Children Act is not concerned with immigration matters in respect of which the Immigration Act states the relevant policies. In this respect we agree with the approach of the Court of Appeal in *Puli'uvea v Removal Review Authority*¹⁸ and the views of Glazebrook J in the present case.¹⁹ The same approach was also adopted in the more recent decision of the Court of Appeal in *Huang v Minister of Immigration*.²⁰

[25] It is appropriate, in the light of New Zealand's obligations under art 3(1), to interpret the relevant provisions of the Immigration Act so that the interests of New Zealand citizen children are always regarded as an important consideration in the decision-making processes. The words "a primary consideration" in art 3(1) do not denote how this consideration ranks against any other relevant consideration such as the public interest. The child's interests are always important; but what ultimate effect should be given to them is a matter of assessment against all the other relevant circumstances of the particular case and the specifics of any applicable statutory test.

¹⁶ (1989) 1577 UNTS 3.

¹⁷ 6 April 1993. That reservation is not relevant in these cases but will have relevance to cases where the children are unlawfully in New Zealand.

¹⁸ [1996] 3 NZLR 538.

¹⁹ At paras [66] – [71].

²⁰ [2009] 2 NZLR 700 (William Young P, Hammond and Chambers JJ).

[26] The Immigration Service has been mindful of the need to consider humanitarian issues outside the RRA appeal process. It introduced some time ago what is known as the humanitarian interview procedure to which we will refer more fully below. The process is undertaken either before a removal order is made or, if that has not occurred, before the order is executed by physical removal. It was introduced to guard against what might otherwise have been a failure to observe New Zealand's international obligations, and also to provide what counsel called a backstop or safety net at the final stages of compulsory removal. The process was also a response to the views expressed in the Court of Appeal in the case of *Tavita v Minister of Immigration*.²¹ The procedure was introduced to reflect the obligation to observe art 3(1) and humanitarian concerns generally. There is no doubt a decision made in terms of the humanitarian interview process is amenable to judicial review. The Crown, rightly, did not contend otherwise.

[27] So as to give proper effect to s 47(3), the RRA should take a liberal approach, within its powers, to requiring or seeking further information if that is necessary to address the interests of New Zealand citizen children. A case which goes to the RRA must, however, in terms of s 50, be considered by the Authority on the papers and with all reasonable speed. This means the RRA is ordinarily required to deal with the appeal solely on the basis of information supplied to it by the applicant. The RRA does, however, have power to seek or receive further information after the time for filing information has passed.²² It would be anomalous to require an immigration officer to go further than the RRA in acquiring additional information. There is no basis upon which to place a greater burden of investigation on an immigration officer than is laid on the RRA.

[28] In summary, the position reached to this point is as follows. Immigration officers making the discretionary decision envisaged by s 54 of the Act whether to make a removal order, must, to the extent practicable at that stage, consider whether the s 47(3) criteria apply to the case. If they do, the discretion should be exercised against making a removal order. The grant of a permit either under s 35A or some other appropriate mechanism will then be appropriate to regularise the overstayers'

²¹ [1994] 2 NZLR 257.

²² See s 50(4)(a) of the Act.

continued presence in New Zealand. A less extensive examination is required if the case has already been through the RRA appeal process.

[29] An officer is not obliged to consider a request that a removal order be cancelled under s 58. But the officer must, when and to the extent s 47(3) issues have not already been addressed, consider cancellation via the humanitarian interview process or otherwise, and, if the officer finds the s 47(3) criteria are established, the officer should likewise not proceed with removal. That brings us to examine the s 47(3) criteria in greater detail.

