IN THE SUPREME COURT OF NEW ZEALAND

SC 53/2008

BETWEEN **WILLIE YE, CANDY YE, AND TIM YE**

Appellant

AND **MINISTER OF IMMIGRATION**

First Respondent

AND **YUEYING DING**

Second Respondent

SC 56/2008

AND BETWEEN **ALAN QIU AND STANLEY QIU**

Appellants

AND **MINISTER OF IMMIGRATION**

First Respondent

AND **HE QIN QIU**

Second Respondent

AND **XIAO YUN QIU**

Third Respondent

Hearing commenced:	21 – 23 April 2009
Court:	Elias CJ Blanchard J Tipping J McGrath J Anderson J
Appearances:	R E Harrison QC with M K McNab for the Ye Appellants A G Mahon with A E Ashmore and D E R Martin for the Qiu Appellants I C Carter with M C Coleman and M R L Silverwood for the First Respondent I C Bassett for the Second Respondent Ding

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CIVIL APPEAL

MR HARRISON QC:

If Your Honours please, I appear for the Ye appellants with my learned friend Ms McNab.

ELIAS CJ:

Thank you Mr Harrison, Ms McNab.

MR MAHON:

May it please Your Honours, my name is Mahon, I appear for the Qiu appellants together with my learned friends Mr Ashmore and Ms Martin.

ELIAS CJ:

Thank you Mr Mahon, Mr Ashmore, Ms Martin.

MR CARTER:

May it please the Court, Carter appearing for the first respondent in both appeals and appearing with me is Ms Coleman and Ms Silverwood.

ELIAS CJ:

Thank you Mr Carter, Ms Coleman, Ms Silverman.

MR BASSETT:

May it please Your Honours, Bassett is my name and I'm appearing for the second respondent in SC53/08, Mrs Ding.

ELIAS CJ:

Thank you Mr Bassett. Yes, Mr Harrison.

MR HARRISON QC:

Yes if Your Honours please, there are some housekeeping matters. My learned friend Mr Carter has filed a memorandum this morning I understand.

ELIAS CJ:

I don't have it, I'm sorry.

MR HARRISON QC:

It relates to over-length submissions and the order of addressing.

ELIAS CJ:

Well everyone's over-length. We might as well get on with it I think.

MR HARRISON QC:

Quite. I simply wanted to draw Your Honours' attention to clause 5 with the order of presentation just to say that that's what we're proposing.

ELIAS CJ:

Yes thank you.

MR HARRISON QC:

There is also an application by both the Ye and Qiu appellants for leave to adduce further evidence in the form of an affidavit of Tuariki Delamere, that is opposed and I suppose it's appropriately argued out now, it won't take long at all though.

ELIAS CJ:

Well do we need to formally resolve it? Shall we take it in and I must say, I'm not convinced of the relevance of the affidavit but perhaps we can engage with counsel on that as we go.

MR HARRISON QC:

Yes Your Honour, I did suggest that we just deal with it that way and subject to the Crown's objection to any further evidence coming in, they've got a generic objection which covers this affidavit as well.

ELIAS CJ:

I should ask Mr Carter if he is very much opposed to the course of action that I propose.

MR CARTER:

Well I wouldn't say very much opposed Your Honour, although there is in my experience a problem sometimes with evidence being let in on a provisional basis like this and then actually the Court doesn't get around to addressing whether it is actually formally before it or not. This particular evidence is in a slightly different category to all the other post-decision evidence that the Crown has objected to. This is evidence coming out of another case, completely different case and the difficulty, the added issue is that, as I've signalled in the notice of opposition, neither the Court nor the parties and their counsel actually know the detail of the circumstances in which that other evidence came into existence.

ELIAS CJ:

Yes, well I think what we will do is we will be mindful of the need to deal with the question of admissibility if the affidavit proves to be relevant to the argument that we're going to hear developed, but I suggest we just proceed at the moment and see where we get to on it.

MR CARTER:

As Your Honour pleases.

ELIAS CJ:

Thank you. Yes, Mr Harrison. Mr Harrison, since your start has been interrupted, perhaps I should indicate that we have read the submissions with attention, I can't say that I, for one, have gone to all of the material that's been cited and I don't want to inhibit you in developing your submissions, but I wonder really, if for this Court, the important matter is going to be what your contention is about the way this appeal should be addressed rather than elaborate dissection of the many judgments below us, which we have taken on board your submissions and your criticisms about those judgments, but I would hope we can get beyond the judgments in the lower Courts and look to what this Court should be doing.

MR HARRISON QC:

Yes, well that's a helpful indication Your Honour, I'm perfectly content to let my critique of those judgments stand as written, and it's only if one of the various lines of reasoning is particularly attractive to one or more of you that I would need to be heard further.

ELIAS CJ:

Yes, thank you.

MR HARRISON QC:

Very well. Obviously, I will be speaking to my written submissions but not immediately. I'd like to do some scene setting, and may I just begin, not too facetiously I hope, by saying I continue in this appeal, as before, to butt my head up against the door marked "first and paramount standard". The first leg of that argument advanced below was based directly on the Care of Children Act provisions, that's been abandoned, but the second leg has developed in the written submissions remains. The second leg argument urging "first and paramount standard" can be re-framed, I submit, as a question, why does the first and paramount standard apply when we seek to remove the children from their mother but not apply when we seek to remove their mother from the children? The Crown response is, because the mother is an illegal overstayer, but that response, I will argue, completely ignores the position of the children and moreover, it amounts to saying that New Zealand citizen children of illegal overstayers are entitled to an overall lesser standard of legal protection than other New Zealand citizen children. In other words, that the law of New Zealand permits and promotes discrimination against such children on the grounds of their parents' national origins.

As Your Honour the Chief Justice has already indicated, given that we've got 162 pages of Court of Appeal decision, 118 pages of High Court decision, nine double-sided volumes of reference, I suspect there will be some hankering after simplicity and I will argue that it is indeed achievable here by returning to first principles. In essence, those are *Tavita* principles, updated and broadened, and *Daganayasi* natural justice principles applied contextually

in each case, each set of principles applied contextually with, I will argue, the dominant but not exclusive focus on the fact that we are here dealing critically with the futures of New Zealand citizen children.

TIPPING J:

Can I just ask for some very early help, are we focusing, as a matter of the target of the complaint, on the section 54 and 58 “decisions”?

MR HARRISON QC:

Those two provisions are my target at every level of the argument, be it looking at the policy, looking at the wording of the humanitarian –

TIPPING J:

In the context of the Act as a whole, and with the international jurisprudence, if you like, hovering above to aid if there’s any lack of clarity in the statutory scheme, is that the right mindset to be in, Mr Harrison?

MR HARRISON QC:

Almost, but not quite. It’s not a case of the international jurisprudence hovering above if there’s a lack of clarity, rather the force is greater and there’s two prongs, one is our obligations at international law and the other is the impacts on statutory discretion of fundamental rights and values, and that’s where citizenship comes in.

ELIAS CJ:

So it’s an advance on *Tavita* because it’s not concerned with ambiguous legislation?

MR HARRISON QC:

Well I wouldn't characterise section 54 as ambiguous, it simply contains a discretion and of course, I am arguing back to basics, the Judges below actually got it wrong because they didn't come back to ask that fundamental question, here’s a discretion, what’s its purpose within the statutory scheme and what mandatory relevant considerations can be imported? And it’s as

simple as that. I may be right, I may be wrong about what these mandatory relevant considerations are, but it has, I submit, to be the starting point. Again, it's a theme in my submissions, but as I've started, I may as well add this, it's also the case that it's the wrong end of the enquiry to begin with the NZIS policy or the questionnaire and seek to link it back to some provision that enables such a policy to be made. Rather, the position is, you start with the discretions, add in the mandatory considerations, if any, that's what the individual decision then has to achieve to be compliant. The policy is merely an administrative way of directing attention to whatever the right considerations are in law and achieving consistency, so the Courts below to the extent that Justice Glazebrook accepted, started at the wrong end of the enquiry, and that's really all I think I need to say about them.

McGRATH J:

Does that mean we really start with the statute?

MR HARRISON QC:

Yes we do, and that's precisely what I'm about to do, just to announce what I propose to do in the next wee while. I would like to take you to the key statutory provisions of the Immigration Act, secondly to the relevant international instruments, thirdly to the NZIS policy in question, which is itself under challenge, fourthly, the key facts set out in the chronology and that will include the record of the humanitarian interview which led to the decision or one of the decisions under challenge. So it will be a while before I come back to my written submissions and then of course I'm only going to be speaking to them.

So the key provisions are in volume 1 of the casebook and the Immigration Act provisions are at tab 12. The first provision that I wish to mention is section 3. The rights of New Zealand citizens are protected in it under subsection (1), every New Zealander has the right to be in New Zealand at any time. Subsection (2), nothing in the Act abrogates the subsection (1) right and subsection (3) concludes, "And no such citizen is liable under this Act to remove or deportation from New Zealand in any

circumstances." And that of course is consistent with the Bill of Rights provisions as well.

Then we can go to section 35A which is at page 14 of the pagination at the bottom, 35A grant a permit in special case. This is the provision that is the most likely candidate for a regularisation of the immigration status of an overstayer who is potentially being dealt with under the removal provisions so that when the Immigration Officer is thinking about making a removal order or thinking about cancelling it, I am subject to correct by my learned friend Mr Carter, that the likely recourse is this power which an Immigration Officer may also utilise under section 35A, that's correct isn't it?

And typically under subsection – and that 35A(1)(d) says that the power to grant in effect is not applicable to someone in respect of whom a removal order is in force so you've either got to have not made the order or to have cancelled it to exercise the power and subsection (2) is in familiar terms under this Act.

Then we come to the current Act, I'll deal with the history a little bit, or at least it's in my submissions, section 45(1), "From the moment that a person is in New Zealand unlawfully until that person leaves New Zealand, he or she has an obligation to leave New Zealand unless subsequently granted a permit." And subsection (3), "The obligation to leave arises whether or not the person is aware of the obligation, or of the implications of not meeting it." And it's not affected under (a) by any failure to communicate the obligation.

Section 46 imposes an obligation on the chief executive to communicate to persons who are seeking visas to come to New Zealand or permits to be in New Zealand, over the page, the section 45(1) obligation to leave and the implications and subsection (4) states that any of those kinds of visas or permits issued must contain the words set out there.

So what we have just to interpolate it is a regime that imposes on a person whose permit to be in New Zealand expires an immediate obligation to leave.

It's not triggered, as under the previous law, by any kind of Court decision or order to remove. There is no communication at the time the unlawfulness begins because the section 46(1) duty is a duty to communicate to those who are seeking visas or permits.

TIPPING J:

The section 54 discretion, if you like to call it such, or power, must be exercised consistently with that.

MR HARRISON QC:

The – I would put it this way. The section 54 power is to be exercised in accordance, first in accordance with its statutory purpose and its purpose is to ensure that this obligation is met in the individual case or as appropriate.

TIPPING J:

Wouldn't there be a duty to exercise the power then, unless some countervailing factor can be shown?

MR HARRISON QC:

Well that's one way of putting it. My submission is that the word "may" is used, a discretion is conferred, and then you have the classic enquiry as to what, if any, relevant considerations are attached.

TIPPING J:

The starting point, surely, must be that the power must be exercised consistently with the statute?

MR HARRISON QC:

The starting point is that the power is conferred so that the obligation under section 45 may be enforced. But it is an enquiry directed to the circumstances of the individual case, hence the use of the word "may" and that's followed up with the possibility of –

TIPPING J:

But if you're already been to the RRA unsuccessfully and to the Minister unsuccessfully, surely the power must be exercised against that background too?

MR HARRISON QC:

The section 54 power is to be exercised against the background of the individual case and if that individual case has involved previous appeals, be they to Tribunals or to Ministers, that is part of the background.

TIPPING J:

But the power can't be expected to, as it were, trump earlier appraisals, can it?

MR HARRISON QC:

Yes, in my submission it – well it's not a case of trumping, it's a case of exercising the power in accordance with such mandatory considerations as are applicable in the particular case. So that, and this is the argument here –

TIPPING J:

So if the RRA says, no I'm sorry you haven't got a sufficient humanitarian case under section 47, is it, then the fellow under section 54 has got to start from the beginning again?

MR HARRISON QC:

It's not a question – we don't – we do not argue that the section 54 decision maker refuse any of the previous decisions. The fact that they have occurred is part of the enquiry into the individual case –

TIPPING J:

Are you saying that something new has to be demonstrated?

MR HARRISON QC:

No I'm not saying that something new has to be demonstrated, but I am saying that if there is something new, or if the facts that are, appear by virtue of the mandatory relevant considerations have not been considered, they must be considered and given appropriate weight.

ELIAS CJ:

Would it be open to the officer to say, there's nothing that causes me to doubt the conclusion that the removal authority came to on the humanitarian questions.

MR HARRISON QC:

In a given case it would be.

ELIAS CJ:

Yes.

MR HARRISON QC:

But it is part of my argument that the section 47(3) test describes in *Patel* as a stringent test, is not a sufficient addressing of humanitarian considerations. So that my argument would involve saying in a particular case, even if there had been a section 47 appeal just before the exercise of the section 54 power, it is possible that because of the stringency of the test that that would not suffice. Equally, it's quite possible that it would –

TIPPING J:

But that seems extremely odd, that a low level official could in effect direct himself by a less stringent test than Parliament set out for the appeal body.

MR HARRISON QC:

Well, I would like the chance to develop –

TIPPING J:

Of course you will have the chance but we are just trying to feel the substance of what you are going to say.

MR HARRISON QC:

Yes, so I'm not back-pedalling. What I was going to say is, I want to develop the point about the limited scope of the section 47(3) test and why it doesn't necessarily achieve a review of what I argue are the mandatory –

TIPPING J:

But you are arguing that the section 54 person can guide themselves by a less stringent test than the 47(3) test.

MR HARRISON QC:

I'm arguing that in any given case and my case I argue is an obvious example, in any given case there will on my argument be mandatory relevant considerations which are not addressed or not adequately addressed by the section 47(3) test.

McGRATH J:

Why don't you say – surely the argument then must be that they are mandatory considerations in relation to applying section 47(3), rather than the subsequent provision?

MR HARRISON QC:

That is one way of analysing it. If we took my mandatory relevant considerations for which I argue and said those are mandatory relevant considerations for 47(3), we reach the same result applying section 47(3) at the section 54 stage. The difficulty with that is it does – I don't want to lose an argument that might work –

McGRATH J:

I don't want it to take you out of turn but what I will be interested to know as you go through your argument, is why the mandatory considerations for which

you argue don't really have to be in terms of section 47(3), rather than the subsequent stages, when you get to section 54 in particular.

MR HARRISON QC:

If we just go to section 47(3) which is where I was heading. It talks of the appeal being brought only on the grounds that there are exceptional circumstances of an humanitarian nature, unjust or unduly harsh and not in all the circumstances contrary to the public interest. Now, that is a test that is formulated to deal with all manner of overstayers, including someone who has no children, no family, who has overstayed their visitor's permit, someone who is found to have some kind of a criminal background elsewhere and thus it's an all purpose test. It is said to be a stringent test and I would have to say it's the most stringent of the three appeal tribunal tests, as I say in my submissions, under the Act, section 22 and section 105 being the others. So, in answer to Your Honour Justice McGrath, I would be perfectly content if the Court said, Mr Harrison's mandatory relevant considerations do apply to subsection 3 but it's doing more violence to section 47(3) than my argument does to section 54.

ELIAS CJ:

Isn't there though, a different between mandatory relevant considerations and I must say, I always thought that administrative law dwells much too much on mandatory relevant considerations rather than substance of outcome but isn't there a difference between mandatory relevant considerations and the test provided by section 47(3), so that there is no inconsistency, it is a standard in 47(3). Once you have identified what has to be taken into account, that's the standard that gets applied and one would have thought that it needs to be consistent under section 54 and section 47 but as to whether you have identified the relevant considerations, that is equally applicable. So, I don't see a necessary inconsistency at all between the two sections and I'm not sure why you are insisting on it.

MR HARRISON QC:

Well, the –

ELIAS CJ:

Unless you are trying to say that section 54 applies a different standard.

TIPPING J:

I think that's really what you are trying to say because otherwise, it makes no sense.

MR HARRISON QC:

Yes, I do because section 54 is a discretion and it is not tied to section 47(3).

ELIAS CJ:

But it's tied to the statute and section 47 is part of the statute.

TIPPING J:

It would be bizarre to suggest that having gone through the whole 47 rigmarole, with whatever other relevant considerations there, against the standard as the Chief Justice puts it, it would bizarre to think that when you get to 54 you can lower the boom.

MR HARRISON QC:

The problem with that approach Your Honour, is that the majority of cases will not have gone through section 47(3) at all. Most people who are going to be the subject of a section 54 removal decision will not have appealed. I can point to a passage in the departmental manual that supports that.

TIPPING J:

That may be so but if we're dealing with a case where there has been an appeal, surely it is bizarre to suggest that the boom is lowered at the 54 stage. Fifty four is really a ministerial, I don't mean minister of the Crown, I mean it's a ministerial act, consequent upon a failure of the appeal.

ELIAS CJ:

That is contrary to your submissions.

BLANCHARD J:

It would also be bizarre not to apply the section 47(3) test to people who have not appealed because otherwise there's an incentive to avoid appealing.

MR HARRISON QC:

The position, as I submit, is that section 54 is serving a different purpose.

ELIAS CJ:

That can be accepted but nevertheless, isn't the standard to be applied, the standard to be derived from 47(3)?

MR HARRISON QC:

I don't accept that Your Honour, that it is the standard because, to repeat myself, it's an all purpose standard that is insufficiently focused on the kind of case we are dealing with here.

BLANCHARD J:

You mean to say, that Parliament in framing that, has totally overlooked the fact that there might be children?

MR HARRISON QC:

Whether or not they have totally overlooked it, they have not enacted a standard which enables compliance with –

ELIAS CJ:

But why not because then the argument surely is that the recognition of what are exceptional circumstances of a humanitarian nature have to be assessed against the weight imported by the international obligations?

MR HARRISON QC:

But, the international obligations themselves are not framed so as to require an exceptional circumstances threshold, nor do –

ELIAS CJ:

But they are not necessarily exceptional circumstances within the concerns of those international instruments. Here, as you say, 47(3) applies to all cases, where you have a case that concerns children and the welfare of children, what exceptional circumstances has to be read in the light of those obligations?

MR HARRISON QC:

I accept that, and if I were here arguing –

ELIAS CJ:

If you were arguing 47(3), you'd be arguing what I'm putting to you.

MR HARRISON QC:

Yes I would, that's what I was just about to say, if I were here for a 47(3) appellant I'm in the situation of my clients' parent, then that's what I would be arguing, but equally, I stand by my submission that section 54 and its discretion is wider and cannot be fettered by saying that the section 47(3) test is what applies when discharging the UNCROC type component.

ELIAS CJ:

It doesn't need to be wider, it just needs to be an independent assessment that has to be made for your argument. I mean, you do have the major block that there has been a determination by the removal authority.

MR HARRISON QC:

No, no – sorry.

ELIAS CJ:

Oh, no you don't. But it's only, I would have thought your argument is sufficiently supported by our acceptance, if we accept that the section 54 determination is an independent responsibility of the reviewing officer.

MR HARRISON QC:

Well, I started this exchange with Justice McGrath and went a long way towards accepting that proposition that that is one way of addressing the issues. I'm reluctant though, to take the approach of saying here's section 54(1) discretion, let's look for mandatory relevant considerations, the mandatory relevant consideration is applying the same standard as under section 47(3).

