IN THE SUPREME COURT OF NEW ZEALAND

SC 74/2008
[2009] NZSC 77

BETWEEN	XIAO QIONG HUANG First Appellant
AND	YONG MING CUI Second Appellant
AND	JARVIS CUI Third Appellant
AND	THE MINISTER OF IMMIGRATION First Respondent
AND	THE ATTORNEY-GENERAL Second Respondent

Hearing: 29 April 2009

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

Counsel: E Orlov and R Zhao for First and Third Appellants
F C Deliu for Second Appellant
I C Carter, M C Coleman and M R L Silverwood for First Respondent

Judgment: 20 July 2009

JUDGMENT OF THE COURT

A The appeal is dismissed.

B Costs are reserved. Memoranda may be filed as indicated in para [10] of the reasons.

REASONS

(Given by Tipping J)

[1] This appeal was heard during the week following the hearing of the appeals in the Ye/Ding and Qiu cases in which judgment is being delivered concurrently. The same legal analysis as that contained in the reasons given in those cases applies to this case and need not be repeated. We therefore move straight to the essential facts of this case and will then state our conclusions as to how this appeal should be determined.

[2] Ms Huang is the mother of Jarvis who was born in New Zealand on 20 November 2000. She entered New Zealand in April 1996. Jarvis' father, Mr Cui, entered New Zealand in December 1996. The couple married in New Zealand on 1 November 2000, about three weeks prior to the birth of Jarvis. Both Ms Huang and Mr Cui claimed refugee status but their applications were refused. The long history of various applications and decisions made at ministerial level in respect of each of them need not be recounted. Their last temporary permits both expired in July 2001.

[3] In August 2000 Ms Huang appealed to the RRA which allowed her to remain until after Jarvis was born. This was because of the risk that if she had been removed to China while pregnant she may have been required to undergo an abortion on account of the one-child policy. After some further activity on the refugee front, a second appeal was made to the RRA, this time by both parents, requesting they be allowed to remain permanently. The second appeal was dismissed by the RRA on 27 June 2003. In September 2005 Mr Cui was served with a removal order. Various unsuccessful processes then took place on his behalf and he was removed to China on 12 October 2005. A humanitarian interview of Ms Huang took place on 3 October 2005, and the decision that her removal should proceed was made by the officer on 7 October 2005.

[4] That decision, which is the subject of the present proceedings, was challenged in the High Court on 4 April 2006. Asher J dismissed the application for

judicial review on 29 September 2006.[1] Removal was voluntarily stayed pending an appeal to the Court of Appeal. That appeal was dismissed on 19 September 2008[2] and the appeal to this Court followed, leave having been granted on 4 December 2008.[3]

[5] In the present case the RRA determination was comparatively recent, being some two years prior to the decision made following the humanitarian interview. The RRA considered carefully and in some detail the impact on the case of China's one-child policy. Jarvis was, of course, at that time a little over two and a half years old. The RRA did not consider the one-child policy or any other features of the case brought it within s 47(3). Hence the appeal was dismissed. There was no challenge to the RRA's decision. It was therefore incumbent on the officer dealing with Ms Huang's case to do no more than consider whether anything had arisen since the determination of the RRA, bearing on the s 47(3) criteria. There was no suggestion of anything pre-dating the RRA determination that could not reasonably have been put before the RRA.

[6] Although the officer did not correctly direct himself in law, for the same reasons as applied to the officers in the cases of Ye/Ding and Qiu, the present case is different because the only matter which counsel advanced, as a relevant change in circumstances since the RRA determination, was the fact that Jarvis was now about two years four months older. From being two years seven months old at the time of the RRA determination, he had become four years and ten months old at the time of the humanitarian interview decision. At that time he had not started school and did not speak much, if any, English. His integration into New Zealand society cannot have been materially greater at the later date then it was at the earlier. In the present case there was careful consideration of the one-child issue by the RRA. The officer did not have to go into that matter again because nothing relevantly new was present on that topic. Jarvis' increase in age was not a material factor in that respect.

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1 *Huang v Minister of Immigration* [2007] NZAR 163.

2 *Huang v Minister of Immigration* [2009] 2 NZLR 700 (William Young P, Hammond and Chambers JJ).

3 *Huang v Minister of Immigration* [2008] NZSC 103 (Tipping, McGrath and Wilson JJ).

[7] Although counsel did not suggest that this was a new factor, reliance was placed on the fact that Jarvis suffers from asthma. We have examined this matter and recognise that the RRA did not specifically mention the asthma issue but did indicate that medical issues generally had been addressed. The important point for present purposes is that Asher J,[4] in the High Court, after hearing evidence, expressed himself as satisfied that the officer, Mr Fennell, had considered the subject of Jarvis' asthma. Hence that matter was considered on an up to date basis.

[8] Against that background we do not consider Ms Huang should be granted any relief. Because the officer did not apply the correct legal approach Ms Huang is prima facie entitled to a reconsideration on the correct legal basis. But the Court has a discretion in the matter. Relief should be declined because the officer must inevitably have come to the same decision, that is to allow removal to proceed, after applying the correct legal principles. The fact that Jarvis was now two and a half years older than when the RRA considered the matter could not reasonably have been regarded as a materially new dimension.

[9] The officer was therefore not presented with anything which might cause him to take a different view from that taken by the RRA. The difference between this case and those of Ye/Ding and Qiu is that the officer's decision in this case cannot possibly have been different had the correct legal approach been adopted. The same cannot be said of the other two cases. For these reasons we consider the Court of Appeal reached the right result in this case and the appeal to this Court should be dismissed.

[10] 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.

Solicitors:
Alastair McClymont, Auckland for First, Second and Third Appellants
Crown Law Office, Wellington for Minister of Immigration

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4 At para [92].