The section 47(3) criteria

[30] The subsection is drafted on the basis of two sequential considerations. The first step is to determine whether there are exceptional circumstances of a humanitarian nature that would make it unjust or unduly harsh for the person concerned to be removed from New Zealand. If that is not shown, the inquiry ends there and removal takes place. If it is shown that it would, on the statutory basis, be unjust or unduly harsh to remove the person from New Zealand, the decision-maker must move to the second inquiry. This concerns whether, despite the injustice or undue harshness, it would in all the circumstances be contrary to the public interest to allow the person to remain in New Zealand. A person seeking to avoid removal must demonstrate not only qualifying injustice or undue harshness but also that it would not be contrary to the public interest for them to be allowed to remain in New Zealand.

[31] We do not, however, consider it can have been intended, consistently with relevant international obligations, that a general concern about the integrity of New Zealand's borders and its immigration system will be enough in itself to demonstrate that it would be contrary to the public interest to allow a person fulfilling the first criterion to remain in New Zealand. Logically that would mean the general concern was capable of outweighing the injustice or undue harshness on a generic basis. The only escape from the logical and policy difficulties inherent in that proposition would be to introduce the concept of degrees of injustice or undue harshness and to say that a high degree of injustice or undue harshness was necessary

to outweigh the general public interest concerned. But that approach would add a difficult and uncertain additional matter of degree and a further layer of assessment on top of what is already a difficult test to administer.

[32] Once qualifying injustice or undue harshness is shown, there must be something in the circumstances of the particular case which would make it contrary to the public interest to allow the person to remain in New Zealand. Something more than a general concern for the integrity of the immigration system is necessary to outweigh the fulfilment of the first criterion, which is deliberately set at a high level. This construction gives effect to the principle that Parliament has legislated consistently with international obligations unless the contrary is clearly shown or unless the language used does not allow that outcome.

[33] It is important to consider the s 47(3) test in its statutory context. Section 47(3) is in a part of the Act which concerns removal of overstayers from New Zealand. Its terms must be read against the general rule that overstayers must leave New Zealand.²³ Parliament has made a clear policy decision that overstayers should generally be compulsorily removed, if they do not leave voluntarily when asked to do so. The rationale for this policy approach includes the importance of border control, New Zealand's right to exercise its own immigration policies and the avoidance of overstayers getting an advantage over those who go through the correct processes. However, it can equally be said that Parliament has accepted that people may be excepted from the general rule if they satisfy the requirements of s 47(3).

[34] That brings us back to the first criterion in s 47(3) which has the following ingredients: (i) exceptional circumstances; (ii) of a humanitarian nature; (iii) that would make it unjust or unduly harsh for the person to be removed from New Zealand. The need for the circumstances of the case to be exceptional means that those circumstances must be well outside the normal run of circumstances found in overstay cases generally. The circumstances do not have to be unique or very

²³ As per s 45 of the Act.

rare but they do have to be truly an exception rather than the rule.²⁴ It is unnecessary and undesirable to attempt to define the compass of the word “humanitarian”. It is unlikely to be difficult to decide whether the circumstances of a particular case fulfil that description. If there are exceptional circumstances of a humanitarian nature, it is then necessary to determine whether they make it unjust or unduly harsh to remove the person from New Zealand.

[35] The qualification of the word “harsh”, by the word “unduly”, recognises that there may be some degree of harshness in removing an overstayer from New Zealand. In particular some degree of harshness may be involved where the removal affects New Zealand citizen children. But the statutory test is couched on the basis of undue harshness. Undue in this context means that the harshness goes beyond the level of harshness that must be regarded as acceptable in order to preserve the integrity of New Zealand’s immigration system. That is why a generic concern on that account is not enough to outweigh fulfilment of the first criterion in s 47(3).

[36] The flavour of the subsection as a whole, with its interweaving of the concepts of exceptional circumstances, injustice or undue harshness and the public interest suggests that Parliament, being mindful of humanitarian considerations, contemplated overstayers being allowed to remain in New Zealand if there were humanitarian circumstances of a sufficiently unusual kind that their remaining would not undermine the general importance of maintaining the integrity of the immigration system. The test was designed to be strict but was seen as representing an appropriate reconciliation of personal humanitarian concerns with relevant aspects of the public interest.