ELIAS CJ:

But they're mandatory under both, they must be mandatory under both.

TIPPING J:

If there's no appeal, as my brother Blanchard said, it would be bizarre if the independent mind exercising 54 could apply a lower standard.

BLANCHARD J:

The independent mind surely has to say, what would the situation be if this were before the Removal Review Authority?

MR HARRISON QC:

I don't accept that. The independent mind can apply a lower standard, a more beneficial standard because it's a discretion.

BLANCHARD J:

Well in that case, anyone who appeals under 47(3) is crazy.

MR HARRISON QC:

The question is whether the independent mind must apply that lower standard.

TIPPING J:

No, it's the potential to apply the lower standards, is the vice and the perverse incentive.

MR HARRISON QC:

Well call it a perverse incentive –

BLANCHARD J:

You're just putting them out of business.

MR HARRISON QC:

Well the fact is that the vast majority of overstayers do not appeal and are probably ignorant of their right –

BLANCHARD J:

They're very clever people. They've realised what you've just urged on us.

MR HARRISON QC:

How about the overstayers' children, particularly their New Zealand citizen children, who are not making decisions, have no right of appeal and may have negligent, criminal, ignorant parents who sleep on their rights, but when it comes to the crunch, like the Ye children, this section 54 discretion has to be made to work in their interests, not – I mean, obviously there are other interests, but their interests have to be brought to bear –

ELIAS CJ:

That's a different argument, though. I think it is important to look at the position, you've slid now into the children which is going to be the main thrust of your argument, but just staying with the parents for a while, I, for one, am prepared to accept that people may not have appreciated that the time limits have expired and that they're subject to removal and therefore the section 54 process needs to consider the same things as would be relevant under section 47, so I see an equivalence in terms of the determination if the officer has had the benefit of – or the people have had the benefit of removal authority decision, they may be able to rely on that. In other cases, events may have moved on and they may need to really do the exercise again. In other cases, it hasn't been to the Removal Authority, but it seems to me that you're really pushing a very big stone up a hill to say that there is not

equivalence between the functions – not the functions being exercised, but the considerations which are relevant and the test to be applied under both section 54 and section 47.

MR HARRISON QC:

Let's assume for the sake of argument Your Honour that that is true, looking at the overstayer and that that is a perfectly valid conclusion to reach, but when we come around to the children, particularly New Zealand citizen children, how do we change gear if we are going to change gear to look at them? The response I'm getting is, well we can still use section 47(3), but that's the point at which I'm balking.

TIPPING J:

Isn't the presence of children who are New Zealand citizens at the highly relevant factor in the 47(3) and the corresponding 54 assessment? It's as simple as that, it is a very, very important factor, but it's not a trump card, because otherwise, you'd have a generic exclusion for people who give birth to New Zealand citizens while they're in – and that would cause all sorts of trouble.

MR HARRISON QC:

Yes, I go along with Your Honour in what you've just said, and the difference is that –

TIPPING J:

It's not the first and paramount, because the convention, or whatever it's called, only requires it to be the primary. A primary, sorry, a primary.

MR HARRISON QC:

Let us park that one for a moment.

TIPPING J:

Right, just to raise that little flag for you to ponder on, but otherwise, surely, it fits in obviously and tidily into 47(3). The fact that there are New Zealand

citizen children must be given proper weight in the 47(3) assessment or the 54 assessment.

MR HARRISON QC:

I couldn't agree more, it ought to be there in 47(3), if we go back to my first principles argument and focus again on section 54 and its discretion, what is the justification for saying that there's a discretion, we think there are mandatory relevant considerations, those are the 47(3) tests.

TIPPING J:

Well there's a difference between a test and considerations.

MR HARRISON QC:

Yes.

TIPPING J:

The Chief Justice has been, in my respectful view, quite rightly addressing that with you, you must be very careful not to slide one in to the other. There are relevant factors going towards meeting the standard.

MR HARRISON QC:

Yes, well my argument is, let's do it more directly. If section 47 is a test, and I think it is a test, and a stringent one, why don't we just identify the considerations directly that, on a classic approach, will be relevant to the exercise of the discretion under 54.

TIPPING J:

But no one is denying that the existence of New Zealand citizen children is a relevant factor in the 47(3) test, the weight you give to it as against other issues, surely, is for the decision maker.

MR HARRISON QC:

The argument, I submit, is that, and I know I'm repeating myself, section 54 is a discretion, there's a factual precondition which is that the subject, the

intended subject of the removal order is unlawfully in New Zealand. The discretion – how do you then approach the discretion? You've got the International Covenant obligations and those are, I argue, mandatory relevant considerations, not going around the long way, putting them in 47(3) which they should go in, then 47(3) is the mandatory relevant consideration, it's just direct. May, international obligations. May, citizenship –

TIPPING J:

But you're wanting a –

MR HARRISON QC:

Duty to protect.

TIPPING J:

– lower standard, aren't you?

MR HARRISON QC:

No I'm just wanting, I'm wanting those mandatory relevant considerations.

ELIAS CJ:

But there must be mandatory relevant consideration under section 47 as well? There must be?

MR HARRISON QC:

Yes, yes.

ELIAS CJ:

Well then the difference is only the standard.

MR HARRISON QC:

The difference is the stringency of the 47(3) test.

ANDERSON J:

Well I look at the matter perhaps simplistically Mr Harrison and I say well there's a discretion there and I ask myself why and in what circumstances might it be exercised. The answer is, well it depends on the circumstances. If the decision maker is making that decision five minutes after the RRA has given a decision, and the applicant is there on the spot, the circumstances might warrant almost a pre-emptory issuing of removal notice. But in reality many people don't avail themselves of the appeal right, or if they do they then go to ground so that there's a passage of time and a change of circumstances by the time they're located, and then there may well be a need to reassess the circumstances as they then exist. But I wouldn't think that it would be reassessed on a different basis from the test applied by the RRA?

MR HARRISON QC:

Well, I agree with Your Honour all the way down to that last sentence.

TIPPING J:

That's the crunch. It has been for about the last 15 minutes and you don't seem to be willing to acknowledge that you're wanting dissonance in the two standards.

MR HARRISON QC:

No, I simply argue that the – that it's – the section 54 discretion is not to be fettered by importing a test which the legislator chose, could have applied to section 54 and chose not to and there's also the legislative history to which Justice Glazebrook refers in her judgment where the process was going through the select committee and the question whether a humanitarian interview approach at the section 54 stage was to continue was raised and determined by an assurance that it would continue. Now –

TIPPING J:

Of course it continues but it's the standard that we're talking about Mr Harrison, with respect.

MR HARRISON QC:

Yes.

TIPPING J:

And I have to tell you here and now that you've got a huge job to do to persuade me that Parliament could have intended a lower standard in 54.

ANDERSON J:

Or a wider range of consideration.

TIPPING J:

Exactly.

ELIAS CJ:

I wonder really, Mr Harrison, I think unless you have further arguments you want to advance to us on that point whether we shouldn't move on because I think we do understand your argument. Parliament didn't import the section 47(3) test into section 54 and you make the bold submission that it's not – that test should not be imported. Does it go further than that?

MR HARRISON QC:

No, it doesn't – well we've had those exchanges and obviously that is my position.

ELIAS CJ:

Yes.

MR HARRISON QC:

All right, so if we can just go back to my trawl through the statute. We dealt with, this is at tab 12 of volume 1, page 16 we've dealt with the section 47(3) test. The liability for removal comes up under section 53.

TIPPING J:

Well there's no argument about that here, is there?

MR HARRISON QC:

Well there's no argument that there was a liability for removal.

TIPPING J:

No, no.

MR HARRISON QC:

We did – we've been talking about section 54 and I just note subsection (2) Justice Glazebrook makes a point about that which I would support, that the fact that the – an Immigration Officer who's previously been involved in determining an application for a permit by the person concerned cannot make a removal order indicates that it's a significant exercise, a discretion.

TIPPING J:

Well it supports the independent mind thesis.

MR HARRISON QC:

Yes and if we look then, I'll come back to 54 in just a moment, 54(3), the removal order may also name any dependant child in any such case section 141B to D apply and those are a regime for dealing with overstayer children to which I will come. 58, cancellation of removal order. Under subsection (1) there's one regime where the person named in the removal order is still in New Zealand and then under subsection (4) there's a companion power in the case of a person whose been removed or has left New Zealand. And then subsection (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." It is henceforth to be an application, whether the application is considered or not no obligation to give reasons.

Now my submission about that in the written submissions is that this is not a privative clause. What it does do is create what one might call a super

discretion in the sense that it's not merely a discretion, it's a discretion that you can't even call upon someone to exercise in a legally binding way.

TIPPING J:

But can we take a step back. Surely the 58 exercise is in the same case as the 54 exercise vis-à-vis the 47(3) standard? If they suddenly realise that something has come up new that shows this 47(3) standard is now met before the person is actually removed, they can cancel. That must be the purpose of it? So that's an even last ditch, even more last ditch for someone caught in the Court of Appeal provision. It bites right up until the moment of departure but it must be the same standard?

MR HARRISON QC:

If Your Honours are going to import 47(3) into section 54, then logically it is imported into 58.

TIPPING J:

All right. That's fair.

MR HARRISON QC:

And I also, in view of the way Your Honour has just framed the point, I'd also agree that if under either 54 or 58 the Immigration Officer finds that the section 47(3) standard is met, then the discretion ought to be exercised in favour of allowing the person to remain. My argument is that it doesn't cut the other way, that if the 47(3) standard is not met, the order must be made or the cancellation must be refused.

ANDERSON J:

Well then that leads to the question of on what principled basis?

MR HARRISON QC:

Which is my – the principled basis I put forward?

TIPPING J:

Well I think.

ELIAS CJ:

The one we've discussed.

TIPPING J:

We've been there.

MR HARRISON QC:

I'm not going back.

TIPPING J:

Well I think you're quite right, that if it applies in 54 it must equally apply in 58. So I just wanted you to accept or not that but I'm sure you're right in accepting on the premise that it applies to 54?

MR HARRISON QC:

Yes, yes, I accept that. Now the – I just want to make this point about comparing 54 and 58 as well. When we come to the argument about the stage at which a humanitarian interview ought to be conducted or if you like the stage at which the mandatory considerations ought to be applied –

ELIAS CJ:

I think it's much better to put it on that second basis myself.

MR HARRISON QC:

Yes, yes. The – I would submit that the fact that section 58, as what I described as a super discretion, strengthens the argument for requiring these things to happen at the section 54 stage, barring flight risk and the exceptions that I've allowed because you ought, particularly for natural justice purposes with the imperative of section 27(1) Bill of Rights, you ought to apply the hearing standards to the first exercise of discretion, the section 54 one, rather

than seek to postpone it to section 58, where you've got this problematical super discretion which need not be embarked on at all.

ELIAS CJ:

Why do you say that the discretion is a super one in terms of 58 but not 54, where is the requirement for hearing under 54?

MR HARRISON QC:

The first of those two questions answered, I say that it's a super discretion because of subsection 5 of 58.

ELIAS CJ:

But that's necessary because it's envisaged that people may apply. The removal order is a consequential one on the status of the people once the – there's nothing in this to indicate that there is a process being set up under 54, 58 necessarily has to embrace the circumstances where a removal order having been made, someone is saying hey, wait a minute, you haven't considered something. So, it takes away the obligation to – well, it makes it clear that there isn't a process that's being envisaged here, a hearing right in terms of a formal hearing and it excludes the application of the official Information Act requirement to give reasons. I don't really see that it is a super discretion, it's an administrative decision that is being taken.

MR HARRISON QC:

I've argued that the Judges below, or some of them, attached too much importance to subsection 5, treating it as in effect a privative provision. I don't want to fall into the same trap of attaching too much importance –

ELIAS CJ:

Well, it's clearly not a privative decision but what it does do is limit other requirements which might otherwise be imported through the Official Information Act, or by the Courts perhaps constructing a duty to set up a process.

MR HARRISON QC:

Yes, I don't dispute that Your Honour. If I can come back to though an earlier exchange, in which Your Honour basically asked me, why is the consideration and any hearing at the section 54 stage rather than the section 58 stage. The point I was making about section 58 is that it doesn't impose – it doesn't confer a discretion which has to be exercised.

ELIAS CJ:

Yes.

MR HARRISON QC:

If therefore, we are going to say, whether it's via section 47(3) or simply by direct importation of the international obligations into a discretion, if we are going to say, that happens at the 58 stage, you have the problem that you are importing the mandatory considerations in respect of a discretion which the decision maker does not have to exercise in law. So, the point I am making is, for that reason and some others I will come to, you ought to be importing the test or mandatory relevant considerations at the section 54 stage.

BLANCHARD J:

I don't have any difficulty with that, subject to the point that's been argued out with you about section 47.

ELIAS CJ:

Surely it is at both stages, it's at 54 and 58?

MR HARRISON QC:

Agreed but of course if it's done at 54, it may not necessarily be reached at 58 because, as I said in criticism of what happened in this case, the Immigration Officer knowing pretty much everything already, makes a section 54 order and then asks himself whether he ought to cancel it in virtually the next breath. The other point I make and it's in the written submissions, is that the consequences of the section 54 decision are also further indicators that that's the crucial decision, the possibility of the mother being taken into custody, the

kids are in school, the ban for five years on applying to re-enter. The consequences bite at the 54 stage and that's why, looking at both the natural justice prong and the mandatory relevant considerations prong, it's the section 54 decision. Justice Glazebrook says, then and I agree and I've always argued, that if you can't use 54 because there's a flight risk, or at the 54 stage you don't actually know that there's a family involved, you might just light upon this overstayer not knowing that he's married and had children, pull him in under the removal order. If that sort of circumstance applies, then you shift to 58 and do it then.

TIPPING J:

It's a fallback. If something genuinely new crops up, in whatever interval there is between the making of the order and the execution of it, then you are honour bound to consider cancellation.

MR HARRISON QC:

Yes, yes but contrary –

TIPPING J:

But it can't be intended that it's anything other than something new cropping up, or some blinding revelation that everyone has overlooked.

MR HARRISON QC:

That's true under 58, provided there's been the proper consideration under 54 already –

TIPPING J:

They both have their work to do.

MR HARRISON QC:

Yes, I accept that. All right, just carrying on through. You've got the statutory materials, you've got the section 105 test for the deportation order and para 23 and in my submission you'll see subsection 2 with a whole lot of

express mandatory considerations there. There's also, I jumped past it, there's the comparable section 22 provision –

TIPPING J:

What has 105 got to do with our present problem?

MR HARRISON QC:

I'm just comparing the tests. The test – if you are actually being deported, in other words, you've committed some kind of crime, the test is whether it's unjust or unduly harsh to deport and not contrary to the public interest. So, you don't have an exceptional circumstances test, added, super added test. You've got these –

ELIAS CJ:

But these people are not subject to removal because they are not unlawfully in New Zealand. Is that the difference?

MR HARRISON QC:

That is a point of difference.

ELIAS CJ:

Yes.

MR HARRISON QC:

But equally, they may have family and even though they are criminal offenders who in effect have forfeited their right to be here in a different way, there's a lesser standard and I just note – but also I'm just noting for completeness that in this provision there is a list of express mandatory considerations.

McGRATH J:

One can see the policy reasons for having the higher threshold in the case of deportation, can't you, so doesn't that really mean that –

MR HARRISON QC:

It's a lower threshold Sir.

McGRATH J:

Sorry, the lower threshold, yes. Doesn't that really mean it's a different situation, it's not really one that you could make a useful comparison with?

MR HARRISON QC:

Well, it depends what the purpose of the comparison is. I accept that – you know, if you say that, I mean, it's possible to say and presumably this is what the legislator thought, that the person who is unlawfully in New Zealand is the one who has the least entitlement to consideration in terms of remaining –

TIPPING J:

Well it's perfectly obvious that Parliament wanted a very, very strict test to allow people who were unlawfully in New Zealand to stay here. And the test can be administered so as to keep faith with our international obligations and I personally can't really see what all the problem is.

MR HARRISON QC:

Well I suppose years of experience taught me to be weary of what's lurking in the woodwork but if the section 47(3) test is given a really broad and beneficial interpretation to apply to a case such as that of my clients.

TIPPING J:

Well that's all very well to put it that way, you can't, when you say a broad and beneficial, it's still the test.

MR HARRISON QC:

Precisely why I'm arguing against its importation into section 54.

TIPPING J:

I know that, but it's perfectly obvious, isn't it, that this is what Parliament wanted, and we've got to administer the standard there has got to be

administered with all the international obligations in mind, but nothing can alter the standard that Parliament has set.

MR HARRISON QC:

This is what Parliament wanted for the all-purpose test to deal with all manner of overstayers.

TIPPING J:

All right, well I don't want you to have to go right down the same road again, Mr Harrison.

MR HARRISON QC:

No, well I'll move on. I wanted to refer to section 141B which is at page 26 of the printout. This is a specific – this is relevant to the natural justice issues relating to New Zealand citizen children, there's a specific dedicated process for children who are overstayers and whose removal is contemplated. So subsection (1) says that, where you've got, for example, the making of a removal order in the minor's name, which is what subsection (2)(a) deals with, in that situation –

ELIAS CJ:

Sorry, am I looking at the right section, is it 141B?

MR HARRISON QC:

141B.

ELIAS CJ:

Yes, thank you.

MR HARRISON QC:

The drafting is a little difficult, it says, "(1), In matters of the kind referred to in subsection (2)…" and going to subsection (2), that includes (a), the making, serving, and execution of the removal order in the minor's name, so our type of case that relate both to a dependant child who is under 17 and to one or

more of the child's parents, "(1)(a), the minor's interests are to be represented by any such parent", and "The parent is the responsible adult for the purpose of these provisions." Then subsection (2), "if a minor does not have a responsible adult, one must be nominated and then there's a process for nominating and appointing, so that's just the introduction provision basically, if you're a dependant child under 17, you will have a responsible adult, that will be your parent by default if the parent is also in line for removal.

Then 141C provides that the responsible adult may exercise rights of appeal under the Act –

TIPPING J:

How does this help the natural justice argument? Because it seems to say that, in our case, the parent is the responsible adult and represents the child.

MR HARRISON QC:

If I may just complete my –

TIPPING J:

Yes, I'm sorry, am I jumping the gun, Mr Harrison? At the moment, it doesn't seem to be helping, but –

ELIAS CJ:

Well the minor isn't somebody under 141B(2), is that the point you're making? We're not concerned with that sort of –

MR HARRISON QC:

Can I just complete my survey of these provisions and I'll come back to Your Honour? Under 141C, you've got (a), the right of appeal, (c), to the extent practicable given the level of maturity and understanding of the minor, the responsible adult must attempt to elicit the views of the minor and make them known on behalf of the minor where appropriate. 141D, Views of minor to be considered, "Opportunity must be given so far as practicable for the minor to express his or her views on the matter, whether personally or through

a responsible adult", and note whether personally or through a responsible adult, "(b), due weight is to be given to those views", et cetera.

The point of referring to these provisions is to demonstrate that in a case of an overstayer child, it's envisaged that, let's just call it the parent because normally it would be, it's envisaged that the parent represents the child and there is a duty on the parent to elicit the minor's views and then make them known on behalf of the minor and the minor has to be given the opportunity to express views. Now that supports the natural justice argument because it demonstrates that, while as here the mother, prima facie, could represent those views, she had to be given the opportunity to do so, as distinct from simply advocating for herself, the argument being that if this is the standard for overstayer children, New Zealand citizen children must be entitled to at least the same degree of representation.

ELIAS CJ:

But they're directly affected, these children, there are orders to be made in respect of them, of course there's a natural justice issue which the legislature has addressed in these provisions by setting up the way in which the interests of minor children who are directly affected will be heard. Where's the leap to the situation that we have here?

MR HARRISON QC:

Well the New Zealand citizen children, like the Ye children, are no less directly affected.

ELIAS CJ:

Well that's the argument that you need to develop I think.

TIPPING J:

They're not the subject of any order, that's I think the point that's being put to you, but you say that they are, in substance, directly affected?

MR HARRISON QC:

They're directly affected because there can be only one of two outcomes. Either, despite being New Zealand citizens with a right to remain, they end up having to accompany or later follow their parents to another country, or they are left behind in New Zealand without their parents.

TIPPING J:

But isn't there significance in (2)(a) of 141B in the minor's name? It's when the order is directed to the minor.

MR HARRISON QC:

Yes, I'm not arguing that these provisions apply to the New Zealand citizen child, I'm just pointing out that the Act itself recognises the position of minors, makes provision for the overstayer child and it would be consistent with the policy of the Act to make at least similar, if not stronger provision, for hearing the views of –

ELIAS CJ:

I wonder about this analogy, you know, because one would have thought that the overstayer minor, or the child subject to removal under some of these other provisions, that the parent who the statute treats as prima facie the person who will represent the interests of that child is almost certainly themselves going to be similarly disadvantaged aren't they? So, in other words, this is some sort of legislative judgment that the interests of the parents and children are not inconsistent, that the parents can be left to represent the interests of the children.

ANDERSON J:

There may be inconsistencies, there may be a case that an overstayer child who wants to go and the parent wants them to stay, or vice versa, and because they're affected by it, they're entitled to be heard on the issue of whether they resist or don't, but that's because they're directly affected.

ELIAS CJ:

Yes I understand that, it's just that this will apply in some circumstances where you have an overstayer parent and an overstayer child and there is a legislative scheme which does envisage that the overstayer child will be represented by the overstayer parent, though they shouldn't be treated distinctly. What I'm really just suggesting to you is, is this analogy really very helpful to you, these provisions?

MR HARRISON QC:

The provision draws a distinction, which I submit needs to be drawn, between representation of the overstayer child by the overstayer parent and the separate representation of the views of the child and the interests of the child as against the views and interests of the parent. So this is why I'm drawing attention to it because it's not merely that the child is in the same boat as the parent so that the parent only needs to advocate for them both jointly, and in the one breath, rather there has to be a separate eliciting of the views by the responsible adult, that's 141C(c), so this opportunity has to be given for the overstayer child and the responsible adult being usually the parent and it – you couldn't say it happened for example in Ms Ding's case. She's snatched – she's not told, go and speak to your children or even you must know your children's views, what are your children's views. She's just asked a whole host of questions about her position. She expresses her personal concerns for her children but that's not the same thing and that's the distinction that I have been drawing in advocating the natural justice interests of the Ye children as against the natural justice interests of Ms Ding.

TIPPING J:

How real is this concern as opposed to theoretical? I mean the children, presumably their views are self-evident. They want to stay and presumably the officer has proceeded on that basis. What more could be added in practical terms by giving them a separate voice?

MR HARRISON QC:

Oh a whole host of things Your Honour. It's not just information about we want to stay or we don't want mum to go. As you say that is – that can be taken as a given. The question is what, what are their personal circumstances in terms of schooling, what language have they been schooled in, could they be schooled in Mandarin when in fact at best they speak Cantonese and we don't even know if they write it. What are their health problems, what is the situation of these three children born in breach of China's one child policy if they go back. What is, what are the citizen implications for them if they go back, coming eventually as I will to Mr Delamere's affidavit, all of these things can be advocated above and beyond the obvious that Your Honour mentioned.

So anyway, I mean I'm not saying my argument sinks or falls on the basis of 141B and following.

ELIAS CJ:

No, but you're just, are you, making the point that the Act does show concern to ascertain the views of dependent children in this respect and one would have thought that it was consistent with that to obtain the views of the dependant children in this sort of case also?

MR HARRISON QC:

New Zealand citizens are not overstayers, yes, that's the test. All right now I'm going to move onto the international obligations although – do I need to go through these provisions? The International Covenant of Civil and Political Rights and the UNCROC provisions?

BLANCHARD J:

I think we should.

TIPPING J:

Yes, I think I would be helped because I may have missed something Mr Harrison. I'm familiar with the "a primary" as opposed to "first and paramount" but there may be something more that I haven't grasped.

ELIAS CJ:

I'm never sure why in these arguments, I mean it may be just because of the way things emerged in New Zealand with *Tavita* that there is not more emphasis on the right to family more generally.

MR HARRISON QC:

Well it's part of the argument I'm putting –

ELIAS CJ:

Yes.

MR HARRISON QC:

In fact that there ought to be more and when we come to the recent English decisions more and more weight is being attached to that in precisely analogous cases so certainly. If we can go to volume 8 of the bundle of authorities and starting with tab 206. As with the covenants the general –

ELIAS CJ:

Is there any reflection, I'm sorry but I can't remember, in the Bill of Rights Act of these –

MR HARRISON QC:

No there's no –

ELIAS CJ:

– rights under the ICCPR?

MR HARRISON QC:

Not the ones I'm relying on.

ELIAS CJ:

No.

MR HARRISON QC:

There's the case of *Taito* in the Court of Appeal where at first instance Justice Baragwanath relied on the right not to be subjected to degrading, whatever it is, treatment in the context where the overstayers were providing care to a grandmother who was a New Zealand citizen.

ELIAS CJ:

Oh yes.

MR HARRISON QC:

And – but that's not a right in the Bill of Rights we've relied on. Even before Justice Baragwanath at this stage, before *Taito* in the Court of Appeal was decided, Justice Baragwanath wistfully asked me if I was relying on his judgment knowing it was on the way to the Court of Appeal and I said no so we don't rely on any provision of the Bill of Rights other than section 27(1) in relation to natural justice.

ELIAS CJ:

Right, thank you.

MR HARRISON QC:

So Article 2(1), each State Party to the present Covenant and undertakes to respect and ensure to all individuals within its territory the rights et cetera, I omit some words here and there, the rights recognised without distinction of any kind. Article 2(3) a familiar provision. "Each State Party to the present Covenant undertakes (a) to ensure that any person whose rights or freedoms as herein recognised are violated shall have an effective remedy." And that the person claiming such a remedy shall have his right thereto determined by competent judicial, et cetera, authorities and to develop the possibilities of judicial remedy; (c) to ensure the competent authorities shall enforce such

remedies when granted. And this is mentioned both in relation to the arguments around section 54, standard of judicial review, but also in respect of the cross – the Crown cross-appeal which argues that the Ye children had no standing or entitled to access to the Court in their own right so these are provisions that reflect on that. Of course that provision was a foundation stone in the *Baigent* decision which established the effective remedy for Bill of Rights and the Court there relied on Article 2(3).

Then you've got Article 17. One, "No one shall be subjected to arbitrary…" we can omit or unlawful, "…interference with his…" omit words family "…home…" et cetera. Two, "Everyone has the right to the protection of the law against such interference or attacks". There are one or two cases before the Human Rights Committee which are in the volume looking at that and I rely particularly on a case called *Winata* which I'll take you to in due course.

Article 23(1). "The family is the natural and fundamental group unit of society and is entitled to protection by society and the State." And finally 24, the rights of the child, every child shall have, without discrimination on those grounds, "The right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State." And we note that it's on the part of family, society and State not merely as the Crown seems to content the parents with the virtual sole right of protection.

That ties in of course to the argument around the citizenship status and the – that I'm coming too, the State's duty to protect its citizens. UNCROC is next and that's at tab 208. I'm just wondering whether that would be a convenient time to adjourn.

ELIAS CJ:

Yes, thank you.

COURT ADJOURNS: 11.30 AM

COURT RESUMES: 11.53 AM

MR HARRISON QC:

We were about to embark on looking at the Convention on the Rights of the Child at tab 208. The focus in the New Zealand case law has been almost exclusively on Article 3(1), "The best interest of the child shall be a primary consideration" but I'm inviting a broader and more holistic taking into account of the convention's provisions and in that spirit, I refer first to the preamble, in particular about six paragraphs down, "The recital is convinced that the family as the fundamental group of society and the natural environment for the growth and wellbeing of all its members and particularly children, should be afforded the necessary protection and assistance so that it can fully assume its responsibilities within the community, recognising that the child for the full and harmonious development of his or her personality, should grow up in a family environment in an atmosphere of happiness, love and understanding ..." Omitting the next one, "...bearing in mind the need to extend particular care to the child has been stated in the Geneva Declaration..." which had the paramount principle in it. Then further down, "...bearing in mind that as indicated in the Declaration of the Rights of the Child, the child by reason has physical and mental immaturity, needs special safeguards and care including appropriate legal protection before as well as after birth". Then all the rest of it and then you've got the articles.

Article 2(1), the conventional statement of ensuring the rights without discrimination to each child within the State's jurisdiction. Article 3(1), in all actions concerning children, whether undertaken by the list including Courts of law, administrative authorities, the best interests of the child should be a primary consideration. Article 3(2) State parties undertake to ensure the children such protection and care as is necessary for his or her wellbeing, taking into account the rights and duties of his or her parents, et cetera and to this end, shall take all appropriate legislative and administrative measures, so the protection duty paralleled of course here for a citizen by the citizenship duty of protection.

Article 4, the State shall undertake all appropriate legislative, administrative and other measures for implementation of the rights. Article 6 which starts at the top of the next page, 6(2) State parties shall ensure to the maximum extent possible the survival and development of the child. Article 7(1), the rights include the right to now be cared for as far as possible by his or her parents. Article 8(1), respect for the right of the child to preserve his or her identity, including nationality, name, family relations, without unlawful interference with New Zealand citizenship. We argue that there's an identity issue here. Article 9(1), not to be separated except pursuant to a decision by competent authorities and in accordance with law, if you like, determining that the separation is necessary and in the best interest of the child. Article 12(1), states parties shall assure to the child who is capable of forming his or her own views the right to express those freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child and specifically under 12(2), the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly or through a representative, et cetera, in a manner consistent with procedural rules.

The expression "affecting the child" was considered by the High Court of Australia in *Teoh* and in due course I will come to the passages that deal with that issue. In Article 16(1), top of page 5, a parallel to the ICCPR provision, no child shall be subjected to arbitrary interference with his or her family home, et cetera, (2), the child has the right to the protection of the law against interference or attack. So, the emphasis on the right to family life, protected against arbitrary or unlawful interferences in both Conventions. I also want to just briefly mention because there's this issue around primary and paramount in international law, the UN Convention on the Elimination and Discrimination Against Women which is at tab 207 of that volume. Article 5, States arties shall take all appropriate measures and you've got (b), to ensure that family education includes a proper understanding of maternity, the recognition of common responsibility of men and women in the upbringing and development of their children, it being understood that the interests of the children is the primordial consideration in all such cases.

ELIAS CJ:

A poor translation I think.

MR HARRISON QC:

Well I don't understand why – I confess not to understand why they use primordial because over the page in Article 16, they use paramount, states parties shall take all appropriate measures to eliminate discrimination against women, et cetera, and then (d), so this is as between men and women, the same rights and responsibilities as parents irrespective of martial status in all matters relating to their children, in all cases, the interests of the children shall be paramount, and (f), same rights and responsibilities with regard to guardianship, et cetera, of children, in all cases the interests of the children shall be paramount. So that's just included for completeness because here the use of the language of paramount, compared with primary in Article 3 of UNCROC.

Now, I want to turn if I may –

McGRATH J:

Is this the CROC convention the one which there was a reservation by New Zealand?

MR HARRISON QC:

UNCROC?

McGRATH J:

Yes, no – there was mention in the submissions of a reservation.

MR HARRISON QC:

Yes, there is a reservation in relation to UNCROC, no sorry, I think, there's a reservation in relation to the ICCPR but not one that's relevant and there is a reservation in relation to the Convention on Discrimination Against Women but I don't think that that's relevant either.

McGRATH J:

No, well don't worry if you don't think it's relevant, I think it was in the Crown submissions.

MR HARRISON QC:

We'll leave that, if we may. I want to go now, if I may, to the NZIS, or it's now called INZ manual, the provisions are in volume 3 of the case on appeal at page 607 and following. As Your Honours I'm sure are aware, there's a departmental manual which contains both government residence policy which has a particular status under the Immigration Act and various other policy which isn't strictly residence policy, all of it's in a manual which is amended from time to time, and these are the manual provisions dealing with removal and related decisions. They start at page 594 but that's not where I'm going to start, I'm just saying that's where the extracts from the manual start there, at 594, and you've got various powers that are set out.

We get to the directly relevant material at page 607, D4.1, Removal Action, and it goes through summarising the statute and pretty basic – D4.5, page 608, Who is Liable for Removal, D4.10, Making and Serving a Removal Order, that's duplicated by the looks, D4.15, page 612, Content and Effect, Currency, then D.4.25, note the setting out here because the policy directly in point, which I'm coming to, is kind of free standing from the section 54 and 58 provisions, so D4.25 talks of cancellation, it says, "A removal order may be cancelled if granted in error", or roman 2, "An Immigration Officer considers that in all the circumstances, it is appropriate to grant a permit under 35A" so that the policy treats the discretion as broad and certainly broader than any humanitarian consideration. D4.30, Executing, and D4.45 at page 618 is the policy directly, with which we are directly concerned, and that has its problems.

We challenge the policy as such, it was criticised by Justice Chambers in *Huang*, in a passage that's set out in the submissions and I'll just take you through it in, if I may, a critical way. It applies under (a) by stating that the

government recognises New Zealand's obligations under international law, it's essential that such obligations be taken into account when executing removal orders, so the first thing to note is that it applies at the stage of executing a removal order which has been made, not at the section 54 stage, refer back to my argument earlier this morning, and that, I submit, is wrong, that's part of our argument. Then, international obligations which may apply in such circumstances are, and the conventions are set out. So when executing removal orders in (a), actually refers you back, if you're meticulously reading the manual, it would refer you back to D4.30.

ELIAS CJ:

Sorry, I'm a little lost, where's the reference to that?

MR HARRISON QC:

D4.45(a), page 618, second line, "When executing removal orders…", and then D4.30, page 615, is what describes what executing a removal order means, which is basically bunging you on the plane, so that's the point in time in the overall process to which D4.45 directs attention. So it's not aimed at D4.25, which is the cancellation of a removal order, it's not tied in. My point is, I'm making it inelegantly, D4.45 is definitely not tied into the exercise of the section 54 discretion, but nor is it tied into the exercise of a section 58 discretion in any explicit way.

ELIAS CJ:

Is there a provision, sorry, that cites 58 at the top? Oh, it's D4.25, I see.

BLANCHARD J:

I agree, Mr Harrison, that the use of the phrase, "When executing removal orders…", in little (a) is a bit clumsy, but the heading talks about removal action, which I would have thought is intended to pick up both the section 54 stage and the section 58 stage?

MR HARRISON QC:

Well that –

TIPPING J:

I think executing is just a clumsy word. Dealing with or something like that.

BLANCHARD J:

One has to read these things sensibly.

MR HARRISON QC:

One does but the problem is that in practice it's been applied and interpreted the way I'm putting to you. That is to say it doesn't apply at the making stage under section 54. When we get to the humanitarian interview form –

TIPPING J:

Is that going to make any difference in this particular case? I mean you may well be right about this, literally read, but can it have any bearing on this particular case as to the outcome?

MR HARRISON QC:

There are other, there are other reasons why on my argument this claim will succeed.

TIPPING J:

You mean better ones than this?

MR HARRISON QC:

No but the – if we're looking at it in principle, in terms of what was flawed the Immigration Officer made an order, he previously conducted at least –

TIPPING J:

Can I be blunt with you? I think part of why this is has gone a bit haywire up until now, and that may be not a very fair way of putting it, is that we've been looking, turning up every possible stone and looking under them. What I would find vastly more helpful, as soon as you can conveniently get to it, is a sort of headline, this is where the thing went wrong in law, this is why, this was

the consequence. The risk is when you're looking under every possible stone you sort of lose sight of the bigger picture.

MR HARRISON QC:

I accept that but the challenge is at different levels of abstraction and we challenge policy.

TIPPING J:

Well the challenge, I suggest, is to get away from the different levels of abstraction and to couch it in a basis that at least a Judge versed in the sort of generalities of administrative law can understand.

MR HARRISON QC:

Right. With respect we do have to come to grips with the wording of the policy and the point in time at which it, on its face bites, and has been treated in practice as biting because as I started to say, we have here, and this is relevant to our natural justice complaint, Mr Zhou interviews Ms Ding I think three times, I could be wrong there, at least two humanitarian interviews, I think three, he makes two removal orders in respect of her. He makes the second one, which is this one subject to challenge, while the first one is still in force. He makes the second removal order and then immediately asks himself whether he should cancel it. Now –

TIPPING J:

It all sounds all very odd but in the end what it – I would be delighted to know at a very early stage what is the essential suggested error of law that is material, that can have affected the outcome?

MR HARRISON QC:

Well I mean it comes back to my starting point of a failure to take mandatory relevant considerations into account. There's also –

TIPPING J:

Being the international material?

MR HARRISON QC:

And the citizenship dimension.

TIPPING J:

Failure to take account of one, international stuff and two, the citizenship –

MR HARRISON QC:

Stuff?

TIPPING J:

– stuff, if you'll forgive my colloquialism Mr Harrison.

ELIAS CJ:

Well I'd like to know what the stuff is because I find talking in these generalities is not particularly helpful. Do you mean – what precisely?

MR HARRISON QC:

Well at the end of the day, whether it is paramount standard in consideration or a primary standard in consideration, this Immigration Officer failed to take the best interests of these vulnerable New Zealand citizen children into account, we say at all, but I will say alternatively sufficiently. But, and this is why I'm going to persist with this if I may Your Honours, one of the reasons he failed to do so was that both the policy and the humanitarian questionnaire failed to direct him to the right question.

TIPPING J:

So the underlying complaint is a failure to either at all or sufficiently bear in mind the interests of the children. Is that the underlying essential complaint?

MR HARRISON QC:

I'm sorry Sir. There is more than one complaint and really there's no point in my reducing it to one because there isn't – there are a number and I'm duty bound –

TIPPING J:

I know but it would be terribly helpful to have a sort of very simple short road map so that we know what one or more you're addressing. I can understand that completely, conception, that's good. Are you able in the same way to summarise the others?

MR HARRISON QC:

I'll – can I start from the heart of the onion and move out. Assuming all else was perfectly valid, the policy was valid, at the heart of the onion is a decision by the Immigration Officer that is unreasonable and asked completely the wrong questions and I want to get to that but I started at the other end, I started at the outer layer which is the policy. But the heart of the onion is a pure and simple asking of a wrong question.

TIPPING J:

Or failing to ask the right question?

MR HARRISON QC:

Yes, yes, and I can take you to that but I come at it from this way –

ELIAS CJ:

Well you have identified that in your submissions –

MR HARRISON QC:

Yes.

ELIAS CJ:

– what the wrong question was and said what the right question should have been. I'm just trying to work out where you're going with your submissions Mr Harrison because are you – you need to take us to the reasons why the decision was unreasonable and made pursuant to the officer having asked himself the wrong question ultimately don't you?

MR HARRISON QC:

Yes, I'm heading –

ELIAS CJ:

What are you going to deal with before you get to that?