[37] One further point should be mentioned. The link between “exceptional circumstances of a humanitarian nature” and “unjust or unduly harsh” provided by the words “that would make it” can be read in two ways. The first is to hold that the presence of the relevant exceptional circumstances necessarily demonstrates injustice

²⁴ See *Creedy v Commissioner of Police* [2008] 3 NZLR 7 (SC) at paras [31] – [32], where this Court, albeit in a different context, discussed the concept of exceptional circumstances.

or undue harshness with no further assessment being required. On this basis the words “that would make it” mean that the necessary injustice or undue harshness derives from the very fact of there being exceptional circumstances. The second reading involves an assessment of whether the exceptional circumstances found to exist make it unjust or unduly harsh to remove the person. On this view that consequence does not necessarily flow from the existence of exceptional circumstances of a humanitarian nature.

[38] We consider the second reading is to be preferred as more appropriately serving the statutory purpose. Whether the particular exceptional circumstances give rise to the necessary injustice or undue harshness is a matter for the assessment of the decision-maker. It will depend on how compelling or persuasive the exceptional circumstances are. Had the first meaning been intended there need only have been reference to exceptional circumstances of a humanitarian nature. The presence of such circumstances would have fulfilled the first criterion without reference to injustice or undue harshness. Those concepts must have been intended to contribute to the overall test and would effectively be written out if the first meaning were adopted.

The humanitarian interview process

[39] That is the legal background against which the humanitarian interview process must be considered. Immigration officers are assisted in conducting the humanitarian interview by a standard form of questionnaire which is designed to elicit relevant information from the person being interviewed. That information and certain instructions and other materials incorporated into the questionnaire are used by the officer as the basis for the decision whether or not to proceed with removal.

[40] The questionnaire has three so-called stages. The first comprises a series of questions about the personal circumstances of the overstayer. The second is designed to be completed if the information elicited at the first stage reveals that further investigation and assessment is required. The purpose of the questions set out in stage two is to obtain additional information of a personal nature to enable the decision on removal to be made “in accordance with New Zealand’s obligations

under international law”. For example, questions 34 – 49 are directed to the existence and circumstances of any children the overstayer may have. Similar inquiries are made about parents, partners and other family circumstances.

[41] Stage three is designed to contain the officer’s assessment of the case and the decision whether removal will take place. Various matters are set out for the officer’s consideration in stage three. They include references to family circumstances, the interests of any children involved, and whether there have been significant changes since any decision of the RRA. In relation to children, there is reference to whether they will go with the parent if he or she is removed, and whether it is “reasonable” for a New Zealand-born citizen or resident child to live in the parent’s home country. If the child or children are not going to accompany their parents, should the parents be removed, the officer is required to consider “what effect” this will have on them.

[42] These references to children are very significant. It is important for immigration officers to ascertain to the extent they can whether the child will leave with the parents, or stay in New Zealand. If the child is to leave New Zealand, the immigration officer must assess the nature and extent of any problems the child may face if returned to the parent’s home country. If the child is to remain in New Zealand without the care of his or her parents, it is important for the immigration officer to consider who will care for the child, and the nature and extent of the difficulties the child may face in remaining in New Zealand without parents. These considerations bear on whether the overstayer parent should be removed to his or her home country. They should be addressed as an important ingredient in the making of that decision.

[43] Further matters referred to are the effect on the wider family of removal of the overstayer, health issues, and any other “compelling” reasons for allowing the overstayer to remain in New Zealand. Various “public interest” factors are then listed to assist the officer in bringing matters under that head to account when making the decision. Finally, there is a reference to whether the overstayer had “good reason” for not leaving the country.