MR HARRISON QC:

The policy, which I am dealing with now. I've dealt with the statute and I've argued that that requires considerations to be taken into account by the decision maker.

ELIAS CJ:

Yes.

MR HARRISON QC:

I then go to the policy and look at whether that policy, what the policy directs consideration of and argue that the policy itself doesn't accord with the statutory –

ELIAS CJ:

But if the gravamen of the case really is the decision that was made, why don't we go straight to that? What are you taking us to the policy for in terms of what you're asking us to do? We're not going to quash this policy.

MR HARRISON QC:

Well you're being asked to declare it invalid, yes.

ELIAS CJ:

Oh, I see.

MR HARRISON QC:

And if it's invalid then any decision purportedly taken pursuant to it would be invalid as well. That's part of the pleaded claim. But with respect Your Honours you may not be able to escape looking at the policy because if,

for example, you accepted my argument about mandatory relevant considerations or if you said 47(3) is the issue, then you've got to compare that conclusion with what the policy says and at least express a view, I suggest, about whether the policy, as it stands, meets the legal position.

ELIAS CJ:

Is it accepted that the decision was taken under the policy, so that if the policy is wrong we can infer that the decision has gone astray, is that what is being said?

MR HARRISON QC:

It's a little more complicated, that's why I'm talking about the onion because in fact the decision was taken under a humanitarian questionnaire prescribed, well not prescribed but written form. That questionnaire form which I was going to be coming to next, it does not refer back to the policy and is expressed in slightly different terms. In purely factual terms, the IO's decision was taken by applying a humanitarian questionnaire which directed him to ask –

ELIAS CJ:

The wrong questions –

MR HARRISON QC:

– certain questions, so the argument is the law, then let's look at the policy which we are now doing, then look at the questionnaire, then look at the actual decision reasoning. Now, I can start at the end and I'm happy to –

ELIAS CJ:

But don't you have to get to the other end?

MR HARRISON QC:

I have to get there but whichever end Your Honours would like me to start at, I will start at.

ELIAS CJ:

I'm just trying to be sure that I'm following where you are going with the policy argument because it's not as if it's, I mean, what status does it have except insofar as it's being invoked and has contributed to a wrong decision here?

MR HARRISON QC:

Precisely, that's why I'm taking –

ELIAS CJ:

Yes, so couldn't you – wouldn't it be better to start with the decision and show us how it is made in reliance on what you say is an invalid policy?

MR HARRISON QC:

It's difficult to argue that without first introducing Your Honours to the policy.

ELIAS CJ:

All right.

ANDERSON J:

Either he's followed the policy in coming to his decision, or he hasn't. If he has, then you can impugn the policy and if he hasn't, the policy is irrelevant, you then impugn the decision.

MR HARRISON QC:

Without, just – we've taken more time debating this, with respect, than it would have taken –

ELIAS CJ:

Would have taken to go through it.

MR HARRISON QC:

– me to go through the policy.

ELIAS CJ:

Yes.

TIPPING J:

I've just been reading it and I can understand that you might be able to criticise some of it but for my part, I would be much more helped by being shown what the decision maker did and his reasoning and then being told why that reasoning was unsound.

MR HARRISON QC:

Can we go to my chronology which is at the beginning of my bound submissions. The reason is that this is a little bit of a road map. At roman 6 at the very beginning of my submissions, headed "Short chronology". I had intended to take you through this in chronology order but let's cut to the decision. Page roman 7, you will see a date at the top, 23/8/05, Mr Zhou makes the second removal order the subject of the proceedings. Now, this is the material, in that entry and also the entry for the 31st is the material assembled as so far as the decision is concerned. So, he makes a second removal order and conducts a further humanitarian interview, those interviews are mentioned earlier and I –

TIPPING J:

Did he do the first before the second?

MR HARRISON QC:

Pardon?

TIPPING J:

He did the – he made the order before conducting the interview, did he?

MR HARRISON QC:

Yes, yes and both on the same day. Then there's this issue, as I say it's there, it's not entirely clear whether Mr Zhou decides immediately at that time

to proceed with the removal or does so later on the 31st. If we go to volume 4 of the case –

TIPPING J:

Does that matter?

MR HARRISON QC:

Yes. It matters when he made the order, when he made his decision because –

TIPPING J:

Not to cancel the order?

MR HARRISON QC:

Yes. Just bear with me Your Honours, it will become clear. Can I just take you to the first affidavit of Mr Zhou, it is in volume 4 at tab 57 and he deals with this at paragraphs 23 on wards, page 724 of the case. He says, a little way in to para 23, "The plaintiff was eventually located on 23 August, served with a removal order, taken into custody..." He then says, 24, "Plaintiff taken to Auckland Central Police Station. While at the police station, I interviewed her, completed a humanitarian questionnaire. Humanitarian questionnaire designed to obtain up to date information, et cetera, specifically refers to the obligations, the reservations..." and so on, 25, "Following that interview, I decided to proceed with the plaintiff's removal from New Zealand. In reaching that decision, I considered...", 25.1, "...the interests of the three New Zealand born children..." and the other matters that are set out including 25.4, "...the fact she would eventually have to rely on a benefit, limited ability to support herself and the three children, claims of domestic violence...", 25.5, 26, "...carefully weighed the competing matters set out above and concluded that the plaintiff should be returned to China and it would be in the best interests of the three New Zealand born children to return to China with their mother and join their father and the rest of the family." So that was his statement there. Exhibit G is the removal order. The humanitarian questionnaire which he completed is at volume 2 of the case, tab 4.

ELIAS CJ:

So, he also in para 24 which you didn't take us to, refers to the International Conventions and so on in the context of the humanitarian questionnaire –

MR HARRISON QC:

He describes –

ELIAS CJ:

I'm just trying to understand. He has adverted to the considerations that you say are mandatory Mr Harrison, is your complaint rather that it's a tick the box approach rather – I had understood you to be arguing on the basis of failure to take into account mandatory considerations but it really is about weight isn't it, your concern?

MR HARRISON QC:

It's a failure to take into account the citizenship aspect –

ELIAS CJ:

Well, he says the New Zealand born children, 25.1. So, he's turned his mind to these topics.

MR HARRISON QC:

This is second hand stuff Your Honour. If I may, if I take you to the humanitarian questionnaire, that is where he does his process. He's just summarised here what he's set out in the questionnaire itself at the time, this is an ex post facto summary of what he did but what he actually did is –

TIPPING J:

It's on oath, this is the decision maker's affidavit, isn't it?

MR HARRISON QC:

There's more than one, there's a second affidavit as well. Your Honours, if I may be permitted to develop this. Seriously, it –

ELIAS CJ:

Well, I think it is absolutely critical. We're not trying to inhibit you, we're trying to understand where it's going and on the face of this affidavit, it appears as though the considerations that you are urging on us were considered by the decision maker and I'm simply raising with you the point that immediately occurs, that your concern is much more with how he considered them, with the weight he attributed to those considerations, than with whether he took into account mandatory considerations.

MR HARRISON QC:

And my response to that is, as regards citizenship he did not take citizenship into account and the bold statement in 25.1 of his affidavit is not a taking of citizenship into account, he merely states – describes the children as New Zealand born.

ELIAS CJ:

Well what else does that mean?

MR HARRISON QC:

It means he claims to have taken their interests into account but he doesn't claim to have taken the citizenship dimension into account.

BLANCHARD J:

You mean he overlooked the fact they were citizens, despite the fact that he knew they were New Zealand born?

MR HARRISON QC:

He may well have known they were New Zealand citizens, but he attributes no significance –

ELIAS CJ:

Well that's weight you're talking about. It's not to say that that undermines the strength of what you're saying, it's just that it doesn't seem to me to be in the mandatory consideration camp.

MR HARRISON QC:

Your Honour I –

TIPPING J:

It goes to reasonableness, not to error of law.

MR HARRISON QC:

I don't want to be tied down to a particular characterisation of his decision until I've taken you through all the material.

ELIAS CJ:

Yes. Very well.

MR HARRISON QC:

That's the point, you've picked out one sentence and we've got material to go through that will put it in a different complexion.

ELIAS CJ:

And will you be submitting that this statement of his, his affidavit, is not to be accepted at face value. Is that what you're saying?

MR HARRISON QC:

It's an incomplete description of the process he went through which emerges from the humanitarian questionnaire.

ELIAS CJ:

Sorry where do we find the humanitarian questionnaire?

MR HARRISON QC:

It's at tab 4 of volume 2. Now if I may, to save coming back to this document again, I want to take you to the standard form aspects of it as well as the content which Mr Zhou wrote in. So it begins, humanitarian questionnaire instructions. Instructions for completion of humanitarian questionnaire at time of proposed service or execution of removal order so that the timing is after the removal order is made and when it's about to be served or executed. Then you've got – the questionnaire is in three stages and this is important. Stage 1 elicits your basic information, bullet 3, on completion of stage 1 decide whether further information is required to enable a decision to be made in accordance with New Zealand's obligations under international law. If no further information is necessary move directly to stage 3. So if there's no indications that it's a children or ICCPR case, you move to stage 3. Stage 2 of the questionnaire to be completed only if information obtained in stage 1 reveals further investigation assessment is requirement. Compulsory if stage 1 reveals the above. Stage 2 designed to obtain further information of a personal nature to enable a proper decision to be made in accordance with New Zealand's obligations under international law. The focus is only on the international law obligations. The citizenship dimension is not separately addressed.

Stage 3 contains the assessment and decision which must always be completed. Now this means that when we read through this the question and answers under stages 1 and 2 are the fruits of the interview with Ms Ding. Stage 3 is the decision making checklist and in effect the thought processes of the Immigration Officer.

ELIAS CJ:

Just pause for a moment. Your comment that this is not about citizenship, it's only the International Conventions. The question of citizenship and its bearing on identity is however an aspect of the international conventions. Your point is that it's not looking at it through a domestic lens?

MR HARRISON QC:

It's not looking through a domestic lens and the International Conventions do not actually invite an addressing of the citizenship dimension for perfectly good reasons, they are citizenship neutral, because they advise against discrimination.

ELIAS CJ:

We'll accept they speak of the right to citizenship and describe it as an aspect of identity, the child's identity.

MR HARRISON QC:

Well, yes they do but the Crown's approach here is, and I'll come to their submissions later, that there's no need to draw the distinction when considering the interests of the child there's no need to draw a distinction between the citizen and non-citizen child. Now, that's my point, that that may at least in a major sense be true under the international instruments at least some of the UNCROC provisions but my submission is that in an immigration context citizenship is quite critical in the case of independent children. We must be entitled to draw that distinction without impermissible discrimination for example under section 19 of the Bill of Rights because it's a justified limitation to attribute greater weight to citizenship status than to illegal overstayer status in the case of the child himself. So the point is that neither the policy, which I didn't quite get to, nor this humanitarian questionnaire draws a distinction which I argue is highly material. In that I rely on Justice Glazebrook's reasoning of course as well.

So stage 1 we see that it starts there an interview conducted with Ms Ding by Mr Zhou with a police officer present at the police station. Just going through this, 11, "Do you have any health problems or special needs?" "I am not feeling comfortable. I feel a pain in my chest. I have a headache." The earlier humanitarian interview which I may get to take you to involved a suicide attempt halfway through and the interview is in two parts completed on consecutive days. So this is Mr Zhou who was involved in that earlier interview being told how she was. 16, over the page, "Why have you not

returned to your home country?" "I can't survive with three children with me and I can't leave them alone here." 17, "What effect will it have on you if you return to your home country?" "I won't be able to survive back in China." 20, "Do you have any children born in New Zealand?" "I have three New Zealand born children." She also says, 18, "I live with my mother. I don't know how I will support myself." So statement of stage 1, that's finished.

If you go to stage 2, page 286. 22, "Please describe the education and medical services available in your home country." "All available with a high price if you are not a citizen." Then there's other material I needn't take you through. Over the page, 37, asking about the children, their dates of birth. 37, "What is their immigration status in New Zealand?" "New Zealand born." "Do they have any health problems or special needs?" "Candy has some skin problems." Eczema the evidence is. 39, "Who supports them financially and takes care of them?" "I support them." 40, "Will they accompany you back to your home country?" "I don't know." 41, "What effect will it have on them if you are removed from New Zealand both if they accompany you back to your home country and also if they remain in New Zealand?" "If they come with me back to China I don't know how we will survive. If they stay here in New Zealand I don't know what will happen to them." And then there's a reference to two earlier children born in China and still in China. There were five children of the marriage, three born in New Zealand, two in China, the oldest two.

Then there's questions about the parents in China, question 50 on, the father's dead, the mother, question 55, is in poor health, she's not at work, retired, there's questions about siblings, then there's supplementary questions at page 291, "Do you want to take the three children back with you to China?", "I want to take them with me back to China but I don't know, how do I support them, and something them back to school back in China."

Stage 3, so this is the, I'll call him the IO, the Immigration Officer, the IO's own decision making, the form says, "Assessment personal factors, matters for consideration in accordance with New Zealand's obligations under

international law…", and I needn't read the rest, "The family is the natural and fundamental group unit of society in the State, every children shall have the right to such means of protection, et cetera, in all actions concerning children, the best interests of the child shall be a primary consideration." "What significant changes have occurred, if any, since any decision was made, by appeal authority, or section 35A decision?" "No." You could quarrel with that, but I'll leave it be. "Will the interviewee's partner or children accompany him or her back to his or her home country? State reasons." "Client's partner, husband was removed from New Zealand back to China on date, client claimed that her three NZ born children are not going with her." "Are interviewee's partner and children New Zealand citizens or residents? If so, is it reasonable to expect New Zealand citizen or resident, spouse, de facto partner and/or children to live in the interviewee's home country?"

Now these next two questions and answers are a critical part of my argument about failure to ask the right question or unreasonable decision. Please note the question, "Is it reasonable to expect a New Zealand citizen to live in the interviewee's home country?" Answer, and this is his words, his thought process, "Client has three NZ born children, client does not wish to take her three children back to China." So there is no – the question posed is not remotely answered, he doesn't say "Yes it is", or "No it isn't".

Next question, "If the interviewee's partner and/or children will not accompany him or her to his or her home country, what effect will the removal have on those left behind, the children left behind?", "NZIS had arranged CYFS to take and, something, arrangement to take care of the children." So again, that critical question is not answered other than by saying well, they're going into CYFS care, but the effect of the removal is not addressed.

So these are the two critical questions, the best the process does in terms of directing the decision maker to consider the best interest and the consequences for the New Zealand citizen children and he simply does not answer or face up to those questions.

Then he deals with, the final question there is about the wider family who are all back –

ELIAS CJ:

I just wonder, not to diminish the force of what you're saying, but whether the criticism that he's not answering the questions that are posed is entirely fair, because the first question is posed on the basis of what's the effect if they go to live in the home country and his response is they're not going to live in the home country. The second question is, if they're not going back, what effect will they have and the answer is that CYFS is going to make the arrangements, so I'm not saying that there aren't other questions that shouldn't have been looked at in a humanitarian assessment, but I wonder whether it's fair to say that the answers he's recorded or his evaluation isn't a response to the questions.

MR HARRISON QC:

Well I don't think I could say much more than I have but the first of those two questions, is it reasonable to expect the children to live in China, in effect, is not answered by referring to the client's wishes. It's why, because the overall –

BLANCHARD J:

If the client has said, "I don't want to take the children back to China", then isn't he entitled to proceed on the basis which leads to the next question, that they're going to stay in New Zealand?

MR HARRISON QC:

No, because the purpose –

BLANCHARD J:

Particularly as they're New Zealand citizens, and for that reason, he's got no right to insist that they go.

MR HARRISON QC:

I accept that he's got no right to insist that they go, but the purpose, surely the purpose of these two questions, and it's the only two questions that are framed in this way, is to get the decision maker to address the situation looking at the best interests of the children, so you look at the best interest of the children –

BLANCHARD J:

Could he not take the view that the best interests of the children may have been that they stayed in New Zealand and CYFS looked after them? He's really on the horns of a dilemma here. On your analysis, there's almost nothing he can do that'll be right.

MR HARRISON QC:

He's got to make a decision about the removal of the mother, or not, and in order to make that decision, he needs to look at the consequences of the two possible alternatives for the children.

BLANCHARD J:

But he's got no control over those alternatives.

MR HARRISON QC:

He's got no ultimate control, but he has to make the assessment. He's got to –

BLANCHARD J:

How can he make it, except on the basis of what the mother says she wants to happen to the children if she goes?

MR HARRISON QC:

He can make it on a wider basis if he makes the right enquiries, coming back to the issue of the views of the children –

BLANCHARD J:

But no amount of enquiry about China is going to determine the question if the mother is saying the children should stay in New Zealand.

MR HARRISON QC:

Well, actually, of course, that is not right, because at the end of the day, if the children go into CYFS care, that begins a process which looks very seriously at sending the children to China pursuant to a decision of the Court as guardians of the children.

BLANCHARD J:

Well he can't anticipate that.

MR HARRISON QC:

Well he can because, again, I'm a bit frustrated, with respect, because I wanted to take you through all of this in chronological order, I've been taken to –

BLANCHARD J:

Well bear in mind Mr Harrison, we have had a huge amount of written material which we've laboured away trying to read.

MR HARRISON QC:

In the chronology which I haven't taken you to, it's perfectly clear that Mr Zhou is the one who got CYFS involved, I'm not criticising him for that, and that CYFS would then, and this is the usual course in these cases, CYFS would be looking at sending the children after the mother but needed the Court to determine that it was in their best interests, that they not remain here, so that all I'm saying is, that if there is a best interests consideration to be undertaken by the Immigration Officer and that's the whole point of the exercise, there are only two possibilities, the children go or the children stay. Whether they go by a decision of their mother or go by a decision of some other decision maker, those are the alternatives.

BLANCHARD J:

But that other decision maker will presumably look at the humanitarian question before deciding they should go.

MR HARRISON QC:

But not the humanitarian question whether to remove the children's mother and whether her removal is in their best interests. She has gone, that's not the – the only humanitarian question that the Family Court will look at is, is it in their best interests to stay here without any family member, or in their best interests to be sent to China. That's why the form asks the questions it does and that's why –

TIPPING J:

I don't think you should be criticising the man's answers to the form. I think the better criticism is that the form is not apt to draw out the relevant matters.

MR HARRISON QC:

That is part of my criticism, of the form and the policy which –

TIPPING J:

Yes. I can understand entirely why in the light of what he understood the position to be, how he came to answer those two questions in the way he did. The better point is, that it doesn't properly address the issue of the mother's removal from the point of view of the children.

MR HARRISON QC:

Can I just proceed because –

TIPPING J:

There I think you'd have some bit of mileage.

MR HARRISON QC:

Again, we are having these exchanges before I've got to the end of the material.

TIPPING J:

Well, don't please overlook the fact that we have, as my brother said, laboured over all this material. We are trying to focus the argument on what we see as the key point.

MR HARRISON QC:

I have no problem with that Your Honour and I accept that there is a mass of material. I wanted to take Your Honours through it in what I thought was the most orderly fashion and I would now like you just to look at the rest of the stage 3 consideration via the IO. There are the two questions at page 292 and I've made my submissions about those. Then it goes on at page 293 to look at location of family members, health and there, "Client is under emotional distress and had a risk of self harm." That assessment of his is relevant of course to the question whether she was in a position to advocate for the children's interests as the Crown contends. "Other compelling reasons? Specify." "No other compelling reasons identified." Then you've got the form direction to public interests factors, the rights and interests of the government in determining who should reside within its borders, the principle goals of government residence policy, intention of the Immigration Act to ensure a high level of compliance and the intention of the Immigration Act to ensure that persons who do not comply with the immigration procedures and rules are not advantaged in comparison with those who do so comply. So there's this list of four public interest factors which, in my submission, are to a degree tautologous and as Justice Glazebrook accepted in her judgment, really do make it inevitable that there is a heavy weighting to be given to those as against the countervailing factors in the individual case. Then at the bottom it said, "Is there good reason why the interviewee overstayed?" "No good reason given. Client only claimed that she can't survive if she takes her three children back to China, she can't afford to schooling and hospitalisation." Then over the page, three down, "Other public factors?" "No." "Decision. I have carefully weighed the competing factors set out above and in the circumstances of this case I consider, see attached two pages." Now, note at the bottom, the date is the 31st of August, whereas the interview was

conducted, or began, on the 23rd, that is why there is the issue about when the decision was made. Over the page you've got stage 3 decision, humanitarian interview conducted on the 23rd –

BLANCHARD J:

Again, it's dated the 31st.

MR HARRISON QC:

Yes, eventually, yes, at the bottom.

BLANCHARD J:

What do you mean by "eventually"?

MR HARRISON QC:

What I mean is it's headed 23rd and at the end it's dated.

BLANCHARD J:

It's pretty straight forward.

TIPPING J:

It's pretty obvious, the interview was on the 23rd and the decision was made on the 31st.

MR HARRISON QC:

There are many contra-indications in other pieces of evidence.

TIPPING J:

What on earth does it matter?

MR HARRISON QC:

It may not matter. At page –

TIPPING J:

Let's see what he said in his decision. That seems to be much more important than the date.

MR HARRISON QC:

Page 295 about two thirds down.

ANDERSON J:

It rather seems Mr Harrison, that the interview was on the 23rd and the decision was on the 31st because if you look at page 294, "Decision. See attached two pages for decision" which have already been typed up.

MR HARRISON QC:

Yes, I pointed that date out Sir.

ANDERSON J:

Yes, I think that's probably the chronology of it.

MR HARRISON QC:

Page 295, three quarters down, it said, "Ms Ding had been advised during her interview with NZIS that non co-operation 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 New Zealand." That was his view as advised to Ms Ding. I omit the next sentence, "I have considered the interests of the three New Zealand born children. I understand that Ms Ding may face financial difficulties with the schooling and any hospitalisation of the three New Zealand born children. I also considered Ms Ding's no family support. The three New Zealand born children all speak Cantonese. Ms Ding has limited ability to support herself and the three New Zealand born children. I have also considered the recent submission from her legal representative in the form of a psychiatric report..." and I can leave the rest of that to be read. "I have also considered the rights of the New Zealand Government to determine who should remain within its borders including the rights of expulsion if a person is not lawfully in New Zealand..." and this is the crucial sentence. "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 three New Zealand born children to return to China with their mother and join their father and the rest of their family."

We can note that paragraph 26 of the first affidavit which I took you to earlier, is to the same effect. This is at tab 57 of volume 4 of the case, where it said, "I carefully weighed the competing matters and concluded the plaintiff should be returned to China and it would be in the best interests of the three New Zealand born children to return to China with their mother and join the father and the rest of their family."

This is the crucial statement and I'm stealing Mr Bassett's thunder here but I think it's necessary because of the way the argument has developed that I deal with it. In my submission, the question that had to be asked at the end day was this, is proceeding with the removal of the mother to China in the best interests of the children? Is proceeding with removal in the best interests of the New Zealand born citizen children? Now, he doesn't ask that question. He says, Ms Ding should be returned to China and returning her, it's in their best interests that they go with her.

ELIAS CJ:

Well he does refer though to the absence of family support in New Zealand. It is, he does say that he's taking – he believes that this decision that he has reached is in the best interests of the children. Now you can say that there isn't much to substantiate that in his reasons, that it's a bit conclusionary, but he does purport to be considering that the interests of these children would be best served by the family being reunited in China.

MR HARRISON QC:

I mean that was fundamentally wrong because –

ELIAS CJ:

Yes, well it may be and I'm not anticipating that argument but I'm just saying in terms of what he's purported to do, he does say that he is taking into account the interests of the children and that he considers their interests are best served by joining the other family members in China.

MR HARRISON QC:

Because he's sending the mother there.

ELIAS CJ:

Not just because he's sending the mother there but because there's other family support there.

MR HARRISON QC:

Well with respect Your Honour this is absolutely crucial –

ELIAS CJ:

Yes.

MR HARRISON QC:

– in terms of this inner layer of the onion. He concludes that the mother is going to be returned. Having so concluded he asks what is in the best interests of the children in that event. He says, their best interests are to return to China with their mother. Now that is – I agree with Justices Hammond and Wilson to this extent, that question was not for him to determine. The question he had to determine was, I am deciding whether or not to remove this woman. Is her removal in the children's best interests and you only determine that by asking about the two scenarios, the debate we had about the earlier questions. You can only say well there's family here removing the mother has one or two consequences. Either they are deprived of their life here, the children are deprived of their New Zealand identity and de facto of their New Zealand citizenship or they all go to China where the children will face all manner of problems which are in evidence –

ELIAS CJ:

But that's saying that his reasons aren't sufficient. All I'm raising with you here is that on the face of it he seems to be considering the interests of the New Zealand born children in the determination to send the mother to China and he says that he reaches the decision to grant the – or what is reorder, not a removal – yes the removal order, on the basis that in fact the removal of the mother to Chine is in the best interests of the children. Now you may say that that's contrary to the evidence and it's unsubstantiated but that's how he's expressing his reason.

MR HARRISON QC:

He –

ELIAS CJ:

He's not saying I've decided to take this – send the mother back to China and therefore I think it would be in the best interests of the children for them also to go back to China. He is –

MR HARRISON QC:

That is precisely what he says Your Honour. In that final paragraph. Almost word for word what Your Honour has just said is what he says there and this is my point. He doesn't, he doesn't say, is removal in the best interests of the children –

ELIAS CJ:

Well you have to look at that last paragraph in the sentence of all that has preceded and there he is considering the question of removal of the mother and considering whether her removal is in the interests of the – or how it affects the interests of the three New Zealand born children. But overall, and I'm not saying whether this is, you know, a defensible result, I'm just looking at it on its face value. It seems to be one that takes into account the interests of the children in the removal of the mother.

MR HARRISON QC:

Well with respect I just don't accept that and basically to summarise, and we should be breaking now, because the questionnaire doesn't sufficiently direct, Your Honour Justice Tipping's point, doesn't sufficiently direct attention –

TIPPING J:

Well it was not my point, it was a suggestion that I made. That might be a stronger point than the one you were raising.

MR HARRISON QC:

Yes. Your Honour I'm not for a moment attributing a concluded view to you and I've been around long enough not to be thinking along those lines. To summarise again the form doesn't sufficiently direct attention. There's the failure to face up to the two questions about which we had the debate, the two questions at page 292 so that it's not addressed at that time and then there's the last paragraph at page 296 and in my submission it's a classic case of not asking the right question. Referring to the best interests, yes, but only determining best interests on the basis that the best interests, as I'm removing the mum, their best interests are to go with her.

ANDERSON J:

Well it does seem that you're overlooking, in saying that, the last paragraph on the preceding page.

ELIAS CJ:

"The three New Zealand born children will have the support of the family members in China."

MR HARRISON QC:

He considers those issues but he doesn't consider it in the context of looking – he doesn't look at the other side of it which is – he looks at the, wrongly and without any basis, at – in effect he treats this as a family which will all come together, which is simply not the case and he didn't have that information. He does not –

ELIAS CJ:

But that's a different point.

MR HARRISON QC:

He does not look at the difficulties that the family will face which were indicated by Ms Ding in terms of poverty, nowhere to live and so on and so forth.

ELIAS CJ:

But that's a different point. It's whether – that's whether he came to the right decision but just looking at the process that he followed, he has purported to take the interests of the New Zealand born children into account in making the determination as to removal of the mother.

MR HARRISON QC:

In making the decision – he's taken the interests into account in making the decision that it would be best if they went with their mother when he removes her.

ANDERSON J:

Are you really saying well if she is removed a possibility is that the children will join her in China and if that possibility occurs, that would be in their best interests?

MR HARRISON QC:

But that's the, that is the only best interest consideration he applies and it's not the right consideration.

ANDERSON J:

Well I'm not sure whether that's so because there are at least three possibilities. She's not removed, what's the implication of that, obviously it would be good for her and the children. If she is removed and they stay in New Zealand and don't join her. She is removed and they join her in China.

Now those are the possibilities and against those possibilities one has to examine the various criteria for removal.

MR HARRISON QC:

And he never looks at the first of them, in my submission. That's my point.

ANDERSON J:

Well it's a question of whether that's implicit in the way that he has conducted his questionnaire.

MR HARRISON QC:

Yes, well we debated this and it is lunchtime but I just don't accept that it is implicit. It's the critical question and one would have to be satisfied that he did.

ELIAS CJ:

Yes, the point is a fair one Mr Harrison. I'm simply going on the form rather than the substance here and you've indicated also that you're going to come back to the substance. All right we'll take the luncheon adjournment now.

COURT ADJOURNS: 1.10 PM

COURT RESUMES: 2.17 PM

ELIAS CJ:

Yes, Mr Harrison.

MR HARRISON QC:

I wonder if we could go back to the chronology at the start of my submissions, page roman 7, I was dealing with the entry of the 23rd of August 2005. I obviously don't want to go back into the debate we were having when we adjourned, but I do want to emphasise that whatever may be said about the question whether the Immigration Officer addressed the best interests question in the right way, it is a further part of my argument that he

nonetheless failed to address other relevant considerations directly, the citizenship and the right to family life in New Zealand of each of those concerned, in particular, the three children. So I don't need to say more, but I don't want those dimensions lost sight of given the emphasis, the intensity of the debate just before the break.

Now, I'm dealing with an argument about the events which both focuses on the natural justice issue which is highly fact-specific, and the question of whether relevant considerations were adequately addressed, so bearing that in mind, I just want to finish off my dealings with the humanitarian interview by pointing out to Your Honours that Ms Ding, in her affidavit gave evidence about language and communication difficulties during this interview and this is not noted in my chronology and is an addendum to it, if you like, in her affidavit which is at case 3, tab 47, paragraph 11, she says, "I was interviewed by an Immigration Officer, Mr Zhou. Mr Zhou filled in a form during this interview but I could not read what he wrote as it was written in English. I understand Mr Zhou's first language is Mandarin, he also speaks Cantonese, but he has an unusual accent which was sometimes difficult for me to understand. I only speak Cantonese, I do not speak Mandarin or English." That statement is uncontradicted by Mr Zhou, I'm not sure whether he could have contradicted it, but my point is, that there's no evidence that Mr Zhou is a qualified Cantonese interpreter and thus there is this overlay when we come to consider whether the mother expressed herself sufficiently, in particular, did so on behalf of the children. There is this added dimension, she complains she's unwell, she is described by Mr Zhou himself as emotionally upset and in danger of self-harm, she herself says there's a language difficulty and that is the background to this humanitarian interview from a natural justice point of view. There is some discussion in the Court of Appeal decision of *Udompun*, which is at volume 1, tab 31, paragraph 89 of natural justice in the context of language comprehension difficulties, so I just note that.

For the reasons just mentioned that there's a parallel natural justice argument, I just want to go back briefly to the chronology both before and after that 23 August humanitarian interview, and I'll try and be as brief as I can, but I do

want to emphasise a few points. If we go to the entry for 6 June 2004, we see that on that date, the first removal order in respect of Ms Ding is made by Mr Zhou and she completes a humanitarian questionnaire with Mr Zhou involved, but he doesn't proceed to a stage 3 decision. He does ask some questions which are relevant to what occurred later, that's exhibit KK, which is at volume 4, page 928, that's noted in the chronology. Questions 40 to 41, the questioning about the children was, "Will they accompany you?", "No, if I take the children back I can't support them to go to school, nobody will look after them." And at 41, about the effect, "It's better I die, I can't support them." So that information was elicited earlier. It does not seem, as I say, in that entry to 11.6.04, no decision seems to have been made.

Then on the 17th of November 2004, Mr Zhou recommends removal. On the 19th of November, the father and husband is served with a removal order, there's a humanitarian questionnaire which Mr Zhou conducts and –

McGRATH J:
What page are you on now Mr Harrison?

MR HARRISON QC:
This is my chronology at page roman 6, I'm just going through the chronology.

McGRATH J:
Yes, no that's fine, thanks.

MR HARRISON QC:
The entry is for 19 November 2004. Father completes a questionnaire, the stage 3 decision is made to proceed with the removal of the father, Mr Zhou makes that one as well. On the 24th of November, the mother attends and is interviewed by two Immigration Officers, including Mr Zhou. Part way through the interview, she makes a suicide attempt in the toilets, there is a specific incident report on that which is among the material referred to, and the humanitarian questionnaire is completed the following day. The questionnaire is, sorry I've just got to find this, volume 4 of the case, page 956 for exhibit PP

and the questions I refer to are at page 958 and there is further material there, for example, question 18, “I will live my mother, I don't know how I will support myself. My home in China was taken away”, and the stage 2 evaluation, question 22, “My children can’t have education in China because they’re not born in China, medical service is very expensive”, so there is further information there.

On the following day, the mother’s interrupted, interview continues and that is noted at, starting from question 34 on, you can see on page 960, just above question 34, the following part is conducted on 25/11/04, at 1.10 pm, so that was interrupted by the suicide attempt at that point and the questions were completed. A stage 3 decision to proceed with removal was made by Mr Zhou and his decision is expressed in much the same terms as that which related to the father.

Then the father is removed, you’ve then got over the page the 23rd of August, which we’ve been through, so he makes a second removal order. On the 24th of August, Mr Zhou forwards a summary of facts to the Minister, the Minister’s advisor, indicating intention to proceed with removal, so he’s quite clear that removal is proceeding. On the 25th, the following day, he updates Ms Scotland and communicates in various ways, preparatory to removing the mother in particular, at case volume 3, page 665.

ELIAS CJ:

What effect do you say the earlier humanitarian questionnaire assessments, and the decisions made in respect of them, have? Was he entitled to draw on his knowledge of what had been said in those earlier interviews? Because they’re quite contradictory aren’t they?

MR HARRISON QC:

There are some contradictions within them, yes. It’s fairly clear that he eventually got the message that she would not be taking the children with her, but has recorded there are different statements at different times. The reason

I'm going through this is a different one to Your Honour's question, namely that it's a totally –

ELIAS CJ:

No, I'm just wondering what use you say we should make of all of this history?

MR HARRISON QC:

My submission, on the natural justice front, it is totally unsatisfactory and a breach of natural justice for Mr Zhou to be making all these decisions along the way and the making the second removal order and whether then and there or later on the 31st, being entrusted with the crucial decision whether to proceed with removal. He has just had too many dealings with her. In the same spirit as section 54(2) says, you are not to make a removal order if you have been involved in earlier applications. On the particular facts of this case, the point had been reached where there was an apparent bias operating and I do cite some authority in my submission, so that's why I'm referring to it. Your Honour's question, if he were otherwise the appropriate person to have made the final decisions, could he take earlier information into account? Yes, I would have to say yes. I'm not being, I hope, too precious about the process. He would be entitled to take the pool of information into account if he were the right person to be making this decision.

TIPPING J:

Of course in one of those earlier forms, he refers to the fact that the children are New Zealand citizens.

MR HARRISON QC:

Yes, I'm not suggesting that he didn't know they were New Zealand citizens because at the time he's making these decisions the law hadn't changed. He would know, I assume, the basic citizenship law but that's not to say he took the citizenship dimension into account, separate point.

TIPPING J:

Is this apparent bias? I had failed to understand an allegation of apparent bias was being levelled against Mr Zhou. Was that pleaded and discussed in the...

MR HARRISON QC:

Unfortunately Justice Baragwanath, if I made say so, with no disrespect, ran out of steam in his judgment.

ELIAS CJ:

Unlikely.

TIPPING J:

May be he had a good precedent to follow.

MR HARRISON QC:

Yes, or may be you've got a precedent to follow. He didn't deal with it but yes, we did plead it. I better just double check this.

TIPPING J:

It comes as a bit of a bolt from the blue.

BLANCHARD J:

I haven't picked it up from your submissions either. Where is it in your submissions? I mean, this demonstrates the danger of putting in these long submissions dealing with many, many points, that one gets to the point where one can't see the wood for the trees.

MR HARRISON QC:

I'm very conscious of that equally, of course.

TIPPING J:

I don't think it's within the grounds. Although they were broadly framed, it comes as a bolt out of the blue to me that there's an allegation of breach of

natural justice in the form of apparent bias. I thought it was a breach of natural justice because the children hadn't been adequately heard.

MR HARRISON QC:

It is touched upon in paragraph 138 of the submissions.

BLANCHARD J:

In one sentence?

ELIAS CJ:

What do these authorities say? That apparent bias attaches to officials, do they?

MR HARRISON QC:

Yes. Who are making decisions in succession.

TIPPING J:

Well, I find it hard to see that as a sort of separate head of a breach of natural justice, to the extent I digested that at all. I just thought it was all part of the idea that if you don't hear the children properly there might be thought that there's some sort of – well, I don't know that I probably fully understood it.

MR HARRISON QC:

I accept it hasn't featured prominently but nonetheless, when we are looking at the process from a natural justice point of view, it is part of my argument. I am anxious to make progress because I do want to get on to some of the case law. What I was dealing with under the entry for 25 August 2005 my chronology, is an item at page 665 of volume 3 of the case, Mr Zhou writes to the Chinese Consulate General advising that the NZIS had arranged for CYFS to take care of the three New Zealand born children. He notes, "A psychiatrist's examination of Ms Ding, not psychiatrically unwell but acutely distressed, wished herself harm. NZIS believes that Ms Ding's behaviour of refusing to be interviewed by Chinese Consulate officials is a blatant attempt

to try and delay the removal process since NZIS had made all the arrangement for the removal of Ms Ding on the travel document."

The point is directed to both the timing of his decision to proceed with removal and also again, the extent to which he had made up his mind. If he is writing in these terms on the 29th of August, what sort of a reconsideration did he give on the 31st?

TIPPING J:

I think he knew exactly what he was going to do, he didn't actually get around to putting it on paper until the 31st.

MR HARRISON QC:

Well, then –

TIPPING J:

What's wrong with that?

MR HARRISON QC:

If he reached his decision on the 23rd –

TIPPING J:

Well, he might have reached it on the 24th for all I know. I honestly wonder what on earth this is all about?

MR HARRISON QC:

If Your Honour pleases, it is appropriate if this man has – we're asking if this man has followed the policy as it stands which is that he made a genuine assessment of whether to proceed with removal under a removal order he had already made. Did he make a genuine assessment? Did he take the relevant considerations into account? If we can't even say when he made a decision to proceed with removal, that's another aspect that must be cause for concern.

BLANCHARD J:

I, like Justice Tipping, struggle with this point. I can't see that it makes much difference. It's some time during that week.

MR HARRISON QC:

Yes. Some time during that week but he can't even tell us when.

BLANCHARD J:

Does it matter?

MR HARRISON QC:

All right. If Your Honours don't think it matters –

BLANCHARD J:

I just don't understand the argument. If you want to clarify it, please do but, like Justice Tipping, I think this is just a distraction.

MR HARRISON QC:

If he made the decision on the 23rd, it's curious that he waited until the day before her scheduled removal to record his reasons in writing, that smacks of formalism –

BLANCHARD J:

It might be administratively sloppy but that's it.