[44] All these matters are designed to be addressed and weighed by the officer in making the decision whether to proceed with removal or, if such be under consideration, whether to cancel an unexecuted removal order. A great deal of time and trouble has obviously been devoted to the design and content of the questionnaire. It suffers, however, from a fundamental legal flaw. Nowhere does it direct the officer's mind to the s 47(3) criteria which the officer must apply when making the assessment leading to the ultimate decision. The governing criteria are neither expressly nor implicitly referred to, nor is the proper role of the public interest considerations that come into play if the first criterion in s 47(3) is fulfilled. We are referring here to the need for a particular rather than a generic focus on the public interest as it applies to the individual case.

[45] The explanation for this apparently surprising omission must be that those who drafted the questionnaire did not realise the linkage between the decision to be made and the s 47(3) criteria. It is fair to point out that although the process was, in part, a response to *Tavita*, this linkage was not expressly made in that case or in the cases which followed and refined that decision and in particular *Puli'uvea*. The consequence is, however, that the mind of the decision-maker is not directed by the questionnaire to the appropriate legal approach. It is therefore not surprising that the actual decisions made in these cases were not made either expressly or by necessary implication on the correct legal basis. In short, the decision-makers, in coming to their decisions, did not direct themselves correctly in law. They did not ask themselves the right questions.

[46] Subject to any relevant discretionary matters, their decisions must therefore be set aside for error of law and the questions involved remitted for reconsideration on the correct legal basis. There are additional matters which provide further grounds for setting aside the decisions made in these cases and remitting them for reconsideration. It is convenient, however, to deal with those matters, and the specifics of the general problem, in the course of addressing the facts and circumstances of each case. Before doing that we will discuss the legal issues which were raised by the Minister's cross-appeal under the headings of natural justice and representation of children.

Representation of children/natural justice

[47] It is convenient to address the questions arising under these two heads together as they substantially overlap. The essential question is how the interests of children in removal cases can best be identified and taken into account by the immigration officer and ultimately the courts. The starting point must be that those interests should ordinarily be advanced and represented by the relevant parent or parents. Section 141B of the Act provides that in certain specified matters affecting children the interests of the child are to be represented by that child's parent(s). The matters concerned include removal of the child from New Zealand. That, of course, can happen only if the child is unlawfully in New Zealand which is not the case when the child is a New Zealand citizen.

[48] Nevertheless the statutory provisions directed to children unlawfully in New Zealand are a useful guide to what should ordinarily happen when the child is lawfully in New Zealand and it is the parents who are the subject of the removal procedure. There may be circumstances in which the parent(s) cannot adequately represent the child's interests. Decision-makers must be alive to this possibility and make such arrangements as are reasonable in the circumstances to ensure that, if this is the case, everything relevant to the interests of the child comes to the decision-maker's attention. That may involve officers in making their own inquiries or in seeking assistance from others. It is important, however, to emphasise that officers can ordinarily expect parents to put forward all that can reasonably be said on behalf of their children. Proactive steps on the part of immigration officers will be necessary only when something relatively obvious is not addressed by the parent(s). Officers should, however, bear in mind when interviewing parents the not infrequent need to prompt the parent(s) to address issues concerning their children. The nature of those issues will obviously depend on the age of the child but they will potentially include schooling, health and general integration issues.

[49] The second question which arises under this head concerns whether and when children should be made parties to litigation or be separately represented. The starting point is the same as for the first stage. Generally children's interests in this kind of litigation should be represented by parents. A child may, however, need to

be separately represented if there is good reason to believe that the parent will not adequately represent the child's interests. In that event the court should appoint counsel to represent the child. If that occurs it is not necessary to make the child a formal party to the proceedings. If any question arises of the child commencing proceedings, the ordinary rules of court concerning that situation will apply.

[50] The general approach which must be taken to these issues is based on a reconciliation of two different considerations. In the first place, it would not be right to place on immigration officers, or the Immigration Service as a whole, too great a burden of time and resources in examining the interests of children involved in removal processes. On the other hand, the State does have an obligation to treat those interests as an important ingredient in the decision-making process. There must therefore be an obligation on State officials, when the need arises, to be proactive in identifying those interests so that they can be properly taken into account. We cannot accept the Crown's argument that officers are never obliged to look beyond what parents may advance in the interview process. In similar vein, litigation in this field should not be complicated by separate representation of children, or by the children becoming formal parties, unless that is necessary to enable their interests to be properly addressed.

[51] What we have outlined is consistent with art 12 of UNCROC which requires that in all matters affecting them, children who are capable of doing so must have the right to express their views freely, and that the childrens' views should be given "due weight" in accordance with the child's age and maturity.

[52] The concept of due weight when read with art 3's reference to the interests of children being a primary consideration, reinforces the view that it is not necessary, in terms of international norms, to give the interests of children, at least in the present context, paramount weight. That, as Glazebrook J pointed out,²⁵ would be likely to mandate the outcome of most cases in a manner which was not necessarily consistent with the need to bring to account all other relevant considerations.

²⁵ At para [17].

[53] The right of children to express their views freely is appropriately recognised in ordinary circumstances by expecting and, if necessary, assisting parents to convey to the decision-maker the views and circumstances of their children. But, if there is good reason to believe that the childrens' views or circumstances will not be or are not being adequately conveyed by the parent(s), the procedures earlier indicated will give appropriate effect to the right referred to in art 12. As the present cases turn on other issues it is unnecessary to examine whether there was any failure to observe the necessary approach in the particular circumstances of each case.

The present cases

[54] The cases involve two different families. It is convenient to call them the Ye/Ding and the Qiu families. In the High Court Baragwanath J dismissed the applications for judicial review in both cases. The Court of Appeal, by a majority of 3:2, allowed the Ye/Ding appeal and ordered that the decision declining to halt Ms Ding's removal from New Zealand be reconsidered "if [the Immigration Service] sees fit". By a majority of 4:1, the Court of Appeal dismissed the Qiu appeal, the effect being that Mr Qiu's removal was confirmed.

(a) The Ye/Ding case

[55] Mr Ye and his wife, Ms Ding, arrived in New Zealand from China on 6 May 1996. Both were detained in custody upon arrival. Mr Ye applied for refugee status, effectively on behalf of himself and his wife. They were then released and granted visitors' permits. The refugee status application was declined on 29 November 1996. There was then an appeal to the Refugee Status Appeal Authority (RSAA) which took a long time to be determined for reasons which it is not necessary to address. The appeal was finally dismissed on 8 June 2000. In the meantime three children had been born to the couple: Willie on 29 April 1997, Candy on 21 September 1998 and Tim on 29 May 2000. After the appeal was dismissed, a number of requests were made to the Minister of Immigration to regularise the position of the family in New Zealand but the Ministers concerned declined each of them.

[56] The first of three humanitarian interviews of Ms Ding occurred in June 2004. Later that month the couple filed an application for judicial review of the adverse decision of the RSAA, which had been made almost exactly four years earlier. In November 2004 Mr Ye was served with a removal order and himself underwent a humanitarian interview. Ms Ding was also served with a removal order and underwent her second interview, this time with a Mr Zhou. During the course of this interview she visited the toilet and cut her wrists in what appeared to have been an unsuccessful attempt to commit suicide. Just after this, she told the interviewing officer that she was going to leave New Zealand voluntarily, and her three New Zealand-born children would be left behind in the care of friends. Following the refusal of interim relief on the application for judicial review, Mr Ye was removed from New Zealand on 23 December 2004 and returned to China. The application for judicial review was struck out on 27 April 2005.

[57] On 23 August 2005 another removal order was served on Ms Ding and she was taken into custody. A crisis assessment team described her as “acutely distressed and ... at risk of self harm”. Later that day the same Mr Zhou conducted what was now the third humanitarian interview of Ms Ding. This time she said she wanted to take the children with her if she was to be removed to China; but elsewhere in the questionnaire she said the children would not be accompanying her to China. She added that if she took them to China she would not be able to afford to send them to school and nobody would look after her and the children. At another interview a little later with officers from the Children and Young Persons Service (CYPS), Ms Ding advised them she did not want to take the children back to China. Provisional arrangements were therefore made for CYPS to look after the children should their mother be removed from New Zealand.