MR HARRISON QC:

All right. I won't pursue the matter further Your Honours –

BLANCHARD J:

If you can tell me how it makes a difference in law, whether it was made on the 23rd or the 31st, I'd be interested but this seems to me to be just an administratively sloppiness.

MR HARRISON QC:

On the hypothesis that he made it on the 31st, he'd already demonstrated gross prejudgement because he is saying between the 23rd and the 31st that she's going.

BLANCHARD J:

So when I have a judgment reserved and I'm mulling it over but I decide at some point that the appeal is going to be dismissed or allowed or whatever, there's prejudgement if I don't actually get around to recording my reasons in writing until sometime later?

MR HARRISON QC:

No, I don't suggest that, but equally, if we are trying to ascertain when you made the decision, it would have been when you made it, not when you recorded it.

BLANCHARD J:

But does that mean that because I've been saying, may be to my colleagues, in the days before I actually make it that I am going to make it in a particular way, I'm guilty of prejudgement?

MR HARRISON QC:

No, I'm not suggesting that either.

BLANCHARD J:

Well it's the same with this man.

TIPPING J:

I think your client must have better points than this because frankly, if they don't, you shouldn't be here.

MR HARRISON QC:

I hope Your Honour is conscious of the other arguments we're running. I won't pursue it further, but I just want to –

TIPPING J:

We're here – we gave leave because we thought there was some high level issues of law to be clarified. We seem to be descending most of the time into minutia.

MR HARRISON QC:

Well I take Your Honour's comment. There is, however, a natural justice issue here.

TIPPING J:

Yes, I agree.

BLANCHARD J:

But that's not it.

MR HARRISON QC:

Very good, very good. Now I want to go back to the policy which we didn't deal with completely, we went on to look at the humanitarian questionnaire and decision. The policy provisions are in volume 3 of the case and I didn't quite finish dealing with D4.45 at page 618, (a), as I mentioned before lunch, talks of taking the international obligations into account and refers to the four sources, D4.45.1 deals with refugee status claimants and then D4.45.5 refers to the necessity to consider other rights, a heading which is unhelpful because if we leave aside the paragraph that deals with refugee status claimants, (a) has talked not about rights, but convention obligations, and so it's a little unclear what other rights are being referred to, (a) of 45.5 says when determining whether or not to execute a removal order, it necessary for the Immigration Officer to take into account the particulars of the case, the impact the removal might have on the rights of the person being removed, any immediate family associated, particularly those who are New Zealand citizens or residents.

So you take into account the interests and then you balance the factors against roman 1 to 4, and my submission is that creates a – doesn't sufficiently stress the citizenship/international obligation side of the ledger and creates by the four overlapping public interest factors, which are, as I argue, tautologous, the balance is not achieved given the importance of the rights at issue. So that's the policy, the policy is not referred to in the immigration questionnaire and it seems as though in practice, the immigration questionnaire is applied in its own terms rather than the policy –

BLANCHARD J:

Does that mean the policy is irrelevant?

MR HARRISON QC:

Well it ought to be relevant, it's the policy, it just doesn't –

BLANCHARD J:

Well I agree, it ought to be, but you've actually just said what I was thinking, that in fact, they didn't take much notice of their manual and it's better to look at the questionnaire and see what actually went on.

MR HARRISON QC:

Yes.

BLANCHARD J:

So the manual's irrelevant.

MR HARRISON QC:

It appears to be treated in practice as such.

TIPPING J:

Isn't the questionnaire built around the policy in a broad sense? You may not say adequately but clearly the questionnaire and the policy are interrelated. There may be room for criticism of weight, I accept that, but that doesn't mean that the policy is unlawful.

MR HARRISON QC:

No, it doesn't. The policy –

TIPPING J:

It might mean that the ultimate decision was unreasonable, which may be your best point, rather than trying to find great areas of unlawfulness in all of this.

MR HARRISON QC:

I'm content to get a result favourable to the appellants if that is forthcoming and a test which properly focuses on their interests. If there is a policy, I argue that it is inadequate. There is a questionnaire, I argue that its content is inadequate. I may not need to argue for both and the pragmatic answer is, it was the questionnaire that was used.

TIPPING J:

But the more inadequate your questionnaire and your policy, the more vulnerable your ultimate decision may be to unreasonableness allegations. That seems to me, with respect, to be the kernel of your client's case. Trying to pin it all on unlawfulness, I think is stretching it.

MR HARRISON QC:

Well it comes back to the question what the statutory test is.

TIPPING J:

Yes, but all these considerations are in here in one form or another, these so called mandatory considerations, they're there. The question is, were they properly applied in the *Wednesbury* type sense or whatever test you're going to posit for review for unreasonableness.

MR HARRISON QC:

That is part of my argument, I certainly argue that, but I am arguing that both the policy and the questionnaire direct the decision maker insufficiently to the range of mandatory considerations.

TIPPING J:

I know you're arguing that.

MR HARRISON QC:

All right, then we understand one another, I do argue that and that's why I'm referring to the policy as I have to the questionnaire. I just wanted to, for completeness, note what's called the Best Practice Manual, which is at – starts at volume 3 of the case at page 675 and –

BLANCHARD J:

Is this another manual?

MR HARRISON QC:

Well this is a Best Practice Manual, yes so there's a whole lot of stuff.

ELIAS CJ:

What's the other one, the worst?

MR HARRISON QC:

Perhaps my argument is that any reasonable Immigration Officer would be totally confused by all of this and is therefore deemed to have erred, but there is a Best Practice Manual and if I just note for the record, pages that are particularly relevant, I won't take you to all of them, are page 676, 684, 686, 711 to 719. I just want to go to two of those pages, 713 –

BLANCHARD J:

What I would like to know is who is the bloke on page 693?

MR HARRISON QC:

Well there's quite a few of these little figures.

ANDERSON J:

Emmanuel.

MR HARRISON QC:

Someone's been having fun. Mantovani did Your Honour say?

ANDERSON J:

Emmanuel.

MR HARRISON QC:

Oh, it looks more like Mantovani. He also appears on page 713 which I am taking you to.

ANDERSON J:

It's the refugee from the New Yorker magazine.

MR HARRISON QC:

This is significant because the second paragraph says, supporting what I submitted earlier about the effect of the 1999 Act, where once removing people was the final and a long process, step in a long process presumably, under the new regime there is likelihood that this final step of removing people will be the process. In practical terms the removal process has now become a one step process and as such increases the likelihood that a person's first contact with the NZIS could be when you arrive to physically remove that person from New Zealand. This being the case, you must be prepared to carefully consider, the officers must be aware. So, this is an admission that as from 1999, this section 54, 58 step has become critical and that supports my contextual submissions about it. Page 719, other factors to consider in addition to international obligations, "You are required to balance our international obligations against the rights and interests of the New Zealand

government in determining who should reside within its borders, need to be fair to other potential migrants –

BLANCHARD J:

Do you make anything of the point that the scales are uneven?

TIPPING J:

Apparent bias.

MR HARRISON QC:

That would be so, yes. That's because it goes on to say, you should give substantial weight to the government's responsibility to regulate entry to New Zealand and choose persons, et cetera.

ANDERSON J:

Where does it take us in terms of your case? I mean, it's a statement of the existence of something but so what?

MR HARRISON QC:

It is just part of the theme of my submissions which is that neither the policy nor the humanitarian questionnaire state the balancing exercise correctly.

ANDERSON J:

The again, so what? I mean, it's what actually happened that is relevant, surely not what was in existence and might or might not have been followed.

MR HARRISON QC:

I don't, with respect, accept that. If the policy which the decision maker is to follow, be it in the capital P policy or the humanitarian interview form, misdirect the enquiry and if the decision maker says he followed the policy, then if I can challenge the weighting in the policy –

ANDERSON J:

I see the connection at that point, yes.

BLANCHARD J:

Just as a matter of interest, did he refer to the policy in his affidavit?

MR HARRISON QC:

I don't thing so, he refers only to the humanitarian questionnaire.

BLANCHARD J:

Right.

MR HARRISON QC:

We can take a shortcut straight to the humanitarian questionnaire but then what's the point of having a policy I suppose is the question. So, I think that's all I want to say about the policy. I'm just looking to see – I think I've covered a lot of other things that I wanted to say. Yes, I just wanted to address the Crown's position at this stage. The Crown, in its submissions as I read them, seems unable to decide, with respect, which of the judicial approaches below to adopt and defend in this Court. It seems that it likes the sound of what Justices Hammond and Wilson said which is that we think the Immigration Service has got it about right and so, to some extent, they just go along with that conclusion but at the same time, the Crown argument seeks to pick and mix by arguing at points for the *Huang* test and for using section 47(3) as governing. The final Crown position ends up being considerably more stringent than even the *Huang* position. Just to take you to, for example paragraphs 161 and following, they conclude that properly carried out section 47(3) assessment –

ELIAS CJ:

I'm sorry.

MR HARRISON QC:

The Crown, at paragraph 161 of its submissions, argues that a properly carried out section 47(3) assessment, reasonably approximate to removal will satisfy the ICCPR, CRC obligations and no humanitarian interview is required

at all in that situation. They argued that, paragraph 165, assertions of fact as to country conditions much be corroborated before they need to be evaluated. They argue that, 168, the question to be asked is, is there anything about the current circumstance of New Zealand born, not necessarily citizen children, that suggest the parents should be allowed to stay, the best interests of the children are, what the parents advance and the best, at 171, the best interests are to be considered at the date their parents became unlawful. So, you don't even get an up to date assessment of best interests. My point simply is this, that the Crown, in its ultimate position, is going further than any of the decisions below.

TIPPING J:
Well, we shall see.

MR HARRISON QC:
Yes.

BLANCHARD J:
You will be comforted to know Mr Harrison, that I did have a question mark alongside paragraph 171.

MR HARRISON QC:
I'm greatly comforted Your Honour. Now, I want to move on. I don't propose to take you through the early part of my submissions. I've received the message that I don't need to go through my critique of the decisions below. I will take Your Honours to page 13, where I deal with the question of formulating mandatory relevant considerations. I have an appendix 3 to my submissions which deals with the general principles in this area. In paragraph 43, I refer to the leading Canadian case of *Baker* and just to emphasise what the majority say in the passage that I have set out because it is a theme of my first and paramount standard argument, that New Zealand values are an important driver for the content of the mandatory relevant consideration. In the second line, "The boundaries are set out by the words of the statute and the values of administrative law..." and then Her Honour goes

on, “In my opinion, a reasonable exercise of the power conferred by this section requires close attention to the interests and needs of children. Children’s rights and attention to their interests are central humanitarian and compassionate values in Canadian society.” So that the values, both the values of administrative law and the values of Canadian society, are part of what is assessed in determining the mandatory relevant considerations.

TIPPING J:

Is anyone suggesting that there should be no consideration given to the interests of the children? It’s the question of the prominence, or the level, isn’t it?

MR HARRISON QC:

And I’m mentioning this because of my argument that the first and paramount standard is appropriate here because that is the legal and societal value that we turn to under New Zealand law.

ANDERSON J:

Does it trump other considerations? It does in the Care of Children Act because that Act is directly concerned with the welfare of children so it’s not surprising that it makes that the first and paramount consideration but wherein other Acts have many other policy aspirations, should they be trumped by the welfare of the children, sentencing acts for example?

MR HARRISON QC:

I’m sort of hesitating because I always think that using the word trump is a kind of question begging shorthand.

ANDERSON J:

It is to some extent, I’m just trying to see what the evaluative differences are between first and paramount on the one hand and one of the primary, or a primary, on the other.

MR HARRISON QC:

Yes, well starting at the second end of that, if we take the *Puli'uvea* approach, the language of the convention is emphasised by saying that it is a primary, not the primary, therefore you can have other considerations alongside it, and there's no particular weighting it to the best interests of the child on that kind of minimalist approach.

ANDERSON J:

Except in relation to secondary issues, I mean, there might be a number of primary aspirations, shall we say, a primary consideration, but then there might be secondary ones as well, and this is amongst the primary ones.

MR HARRISON QC:

But if that is the proper approach to the Article 3 UNCROC standard, and I don't accept that it is, I have a subsidiary argument around that.

ANDERSON J:

Yes I understand.

MR HARRISON QC:

Then that is very weak, in fact, it's so weak that the *Huang* Court was willing to say that you could expressly formulate a test where other considerations were entitled to greater weight than the interests of the children and if that is so, if that is the true interpretation and application of the "a primary" consideration test, then it is so foreign to New Zealand's legal and social values that it ought not to be adopted, rather the first and paramount test should be used because it's recorded in statute, the underlying common law and significant public policy statements.

TIPPING J:

It's extraordinarily difficult to capture weight in language. I just wonder whether we shouldn't simply say that it's an important fact, in other words, not try and give it an artificial weighting by the language we use. Artificial in the

sense that you're never, unless it's absolute, it's always capable of being overtaken by other considerations.

ELIAS CJ:

Well it depends on the context, doesn't it, as Justice L'Heureux-Dubé says, all of this is contextual and in some contexts, it may amount to a trump, in other contexts, it may, sort of, recede.

TIPPING J:

It's got to be considered and it's always important, but the level of weight that it has must very much depend in the end on the countervailing. I think we're striving for an artificial precision here.

MR HARRISON QC:

I accept that in a sense, but just to come back to what I was saying in response to His Honour Justice Anderson, it's not sufficiently captured by the *Puli'uvea* approach, a primary, not the primary, consideration.

BLANCHARD J:

Well that's what the International Covenant says, UNCROC.

MR HARRISON QC:

Yes, that is the – but the wording, the language of one of the articles of UNCROC is "a primary consideration." What I'm submitting, and it comes back to the contextual point, is that that is an insufficiently strong test to deal with children in the circumstances of these children, New Zealand citizen children who have never experienced any other society than New Zealand society. It is insufficient –

BLANCHARD J:

So to apply UNCROC is not good enough?

MR HARRISON QC:

Yes.

TIPPING J:

You say that it's not a sufficient test for this case, suggests you're going to have different tests in different cases, which frankly is the very point that was troubling me, how can you? The weight, the importance of the factor in the particular case is, as the Chief Justice says, highly contextual, but it's always important.

MR HARRISON QC:

I accept that. The test that Your Honours need to be concerned about is the test that applies to New Zealand citizen children who face removal to a country where they will undoubtedly face a far worse existence than they do here.

TIPPING J:

That's the evaluation. The test, surely, can't be driven off the facts of the individual case.

MR HARRISON QC:

Well I suppose – it can if it's formulated with sufficient care and allows for different weightings to different types of interest and circumstances. I'm still plugging for first and paramount standard because it is the New Zealand domestic standard. We have said –

TIPPING J:

But it's not the correct contextual standard for the interests that are in competition here, is the point you have to meet.

MR HARRISON QC:

Well why is the – why is it only the international standard derived from one provision only of one, of two relevant conventions? Why is the international standard thus derived the correct one?

TIPPING J:

Because it creates a – if it virtually means that in all cases where there are New Zealand children, the parents can't be removed, and that's what you really are batting for. It's the wrong approach.

MR HARRISON QC:

That's a policy assessment and Your Honour will ultimately be at liberty to make it, but if we go back to the starting point of today's debate, we are looking at a statutory discretion and asking, what are the mandatory relevant considerations applicable to these children, to a consideration of these children and their mother and the family? It does not follow inexorably that we only bring to bear the question of international obligations and indeed only one article out of all of those obligations, we have to have a wider focus, first of all on looking at all of the international obligations and entitlements, the right to a respect for family life, and we also should canvass what the domestic law standards are, because these are New Zealand citizen children and they ought to have their – they must have an entitlement for that reason, I argue, to consideration in terms of domestic law standards, the pervasive standard under statute common law and New Zealand public policy being the first and paramount standard. I probably can't put the argument better than that.

BLANCHARD J:

What's your best case on this, the best case effectively for saying *Puli'uvea* is now outdated?

MR HARRISON QC:

There isn't one. You can't – neither *Tavita* nor *Puli'uvea* –

BLANCHARD J:

No, I was thinking internationally. Obviously there's not one in New Zealand.

MR HARRISON QC:

Well, there's no enforcement body under UNCROC, so I can't point you to a judicial type rule on the UNCROC provisions.

McGRATH J:

None of the writing would support you either, is there, I mean, I think Alston for example and others, no one seems to go as far as you're going in relation to invoking the paramount standard?

MR HARRISON QC:

That's right because I'm not trying to rewrite Article 3 of UNCROC. I'm inviting a consideration of the domestic standard which we repeatedly say and this is in the Parliamentary materials, when we enact the Care of Children Act and the Commissioner for Children Bill, the responsible ministers say, we are doing this in order to better achieve compliance with UNCROC. I mean, this is in the Parliamentary materials. We are saying this, we are doing this and we've chosen to set our compliance standard higher at the first and paramount standard.

McGRATH J:

Plenty of other jurisdictions apply that standard in relation to their domestic law concerned with child welfare. No one has yet been prepared to reason that it should be applied to the position of children in relation to immigration. I mean, I think that you really have to acknowledge you are on your own here, aren't you, blazing a trail Mr Harrison?

MR HARRISON QC:

Yes and the –

McGRATH J:

Harrison's Comet.

MR HARRISON QC:

That's right. Did that go down in flames?

ANDERSON J:

No but I wondered when it would come around.

MR HARRISON QC:

I acknowledge that. If we look at the House of Lords cases which I hope to get onto, many of these cases do not seem to involve British citizen children, whether that's because of the way British citizenship law operates, they may have some kind of residence status but there's no mention of the citizenship dimension. All I can do and I'm not – I'm going to leave it here, to point out that we have in New Zealand and in relation to these facts, the combination of New Zealand citizen children who have been here for a significant period of time, who have never been anywhere else and we have our domestic law standards and those I submit, taken together, are sufficient to warrant stepping out in this direction. If not, then the fallback is again by way of mandatory relevant consideration, the two pronged approach of Justice Glazebrook saying on the one hand, to comply with the international obligations, those are a mandatory relevant consideration including the primary standard –

TIPPING J:

I have great difficulty with this mandatory consideration. The question is surely, whether the officer has correctly directed himself in law as to the approach. He's addressed the position of the children. The sole issue is whether he's put it high enough in the way he addressed it. I just think that's a much more logical and persuasive way of arguing than talking about mandatory relevant consideration.

BLANCHARD J:

I suppose Mr Harrison would say he hasn't addressed the citizenship aspect for the children.

TIPPING J:

If he's right, that he hasn't addressed that at all, then that's a failure to take into account a relevant consideration but, with great respect, I can't see that floating. He may not have put enough weight on it but then it comes to the question of reasonableness, or he's misdirected himself in law because he hasn't applied the right test for this consideration.

MR HARRISON QC:

We're at odds over what the test is.

TIPPING J:

I know, that's the whole point. I'm not by any means, persuaded at the moment that he has applied the wrong test but you're seeking to say he has because he hasn't put it high enough.

MR HARRISON QC:

One approach to section 54 is to say that it doesn't import any humanitarian questions at all and that was the approach of some of the Judges in the Court of Appeal.

TIPPING J:

I think we're past that.

MR HARRISON QC:

Yes, we're past that. So, if we go past that, then how else do we describe what needs to be considered, than by calling them mandatory relevant considerations?

TIPPING J:

The interests of the children are the consideration. How much weight they should have is potentially a question going to both reasonableness and going to whether he's erred in law in not applying enough weight, I would have thought.