[58] On 30 August 2005 Ms Ding’s solicitor wrote to Mr Zhou referring to her mental health. He supplied a copy of a report prepared on 4 August 2005 by a senior psychiatric registrar at the request of friends of Ms Ding who were concerned about her mental state. The report referred to allegations Ms Ding had made that her husband had been abusive. It referred to the suicide attempt and spoke of her fears for herself and her children should she be compelled to return to China. The author

stated that his diagnosis of Ms Ding was that she was suffering from a “major depressive disorder” and that she was at very real risk of suicide.

[59] Mr Zhou made his decision to proceed with the removal of Ms Ding on 31 August 2005. It is this decision which is the subject of the proceedings. It reads as follows:

Ms Ding arrived in NZ on 06/05/1996 with her husband Mr. Weiguang Ye and was granted a visitor’s permit on arrival valid till 06/06/1996.

Ms Ding claimed refugee status on 27/05/1996. This claim was declined on 29/11/1996.

Ms Ding’s appeal to the RSAA was also declined on 09/06/2000.

A subsequent appeal to the RRA was withdrawn.

Ms Ding has made 6 representations to the Minister of Immigration. The Minister declined to intervene in all representations.

Ms Ding was taken into questioning by NZ Police on police matters on 11/06/2004. She was served with a Removal Order on the same day but was released to allow her to take care of her children.

Ms Ding’s husband Mr Weiguang Ye was located on 19/11/2004 and was removed from NZ on 23/12/2004.

Ms Ding was offered the chance of returning to China on a voluntary basis on 2 different occasions dated 11/06/2004 and 25/11/2004 respectively to avoid removal action and a 5-year-ban. Ms Ding failed to cooperate with NZIS and went into hiding with her children to avoid contact with NZIS.

Ms Ding had been advised, during an interview with NZIS, that non cooperation would result in removal action. She was also advised that it would not be in the best interests of herself and her children to remain unlawfully in NZ.

Ms Ding had taken High Court actions on 2 occasions: on 23/06/2004 and on 21/12/2004.

I have considered the interests of the 3 NZ born children. I understand that Ms Ding may face financial difficulties with the schooling and any hospitalisation of the 3 NZ born children.

I have also considered Ms Ding has no family support in NZ. Her husband, mother, 2 additional children, 3 brothers and 3 sisters are currently living in China. Ms Ding and the 3 NZ born children will have the support of the family members in China. The 3 NZ born children all speak Cantonese.

Ms Ding has limited ability to support herself and the 3 NZ born children in NZ. Ms Ding has claimed that she is only able to earn about \$100 per week as a cleaner and would no doubt have to rely on a benefit eventually.

I have also considered the recent submission from her legal representative in the form of a Psychiatric report which claims that Ms Ding is suffering from a depressive disorder, domestic violence, sexual and emotional abuse. However, these claims are recent and have never been put as submissions to the RSB, RSAA, RRA and the 6 representation to the Minister of Immigration. Besides for the fact that there is no document or other evidence suggest[ing] that she suffered abuse at the hands of her husband, she could call on the protection of the Chinese authorities (Police) once back in China should her husband try to abuse her.

I have also considered the rights of the NZ Government to determine who should remain within its borders including the rights of expulsion of persons not lawfully in NZ.