MR HARRISON QC:

But surely Sir, the first step is to identify the considerations –

ELIAS CJ:

Nobody is, as I understand it, arguing against the interests of the children being a relevant consideration. Certainly, I accept that they are a relevant consideration, it's where do you go from here? It does seem to me that if one adopts a contextual approach, then you have to get quite facts specific and you make the submission and I think it's a fair one, that *Zaoui (No 2)* is relevant, the approach that is taken there. If there were any question here that these children would be subject to torture or cruel and unusual treatment, or something of that sort, then of course their interests get elevated in the way that *Zaoui (No 2)* provides for. The question though is where the balance gets struck along that spectrum and what I'm feeling for, is how the official is to grapple with that? It seems to me that there probably is something he has to engage with there and that you may well make the submission that if one looks at his decision it seems to be a tick the box thing, I have considered this, I have considered that, on balance I come down here but then, if you say that that's not good enough, you have to demonstrate to us what are the factors which make the risk to these children out of the ordinary, if one is applying the section 47 test? I don't mean out of the ordinary in terms of risk to children but what is the humanitarian concern for these children and why is therefore the balance that he has reached an unreasonable one, or an unsubstantiated one?

MR HARRISON QC:

I accept that is part of what I have got to address. I suppose what I'm groping with is, we first need to determine the intensity of the consideration of the best interests. Whether it is simply unvarnished a primary and you can have lots of others –

ELIAS CJ:

It may become, in context, it may become the most important consideration, one that no reasonable immigration official could find anything to balance against. That's the sort of enquiry that's required surely?

MR HARRISON QC:

I will take Your Honours shortly to the evidence about what they will face if returned but in short –

ELIAS CJ:

It will have to be something that goes further, won't it, than these children will not be as well off in another country than they would be in New Zealand because otherwise, one would never be able to deport parents of New Zealand children or of children entitled to be here if they would face any disadvantage, so a humanitarian concern must be more than that.

MR HARRISON QC:

Yes, well the evidence on that is all one way. Ms Ding says that they will face poverty, that she won't be able to look after them, that they will face – they will have nowhere to live other than in her mother's flat, that they will not be able to access education or medical and hospital care, and the latest affidavit of Mr Delamere suggests that they will effectively be stripped of their New Zealand citizenship by the Chinese government who won't recognise their New Zealand citizenship because their parents were overstayers in New Zealand when they were born.

BLANCHARD J:

How can the Chinese government strip them of their New Zealand citizenship?

MR HARRISON QC:

Practically speaking, at the Chinese end, obviously not at the New Zealand end. In other words, they will end up not having their New Zealand citizenship recognised, being forced to regularise their position in China and having an

inferior status of black children born well and truly in excess of the one child policy.

TIPPING J:

You mean they're going to have greater difficulty getting out of China to come back to New Zealand if and when they're wanting and able to do so, is that what you're saying?

MR HARRISON QC:

That's part of it. These are children who now plainly identify as New Zealanders, they've only ever enjoyed New Zealand society, they are being educated in English, they have ties here with friends and school and what is being proposed is that they are sent to China to be educated in a language, Mandarin, which they don't even speak, and –

BLANCHARD J:

Is all Chinese education in Mandarin, even for the Cantonese?

MR HARRISON QC:

I understand that Mandarin is the official language for education in the part of China they'd go back to, but I don't want to give evidence –

BLANCHARD J:

Where is that?

MR HARRISON QC:

Where is that, I'll see if I can tell you.

BLANCHARD J:

Because I had understood there was a significant sized portion of China where the predominant people were Cantonese.

MR HARRISON QC:

Well I understand that Mandarin is used for education purposes, that's the evidence.

ELIAS CJ:

But Mr Harrison, a contextual analysis is also not a one-way street and to the extent that you seem to be arguing that all children born in excess of the one child policy will be disadvantaged to the extent that their parents shouldn't be able to be deported from New Zealand, you elevate the other relevant considerations under this legislation which are to do with the immigration policies more generally. There's nothing more specific to the circumstances of these particular children that you can point to?

MR HARRISON QC:

Well the specifics are circumstance of being children born in breach of the one child policy.

ELIAS CJ:

There must be a lot of children in New Zealand who fall within that category.

MR HARRISON QC:

Well then may be they're all entitled to the same degree of consideration.

ELIAS CJ:

Yes well that might be right but what I'm putting to you is that a contextual application of the Immigration Act does bring in other considerations and the stronger the claim to all children similarly situated to these children to be able to effectively prevent their overstayer parents being deported, the greater emphasis that may be given to the other policies of the – in other words, the more specific one is able to be is quite important I would have thought.

MR HARRISON QC:

It depends where you intend to put the cut off point. The fact that there may be others, and I don't know that there are others in the same position as the

Ye children, who would go to China in breach of the one child policy, cannot be decisive if the effects for them are significant enough. In other words, if there's two or 20 or 200, that ought not, from a policy point of view, to weigh on the other side of the scale, in my submission, so that would be my response.

The thing is, that none of these issues were considered by the Immigration Officer, he did not address this issue of the specific consequences for the children as black children, as they're called, because it is generally accepted that it's not only the parents who produce the excessive children, but the children themselves who are singled out for adverse treatment, fines are imposed so that access to services becomes more difficult and if the parents are impecunious then the fine becomes in effect a discrimination and penalty imposed on the children.

The High Court of Australia in a case which is in the casebook and which I have mentioned, concluded that these children were sufficiently discriminated against in China to be entitled to refugee status if they were not Australian citizens, obviously if you're a citizen you don't get to be a refugee, but a non-Australian citizen child, black child, facing removal actually could make out a refugee status claim and as I say in my submissions, it would be very odd if we treated a New Zealand –

ELIAS CJ:

But that application could still be made for these children.

MR HARRISON QC:

No.

BLANCHARD J:

When was that case?

MR HARRISON QC:

The case is in the year 2000, it's *Chen Shi Hai*, volume 7, tab 163.

BLANCHARD J:

Sorry, could you give me the reference again please?

MR HARRISON QC:

Chen, C-H-E-N, new word, S-H-I, new word, H-A-I, volume 7, tab 163. It's referred to in a footnote on page 27 of my submissions. That footnote deals with the Hei Haizi, or black children.

ELIAS CJ:

Why did he say that no application could be made for these children, for refugee status, if it is true that they will be so discriminated against?

MR HARRISON QC:

Because they are New Zealand citizens, they can't apply for refugee status.

ELIAS CJ:

I'm sorry, yes.

MR HARRISON QC:

So, that's my point.

ELIAS CJ:

Yes.

MR HARRISON QC:

If we treat non New Zealanders – if we recognise the possibility that the non New Zealand citizen could be refugee because of the implications of a return to –

ELIAS CJ:

But certainly, that would have to be a factor in the Family Court's determination of where they are to reside. They are under the guardianship of the Family Court.

MR HARRISON QC:

Yes but at the moment we're looking at whether their best interests, assessed in the context of the potential removal of their mother –

ELIAS CJ:

No, I appreciate that but when you go on to talk about the serious consequences for the children, if those serious consequences exist, they will have to be taken into account in respect of any orders made for relocation of the children.

MR HARRISON QC:

Yes Your Honour but it doesn't follow from that, that the consequences are not to be taken into account at the earliest stage –

ELIAS CJ:

No, no, I understand that, yes. Sorry, what tab is it?

MR HARRISON QC:

It's tab 163 and in my footnote 40, I give the key references.

ELIAS CJ:

So what did they decide?

MR HARRISON QC:

They decided that children, as per the head note, "Children born in contravention of China's one child policy could constitute a particular social group so that there could be a claim based on a well fathered fear of being persecuted for reasons of membership of a particular social group", so that the case was sent back for a final determination but the discussion does deal with the category of black children.

TIPPING J:

All this decided, as I've just been trying to read, is that these children, or child, was a member of a qualifying group. That's as far as the High Court went, wasn't it?

ELIAS CJ:

That's perhaps as far as you –

TIPPING J:

Did not find it was persecution but that would be a question that someone else would have to decide.

MR HARRISON QC:

Yes, that is the case but there were also – there had been findings in the tribunal, for example at page 303, paragraph 31, it said, "As noted earlier, the tribunal found that if returned to China, the appellant is likely to face discrimination amounting to persecution. In reaching that decision, it proceeded on the basis that in China black children are treated differently from other children. Moreover, it found it was likely that the appellant would be denied access to food, education and health care beyond the basic level. As already noted, it also found that having regard to his parents' financial situation, when the benefits of subsidised education are withdrawn the appellant will be unable to have an education. Given those findings, it was clearly open to the tribunal to find as it did, that the treatment the appellant was likely to receive if returned to China amounted to persecution." Significantly for present purposes, that finding has not been challenged. The issue was and it has been an issue that's been around for a while, whether the black children or those, indeed the parents, subject to the one child policy, constituted a particular social group. The High Court of Australia held that they did but that was against the background of the tribunal findings which I've referred too and that's one of the reasons why I rely on the case.

ELIAS CJ:

What's the position taken in the UK? I see that Justice Kirby cites a decision in *ex parte Shah*. It doesn't sound as if it is about China's one child policy from the name of the litigant but it seems to be dealing with children born...

MR HARRISON QC:

The issue I think – it's a while since I looked at these cases, I'm sorry Your Honours. The two English cases that are referred to in footnote 50 on that issue, just give me a moment. Yes basically, I'm subject to correction but when our Refugee Status Appeal Authority was dealing with the parents' claim in this case, its approach to the social group issue was to find that parents punished for breach of the one child policy were not a particular social group, thus the refugee claims were being refused on that basis. The law moved on both with the High Court of Australia decision and an English Court of Appeal decision which is at volume 4, tab 109 and this case, *Lan Liu,* holds that a parent can, by reason of being in breach of the one child policy, be a member of a particular social group capable of being prosecuted. So in this case, the mother had been sterilised forcibly – sorry, had been aborted by caesarian section, refused to undergo sterilisation, escaped China and arrived in the UK. Her refugee status claim was allowed by adjudicator, overturned on the legal issue by the Immigration Appeal Tribunal and then the Court of Appeal allowed the appeal and reinstated her refugee status. So, what we have in terms of refugee law according to the English cases, a recognition that, at least for a parent in this instance not a child, that refugee status can be founded on the consequences of the one child policy.

ELIAS CJ:

That's contrary to the decisions of the removal authority in New Zealand?

MR HARRISON QC:

Of the Refugee Status Appeal Authority –

ELIAS CJ:

Of the Refugee Status Appeal Authority, yes.

MR HARRISON QC:

Certainly contrary to the way they were deciding these issues at the time Ms Ding's and her husbands refugee status claim was decided. My learned friend will say her claim was decided on credibility grounds but –

TIPPING J:

But this is obviously an important point. It couldn't go as far as decisive, could it, because otherwise everybody would come to New Zealand, overstay, have two children?

MR HARRISON QC:

Well Your Honour –

ELIAS CJ:

Justice Kirby deals with that.

TIPPING J:

Does he? Well I just put that as a point that surely must be one of some concern. You can't, as it were, set up an incentive for people to overstay and then create their own grounds for staying?

MR HARRISON QC:

Well at the end of the day my submission that it – if there's a problem then it's not at the tail end of the process where children are potentially to be victimised that we tackle it. We stop people coming in. one of the ways we have dealt with it, of course, is to –

TIPPING J:

We stop people coming in just to make sure they don't breach our laws downstream.

MR HARRISON QC:

Well the change in the citizenship law was one of the ways in which this area was tightened up.

TIPPING J:

Yes, but this wouldn't address this point.

MR HARRISON QC:

Well at the end of the day we have a system for dealing with refugee claimants. It is, it is something of a game or a challenge, a contest, for people to get here who wish to claim refugee status. It's hugely difficult for people to come to New Zealand just to make a refugee status claim but if they do get here then it is quite plain that they can make a claim and that's what the Refugee Convention contemplates.

TIPPING J:

Oh yes, I'm not talking about refugees, I'm talking about people who come in, get a visitors permit and then decide to overstay, have a couple of children and then they can't be sent back because of this black child problem.

MR HARRISON QC:

Well the answer is that if, if they come and make a claim for refugee status then that will be dealt with on its merits along the lines of the cases we've been discussing. If they come and manage to hang around long enough to have a child, then that's a different kettle of fish and it will be dealt with on its merits but again the interests of the child should prevail. The mere fact that the parents have been calculating ought not to be decisive and we ought not to, we ought not to construct our consideration of the interests of the child around the possibility that people might come here with some ulterior motive. I my submission we, that is the wrong –

TIPPING J:

I understand that you're not arguing that simply ipso facto the black child factor will mandate against removal of the parents. There must be capacity, if you like, for – or are you arguing that?

MR HARRISON QC:

No I was asked by the Chief Justice to indicate what special and weighty factors were –

TIPPING J:

But they're not special to this, for this family are they? There's a capacity for this to be very much an across the board problem?

MR HARRISON QC:

Well no I don't accept that. I mean at the end of the day, I mean, I trust that the Court wouldn't lay down a test that said that the children's circumstances have to be unique. Now if – as soon as we say they don't have to be unique, then what they need to be is significant and the stakes need to be sufficiently high in the country to which they are to be sent to outweigh other considerations. The New Zealand citizenship is part of what's at issue. The consequences for these particular children if removed are part of the issue but Your Honours don't have information to suggest that the floodgates will open for Chinese children born in breach of the one child policy, which it would appear to be, you know having extra territorial effect strangely. The test ought not to be formulated on the basis that it needs to deter others overseas from coming here.

TIPPING J:

One of the considerations, and I don't understand you to challenge this, is you shouldn't allow people to queue jump as against those who obey the rules?

MR HARRISON QC:

I do challenge that and there's a useful discussion about queue jumping in one of the English cases, I think it may be Lord Bingham and he deals with

the issue so much better than I but I'll defer that to when I get to his judgment. But to come back to the earlier point, I do not say that the black children issue is absolutely and in all circumstances going to prevail because there are issues around, for example, the parent who may be thoroughly undesirable may be a total burden on the State in terms of health costs or something like that. I don't accept that Mr Zhou's conjecture that she may have to go on a benefit is in that category but there may be serious countervailing character overseas criminal offending issues that would weigh against it. But where you've got a perfectly innocuous law abiding mother who, in all her time here, has not been found to have breached New Zealand law, who is supporting her children and schooling them so that they are doing well at school, there's nothing of that sort to outweigh the kinds of consequences for the children.

TIPPING J:

Is there any case that you're aware of that a Court in the Commonwealth for example has had to grapple with this very point? The black children point in the sense of the weight that that factor should attract?

MR HARRISON QC:

No, I'm not aware of a case dealing with that issue and I spent –

McGRATH J:

Does that mean there are no House of Lords decisions, there's only the Court of Appeal decision *Liu* and the Australian decision *Chen Shi*?

TIPPING J:

Which were in the refugee –

McGRATH J:

Both of which are refugee cases, yes.

MR HARRISON QC:

I footnoted this case of *Fornah* but I don't think it's on that issue. I mean the problem is that each, if we take the key common law jurisdictions, they're

dealing with these issues each in their own way. As will end up being the case if the current Immigration Bill goes ahead, many jurisdictions consider refugee status, torture convention, family life, all in the one hearing and the grounds can be advanced in the alternative so we find the House of Lords cases for example a failed refugee status claimant is also advancing the Article 8 right to respect for family life. The refugee claim fails but the right to family life claim succeeds because while awaiting the refugee determination, family life has been established in the UK and the House of Lords is saying well fine that's the obligation.

ELIAS CJ:

Which case is that?

MR HARRISON QC:

Perhaps I, what's the time, I would really like to spend some time on these English cases because I think they're actually the most helpful in looking –

ELIAS CJ:

Can you just give us an indication of where you want to take your submissions? I'm just getting conscious of, I know it's been, in part, well largely our fault, but I'd just like to know how you intend to develop your submissions from here, Mr Harrison.

MR HARRISON QC:

Yes, we have a bit over the place, what I would like to do is look at the European Convention right to respect for family life cases in the House of Lords. If we go to page 30 of my submissions, some of them are listed there. Perhaps may be also I should look at – to put it another way, I'd like to change focus and go through some of the case law, because I think we battered around the conceptual arguments.

TIPPING J:

What actually is this case law going to demonstrate in your submission, Mr Harrison? Just in a sentence or two, just so that I can perhaps look at some

of this overnight with a view to what you're suggesting it supports, that helps your case.

MR HARRISON QC:

All right, the ICCPR and UNCROC talk about the right to family life and not to be arbitrarily deprived of it, the European Convention cases have been focusing on that right, they emphasise that it's a right to which each member of the family unit is entitled and each member's respective right is of importance and needs to be assessed separately.

TIPPING J:

Is this a rather different slant than that which has been prominent below?

MR HARRISON QC:

Well yes and no, if we just go to page 30 of the submissions, para 97, you'll see that all of those decisions are very recent. Most of those decisions, except perhaps for *Huang* and I think *Beoku-Betts* came out while the decision was reserved, and there's three more I want to refer to which have come out very recently, or been brought to attention, so the answer is yes, the emphasis wasn't there because the decisions have come along afterwards. But I've always stressed that the right to family life is a separate consideration to the best interests of the child consideration.

ELIAS CJ:

After taking us to the English authorities, what is required to conclude your submissions after that?

MR HARRISON QC:

I'd like to review that overnight if I may, I'll need perhaps just to highlight some points about the natural justice argument.

ELIAS CJ:

Do you think that you will be concluded within the first hour tomorrow Mr Harrison?

MR HARRISON QC:

If I get a clear run of the English case law, I will make every effort.

ELIAS CJ:

Well perhaps we'll carry on for the next 10 minutes and you can make a start on that.

MR HARRISON QC:

All right. What I'd like to do just to tie the English case law in is to, first of all, look at the – and this is page 30 of the submissions, look at *Winata* and that is at volume 7 of the case law, tab 187.

BLANCHARD J:

187, not in number 7.

MR HARRISON QC:

Sorry, 178 I beg your pardon. Volume 7, 178.

ELIAS CJ:

This is the Human Rights Committee?

MR HARRISON QC:

Yes, yes. So it's in Article 17.1, ICCPR case primarily. This involved as para 1 says, a child, an Australian national child born to Indonesian parents currently stateless and the parents were to be removed back to Indonesia and they complained of a violation of the relevant articles of the ICCPR. The son was aged 13 or thereabouts at the time and the complaint was that the removal of the parents would break up the family and if not force Barry, the Australian citizen child, to relocate to Indonesia. Paragraph 3.4, page 3 of the printout, they claim that Barry was fully integrated into Australian society, speaks neither Indonesian or Chinese, no cultural ties to Indonesia as he's always lived in Australia.

So one of the arguments for Australia was that there was no interference by the State with the right to family life because it would be the parents' decision whether Barry went with them or not, not a State action. The reasoning is, in particular, at 6.3 on page 7 of the printout. First of all, it said, "As to the State Party's contention that the claims are in essence claims to residence by unlawfully present aliens and accordingly incompatible with the Covenant, committing notes that the authors do not claim merely that they have a right of residence in Australia but by forcing them to leave the State Party would be arbitrarily interfering with their family life. While aliens may not as such have a right to reside in the territory of a State Party, State Parties are obliged to respect and ensure all their rights under the Covenant. The claim that the State Parties actions would interfere arbitrarily with the author's family life relates to an alleged violation of a right which is guaranteed."