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

[60] We have set out Mr Zhou's decision in full in order to demonstrate that he neither expressly nor implicitly asked himself the right question, namely whether the criteria in s 47(3) were fulfilled. There are, however, additional matters relating to the decision to which we should refer. First, the decision makes no reference to a relevant consideration, namely the effect on the case of China's one-child policy. Counsel for the appellants argued that this policy would lead to the children being labelled as *hei haizi*, or black children. It was accepted by the Crown that in some parts of China (it is understood the policy is applied differently throughout the various areas of China) being black children could result in limited, or at least reduced, access to health and education services. As well, it is possible that the family may be required to pay a fine for breaching the one-child policy.

[61] How the issues arising out of this aspect of the case should have been dealt with is another matter. But the complaint that a relevant consideration was not taken into account in the decision is a valid one. Secondly, the way the psychiatric report was dealt with seems unreasonable. The reference to the "claims" in the report being "recent" is doubly difficult. The description of the diagnosis in the report as a claim has the appearance of being unduly dismissive. The proposition that the claims were recent is incorrect in relation to Ms Ding's mental health because Mr Zhou himself was aware of the suicide attempt which occurred about eight months before. Thirdly, and most importantly, the final paragraph of the decision contains a clear legal misconception. The officer reasoned that Ms Ding should be returned to China

and, on that premise, it would be in the best interests of the children to accompany her. The proper approach was not to look at the best interests of the children on the premise that their mother was to be removed to China but rather to ask whether their mother should be removed from New Zealand in the light of the best interests of her children.

[62] Bearing in mind these additional difficulties, as well as the overriding failure of the officer to apply the correct legal approach, we are in no doubt that, subject to a modification to be addressed in a moment, the order made in the Court of Appeal that the matter be remitted for reconsideration on the correct legal basis was the right one.

[63] The point on which we consider the Court of Appeal's order should be modified is that it was expressed to require reconsideration by the Immigration Service "if it sees fit". That rider was adopted because of the terms of s 58(5). The Judges of the Court of Appeal who favoured reconsideration therefore felt unable to make a formal order simply to that effect.²⁶ That view is understandable but does not reflect the interpretation which we consider should be given to s 58(5), as earlier set out.²⁷ The officer was under an obligation to consider whether the removal order should have been cancelled on account of s 47(3) considerations. He can and should be directed to reconsider the matter on the correct legal basis. As this conclusion requires a modification of the Court of Appeal's order, the appeal must be allowed to that extent.

[64] We do not consider it would be appropriate for this Court to give any indication of what the outcome of the necessary reconsideration should be. Specifically, we do not consider that the circumstances so clearly demonstrate that Ms Ding should be allowed to remain in New Zealand that the Court should consider whether some sort of mandatory direction can and should be made. My saying that should be regarded as a completely neutral observation in relation to the ultimate issue. Because of the need to reconsider the children's interests on the correct legal basis, the necessary reconsideration should take into account all relevant matters and

²⁶ At paras [413] – [415] per Hammond and Wilson JJ.

²⁷ At paras [20] – [21] of these reasons.

circumstances that have occurred or are existing at the time it is undertaken. It would therefore be inappropriate to express any view about the reasonableness of the original decision which was made nearly four years ago.

(b) The Qiu family

[65] Mrs Qiu arrived in New Zealand on 28 December 1996. She made an application for refugee status on 5 March 1997. Mr Qiu arrived in New Zealand on 1 December 1997 and obtained a two week visitor's permit using a forged passport. He applied for refugee status on 10 December 1997, using his real name, and was granted a work permit. Mrs Qiu's refugee application was declined on 15 October 1998 and on 12 February 1999 her visitor's permit was revoked. She was served with a removal order on 8 April 1999. On 20 May 1999 she appealed to the RSAA. Her appeal was dismissed on 28 January 2000.

[66] On 31 May 2000 Mr Qiu's application for refugee status was declined. Alan Qiu was born on 12 June 2000. Mr Qiu's last work permit expired on 22 September 2000. Following the service on her of the removal order, Mrs Qiu appealed to the RRA which dismissed her appeal on 11 June 2001. The Authority considered the interests of Alan but, because of his very young age, did not view his circumstances as militating against the removal of his mother. On 17 September 2001 Mrs Qiu applied for judicial review of the decision of the RRA but her application was dismissed on 21 December 2001. An application to the Minister for a special direction was declined on 16 July 2002. Stanley Qiu was born on 18 April 2005, the Qius having avoided removal during the intervening time.

[67] On 14 June 2005 both parents were served with removal orders, and Mr Qiu was taken into custody. Mrs Qiu, who had the care of her two young children, was not. On 15 June 2005 a designated officer, Mr Wang, conducted a humanitarian interview of Mr Qiu. Asked why he had not returned to China, Mr Qiu replied "because my first child was just born in 2000. I was afraid of taking him back to China because of the one-child policy in China." In response to the question "What effect would it have on you if you were returned to your home country?", Mr Qiu replied "I don't want to go back to China. My two New Zealand-born children do

not have a future in China.” In various further answers, Mr Qiu asserted again that his New Zealand-born children would not have a future in China. He suggested they could not go to school in China and that he and his wife could not find jobs in China. In the place where the printed questionnaire form says “I have carefully weighed the competing matters set out above and in the circumstances of this case I consider,” the challenged decision made by Mr Wang is recorded in the following terms: “A failed refugee claimant, there are no compelling reasons why a custodial removal should [not] take place”. The word “not” was omitted but was undoubtedly intended.

[68] This decision related to Mr Qiu, but he has not been physically removed from New Zealand pending the outcome of these proceedings. There was no humanitarian interview of Mrs Qiu. She went into hiding with the children for a time after Mr Qiu’s decision was made. No decision has therefore been made whether her removal order should be cancelled. She has not, however, been removed pending the outcome of Mr Qiu’s application for judicial review of Mr Wang’s decision. In this case the matter had been before the RRA prior to Mr Wang’s decision, albeit on an appeal brought by Mrs Qiu. Arguably therefore, the necessary scope of Mr Wang’s inquiry was narrower than it would have been had there been no reference of the matter to the RRA. It was still necessary, however, for him to approach the case on the correct legal basis and ask himself the right question. On the same basis as outlined in the Ye/Ding case, Mr Wang did not ask himself the right question, that is, whether the criteria in s 47(3) for non-removal were present.

[69] The issue becomes whether had he asked that question his decision would inevitably have been the same. If that is so the Court may exercise its discretion not to grant relief, but otherwise Mr Qiu is entitled to a reconsideration on the correct legal basis.

[70] When the RRA considered the matter in June 2001 Alan was aged one and Stanley had not been born. When Mr Wang considered the matter in June 2005 Alan was five and Stanley was two months old. The arrival of Stanley did not create a one-child problem. It already existed because the Qius had two other children living in China. At most Stanley’s arrival may have exacerbated the problem. Stanley’s

presence does, however, mean that his interests were a new factor requiring consideration. In addition, the fact that Alan was now four years older and had started school is a new dimension. It cannot therefore be said that Mr Wang's decision would inevitably have been the same had he adopted the correct legal approach.

[71] For these reasons, and differing from the majority of the Court of Appeal in this respect, we consider the decision of Mr Wang should be set aside on the basis of legal error. The case of the Qiu family should be reconsidered on the correct legal basis. In the case of Mrs Qiu, it is not strictly a reconsideration but her circumstances must be considered on the correct legal basis. As in the Ye/Ding case the reconsideration should be undertaken on an up to date basis and it is therefore unnecessary and inappropriate to address the issue of whether the original decision was unreasonable.

Formal disposition

[72] For all these reasons the appeals in both cases should be allowed. Each case should be reconsidered on the basis of the law as stated in these reasons. The Minister's cross-appeal concerning the representation and natural justice issues should be formally dismissed.

[73] Costs should be reserved. If necessary, memoranda may be filed. Any application must be made within 15 working days of the date of delivery of judgment with responses within a further 10 working days.