Then 7.1, "As to the claim of violation of Article 17, the Committee notes the State Party's arguments that there's no interference with the right as the decision of whether Barry will accompany his parents to Indonesia or remain in Australia, occasioning in the latter case a physical separation is purely an issue for the family, not compelled by the State's actions. The Committee notes that there may indeed be cases in which a State's refusal to allow one member of the family to remain in its territory would involve interference in that person's family life, however the mere fact that one member of a family is entitled to remain in the territory of State does not necessarily mean that requiring other members of the family to leave involves such interference." So it's not a fundamental black and white situation, but equally, it's not true to say that it's always just the parents' decision and not a State action.

Over the page, "In the present case, the Committee considers that a decision of the State Party to deport two parents and compel the family to choose whether a 13 year old child who has attained citizenship after living there 10 years either remains alone in the State Party or accompanies his parents, is to be considered interference with the family, at least in circumstances where as here, substantial changes to long settled family life would follow in either case. The issue thus arises whether or not such interference would be arbitrary."

And then they go on to say, and this is qualifying it, obviously, I accept it's not, again, totally black and white, 7.3, "Certainly unobjectionable under the Covenant that a State Party may require departure of persons, nor is the fact that a child is born or by operation of law received citizenship, sufficient of itself to make a proposed deportation of one or both parents arbitrary." So there's scope, they say. "The discretion is however not unlimited and may come to be exercised arbitrarily in certain circumstances. In present case, both authors have been in Australia for over 14 years, the authors' son has grown up in Australia, attending Australian schools as an ordinary child, developing social relationships. In view of this duration of time, it is incumbent on the State Party to demonstrate additional factors justifying the removal of both parents that go beyond the simple enforcement of its immigration law in order to avoid a characterisation of arbitrariness, particular circumstances therefore the Committee considers the removal by the State Party of the authors would constitute, if implemented, arbitrary interference with the family."

Now, this ties in quite nicely to the English cases which do focus on age and the duration of existing connection with the UK in these cases, the family ties that have been developed there and so we can come to those tomorrow if the timing is right for Your Honours.

BLANCHARD J:

Now, those English cases, are those *Beoku-Betts* and *EB (Kosovo)*?

MR HARRISON QC:

Yes, and *Huang* to some extent. I'm actually going to refer to three more cases that have come along almost in the –

ELIAS CJ:

Why don't you give us the references to the cases and we'll look at them overnight?

MR HARRISON QC:

Yes, I'll do that. If Your Honours go to paragraph 97, note beside *Huang*, these are references to the casebook, 4/114, *Beoku-Betts* 4/107, *EB (Kosovo)* 4/111 and then there are three more cases and note them where you will, *EM (Lebanon)* 4/112, *Chikwamba* 4/108, and finally *AF (Jamaica)* 4/106. The good news is that you'll only have to take volume 4.

ELIAS CJ:

Yes, I was waiting for another volume to sneak in, well done.

MR HARRISON QC:

The *EM (Lebanon)* and *Chikwamba* are referred to in my reply submissions with the relevant paragraph numbers noted.

TIPPING J:

Some of them look very short judgments too, that's also good news.

MR HARRISON QC:

Yes.

TIPPING J:

Are they broadly, I know we're going to read them for ourselves, but are they broadly consistent with that Human Rights Committee, sort of, not absolute but depends on the circumstances sort of approach?

MR HARRISON QC:

Yes, although I think they progressively go further in favour of upholding the right to family life and in that sense, perhaps they provide a little more guidance and support for my arguments.

ELIAS CJ:

Thank you Mr Harrison, we'll take the adjournment now. Thank you counsel.

COURT ADJOURNS: 4.05 PM

COURT RESUMES ON WEDNESDAY 22 APRIL 2009 AT 10.06 AM

ELIAS CJ:

Thank you Mr Harrison.

MR HARRISON QC:

Good morning Your Honours. Overnight I pondered, as one does, about where we're up to with the argument. I want to deal with the right to family life aspect by addressing the UK authorities but it seemed to me, given some of the comments yesterday about a lack of clarity in my presentation as to the essentials of the argument, that it would be appropriate to recap and if I may I'll do that and it will be easier, if I may say so, if I can set out the argument step by step. I'm happy to answer questions but –

ELIAS CJ:

Afterwards?

MR HARRISON QC:

Well yes but some of its recapping anyway and we've dealt with the concerns in many respects. So this argument is really my second ditch argument assuming that the first and paramount standard argument is rejected and as Your Honours know, we go back to Justice Glazebrook's analysis and formulation and that really means we are seeking to proceed on two fronts. One, is the international obligations front and the other is the citizenship entitlements and the privileges associated with citizenship status front.

Now just quickly to recap on the second, the citizenship. We say, that both the – I'll call it the questionnaire even though it's wrapped up with the capital P policy. Both the questionnaire and the decision under review fail to address the citizenship aspect we say at all or alternatively adequately given its importance. So that's one of the two fronts.

Then the second front is the international obligations front and as you know that has two aspects broadly. The best interests of the child and the

protection of the right to family life and by the analysis I'm engaged in I'm seeking to demonstrate those are overlapping but separate and distinct considerations. So to make that point I need just to revert to the best interests. There we argue that the questionnaire fails to address best interests coherently and/or adequately in terms of weight. Weight in the Glazebrook sense which I will come to shortly, I mean I'll be short about it but I'll come to it. So the questionnaire fails to address best interests coherently and adequately. The decision maker, we say, fails to address the best interests question correctly and/or his conclusions are unreasonable.

To recap why the latter point is so, I submit that the first step for the best interests of the child analysis in a removal case is for the decision maker to identify which of the likely alternative outcomes is in the best interests of the child. Inevitably that means comparing the status quo on the one hand, that is the mother is not removed and family life continues in New Zealand, as against, on the other hand, first the prospect that the children are either sent to or go to China with or after their mother or alternatively that they remain here without their mother.

That best interest conclusion has to be reached and then when identified it is utilised in the exercise of the discretion whether or not to make a removal order for example and when utilised it must be given the weight to which it is in law entitled, that is the best interests conclusion, where the best interests lie. That may be, this will depend on Your Honours but the weight might be primary, important primary or some other formulation. Normally entitled to greater weight – however it's formulated, it gets that weight and any identified countervailing considerations are of course weighed as well in order to come to the overall decision as to the exercise of power.

Now what we say, and I'll mention that the – just refer to the paragraphs of the submissions that identify the evidence later, what we say is that in this case there was only one possible, only one reasonable condition in the – conclusion in the *Wednesbury* sense as to where the best interests of these

children lay, and that had to be the status quo. It was not possible to reach, reasonably, to reach any other conclusion.

Now it's part of my argument that even if that conclusion were reached, the decision maker could then take it, apply, weigh it and come to a removal decision but we do not see the decision maker adopting that sort of approach. It's completely muddied and furthermore the questionnaire really doesn't give him any assistance along those lines. So that's the best interest point.

So to go on to, by comparison, the second aspect of the international obligations front, is the protection of the right to family life and as I have said I argue this is a separate and distinct but overlapping enquiry. The enquiry here, I submit, looks at the nature and extent of the threatened interference with each family member's family life, threatened by the removal.

ELIAS CJ:
Including the father?

MR HARRISON QC:
No. At the time of the decision, no, because by – I'll come back to that point.

ELIAS CJ:
Yes, all right.

MR HARRISON QC:
It's a legitimate query but my argument in its pure form are muddied by the recent removal of the father is that it's the family life they're presently enjoying at the time the decision is made and that, I submit, is not the same enquiry as the best interest enquiry which examines potential, future outcomes for the individual child. This looks at the family that the decision to remove – the New Zealand family life if you like, the decision to remove will affect arguably adversely.

BLANCHARD J:

Wouldn't that be factored into the examination of the status quo? So there's a very considerable degree of overlap.

MR HARRISON QC:

There is a degree of overlap but you are looking at, you are comparing alternatives and the *Schier* case is a good comparison example. There the German parents wanted to stay in New Zealand and the best interest's analysis was there's no problem with these children, quite young children, going to Germany with their parents. The best interests, the first, foremost best interest's assessment, rightly I would accept, was that these are professional parents, or employed parents. They go to Germany, they're citizens there. There's no question of discrimination against them for being in New Zealand or having children or anything. Off they go. That's the – they might equally have said, the Schier parents, and I forget the facts, we've been here for five years. We've got a family life here of five years duration and my argument says well yes that is separately assessed and its perhaps it's much more of a family law Care of Children Act by analogy consideration, the importance of the status quo and avoiding deleterious change for children is emphasised in terms of the right to family life. But I accept Your Honour's point. In some cases there will be a significant overlap of factors and facts between the two. But they are different enquiries, I submit.

BLANCHARD J:

Would it make a difference here though, which way you went? I'm not sure I see the family life aspect as adding much, in this case, because there aren't any other relatives in New Zealand for example.

MR HARRISON QC:

No, it's – I accept that but on the scenario where the children stay and the mother goes, then it's a very significant blow to their family life.

BLANCHARD J:

Well I would have thought that would have been very adequately addressed under the first test, if I can call it that.

MR HARRISON QC:

Well if we take –

BLANCHARD J:

I mean we just don't want to add complexity for the sake of complexity.

MR HARRISON QC:

Well –

BLANCHARD J:

In some cases it might make a real difference if there's an extended family, for example, in New Zealand and not in the country to which they're being asked to go. But I'm not sure I see it as adding much here other than lovely complexity and we've got enough of that already.

MR HARRISON QC:

Well it's just that on the one hand this case has to be disposed of, on the other hand the right principle which, with respect, it may need to be determined, UNCROC provides for both rights for children. Both the best interests test and the right to family life so that they are seen, even just under UNCROC itself, as separate and distinct rights.

ANDERSON J:

In this case it's really a facet of the best interests, isn't it, because their interests involve the enjoyment and incidents of the family unit which will be disrupted?

MR HARRISON QC:

They are –

ANDERSON J:

In this case.

MR HARRISON QC:

They are intimately bound up, yes.

ELIAS CJ:

Well they are parallel rights at international law and so they both have to be grappled with. It's just that the right to family life cuts both ways but that's a matter you're going to come back to at some stage?

MR HARRISON QC:

Well yes very shortly I am –

ELIAS CJ:

Because on one view the officer did take that into account in his overall assessment in identifying the family relations available to these children in China.

MR HARRISON QC:

That's where I'm heading towards –

ELIAS CJ:

Yes.

MR HARRISON QC:

– because I don't accept that was – it was proper for him to do that and I'll come to that directly in just a moment Your Honour. So the position then is that they are or certainly can be different enquiries, best interests and family life. We argue again that both the questionnaire and the decision under review fail to engage in that enquiry and I'll have to explain why in just a moment. I should add, as Your Honours know, that both the ICCPR and the UNCROC standard for protection of family life is arbitrariness so when I talk loosely of the right to family life I'm not overlooking that it's a right not to be

arbitrarily deprived and I would argue that that involves a proportionality enquiry and thus the United Kingdom and the European Convention case law is of assistance when looking at our international obligations.

ELIAS CJ:

I suppose a significant difference, as a matter of domestic law, is that the Convention on the Rights of the Child is clearly behind the Care of Children Act so there has been domestic law performance of those obligations. One of the problems with the right to family is that it's not incorporated into our Bill of Rights Act and so it hangs there as I would accept a relevant consideration but it doesn't have the emphasis that you're able to point to for the rights of the child.

MR HARRISON QC:

Well the position as I see it is that once the argument that the Care of Children Act applies directly is abandoned, then I go to my next point which is to say the paramount standard ought to be drawn upon at some point in the Court's reasoning. But if that argument is also lost then really both UNCROC and the ICCPR, both best interests consideration and the right to family life have the same status, they're there at international law so I wouldn't draw that distinction. And by saying that I am saying there's no right in the Bill of Rights that I can see that can be relied on to back up either of those convention rights.

ELIAS CJ:

Well I suppose there are interests affected by law so it ties into your natural justice point that –

MR HARRISON QC:

Oh yes I'm talking on the substantial –

ELIAS CJ:

Yes I'm sorry, I'm thinking out loud. Carry on.

MR HARRISON QC:

Obviously I do rely on section 27(1) when we get to natural justice but that's a different issue. So in any event if Your Honours could just note a cross-reference to my reply submissions on the Crown cross-appeal paragraphs 56 to 63 where I examine the case of *EM (Lebanon)* and there I make this point. That in terms of the right to family life there's a distinction to be drawn between the right to family life of a family member who's entitled to remain and thus on the side, this side of the distinction also the family of which he or she is a member. So you've got a family where one at least has a right to remain. To be distinguished from the right to family life of a family when no members entitled to remain, which in the English case law are referred to as "foreign cases". In the latter case the English case law shows the consequences for future family life following removal become the critical consideration because no member of the family is – has a right to remain. To insist on a family life in say New Zealand the enquiry turns to the kind of family life they'll have wherever they will end up. But my argument is that that's not so here. If we look at the Ye children, their right to family life is grounded in New Zealand because of their citizenship.

What's considered under this heading is therefore the existing family unit which by attrition, by the time that the decision ends up consisting of the mother and three children, living in New Zealand and I stress that. The question for the Immigration Officer is the affects of removal on that family life and so, and I'm nearly finished with this, therefore the argument runs, it's not proper to consider the right to family life issue by reference to some conjectural family life, which might possibly occur if all were sent to China and they ended up playing happy families in China. That's not the focus of the family life enquiry where there are New Zealand citizen children whose only family life has been and is being enjoyed in New Zealand and that's a distinction which, at least by implication if not more strongly, emerges from the English authorities which I'll turn to in just a moment.

ELIAS CJ:

But that don't really put the emphasis, do they, on citizenship that you're putting on? They do look at the status quo and whether it would be fair to uproot and disrupt but – so it's a before and conjectural comparison?

MR HARRISON QC:

If I may I'll take Your Honour to the decisions because there are certainly statements in the cases which – it may not be citizenship, but it's certainly right to remain if one member of the family has the right to remain, the approach is different to where no members do and that's a perfectly logical policy, a sensible policy approach, in my submission.

McGRATH J:

Is the emphasis on the family life that's the status quo?

MR HARRISON QC:

Yes.

McGRATH J:

That's what the *Lebanon* case would say, I think in particular, you would be arguing?

MR HARRISON QC:

Yes. And then just to finish off this before I come to these English cases, to return to Your Honour the Chief Justice's point about what the Immigration Officer did and we go to case 2, page 295, just to recap four paragraphs up, he mentions that in a previous interview, Ms Ding was advised it would not be in the best interests of herself and her children to remain unlawfully in New Zealand, miss a paragraph, he says he's considered the interests of the New Zealand born child, then final paragraph on that page, "I have also considered that Ms Ding has no family support in New Zealand, other family currently living in China. Ms Ding and the three New Zealand born children will have the support of the family members in China", and then there's the

final paragraph over the page, “Best interests to return to China with their mother and join their father and the rest of the family.”

Now, I attack that on – I don’t want to, we’ve spent time on it, I don’t want to go over it again but I attack that broadly for two reasons. First of all, it does what I’ve just argued should not be done, it fails to examine the effect on the present New Zealand based family life, and simply jumps to the supposition about the nature of the future family life. It’s perfectly plain, for example, although Ms Ding doesn’t have family members in the blood sense, it emerges from the affidavit evidence that she has – at the time people were giving evidence, she has supporters, neighbours, friends, other members of the Chinese community in Auckland and that of course is typical with migrant communities, whether lawfully or unlawfully present, that they support each other.

The second prong of the criticism is that everything Ms Ding said at interview contradicted this happy family scenario. She said that the husband was violent, his family hated her and looked down on her, she was estranged from her own siblings and her mother was very elderly and living in a small apartment. So my submission on that is –

ELIAS CJ:

What are you referring to there, are you referring to the questionnaire?

MR HARRISON QC:

I’m referring to the questionnaire, of course it’s fleshed out in the affidavit evidence but I don’t need to rely on that. Just in terms of the questionnaire –

ELIAS CJ:

I think it is fleshed out because I hadn’t picked up some of that detail from the answers recorded to the questionnaire so I wonder whether you’re pulling the two together.

MR HARRISON QC:

Well I could be, may be I'm pulling it from earlier questionnaires as well.

ELIAS CJ:

Well some of the earlier questionnaires contradict that, don't they, because they talk about how close the husband and wife are.

TIPPING J:

It's close to unreasonable because it's an error of fact, if it fits at all.

MR HARRISON QC:

Yes, it certainly can be articulated that way, yes. But it's an error of law insofar as his focus is only on –

TIPPING J:

He's not looking at the present set-up, that's your point.

MR HARRISON QC:

That's my argument. So can we go to these authorities which are at paragraph 97 of my submissions and I just want to go through them as quickly as I can but just make some points about them.

ANDERSON J:

What's the reference in the submissions Mr Harrison?

MR HARRISON QC:

Paragraph 97.

ANDERSON J:

Yes, thank you I've got it.

MR HARRISON QC:

So the first one is *Huang*, another *Huang*, at tab 114 and this is where the –

TIPPING J:

Are you going to go through every single one of these Mr Harrison?

MR HARRISON QC:

No, well I'm going to highlight some passages, not every single one.

TIPPING J:

Because there's a very useful one of the English Court of Appeal, right at the end which summarises, in effect, where the state of English law is on this, these issues. Wouldn't it be, well I don't want to interfere in how you –

ELIAS CJ:

Well I thought *Huang* was rather good actually.

TIPPING J:

Well there is a very convenient summary of where the English has got to in that last English Court of Appeal case.

MR HARRISON QC:

I agree, and that was a comment I was going to make about that but there's just one – well, there's more than one or two, there's a few passages I just want to mention, what I did want to go back to was though just to recall the two Claudia Geiringer narratives, the compliance based narrative and the rights based narrative, and with the greatest of respect, I had a fair amount of compliance based narrative dialogue with Your Honours yesterday and of course, I am urging a look at the other one.

I think it's fair to say, Your Honours may disagree, that the House of Lords, the English Courts are paying less attention to the compliance based narrative and placing a bit more emphasis – it's not either or, but these decisions show a greater emphasis on the rights based narrative and that's why I wanted to go to *Huang* because it's interesting, Lord Bingham says in paragraph 6, page 180 of the report, right down the very bottom, he talks about the rule under which Mrs Huang does not qualify to be lawfully present and right down the

bottom, “Such a rule which does not lack a rational basis cannot be stigmatised as arbitrary or objectionable, but an applicant’s failure to qualify under the rules is, for present purposes, the point at which to begin, not end, consideration of the claim under Article 8. The terms of the rules are relevant in that consideration but they are not determinative.” So it’s because she’s unlawful that we begin consideration of her human rights, you wouldn't need them if she was here lawfully, this is Ms Ding I’m referring to.

Then at 7, it’s noted that, for some years, Article 8 didn't exert any influence on British law and practice in the immigration field but now that is, there’s been a major change progressively there.

At paragraph 11, there are a series of statements about the standard of review and I acknowledge that –

ELIAS CJ:

Very different appellate provision.

MR HARRISON QC:

That’s what I was about to acknowledge, it’s an appellate provision not a judicial review, but it does come around to referring, His Lordship does come around to referring in paragraph 13 to *Daly v Secretary of State*, and that’s an authority well known to Your Honours and that of course is, if my memory doesn’t fail me, in the judicial review area, the talk about proportionality and this ties in to the question of the standard of review of the decision which Mr Bassett will be addressing. So there’s that there, there’s more on that in paragraph 14, paragraph 18 there’s a passage at –

ELIAS CJ:

You’ve jumped over para 16 but there is acknowledgement of the compliance issues.

MR HARRISON QC:

Sorry yes, and I’m sort of trying to hurry but not miss things.

ELIAS CJ:

Yes.

MR HARRISON QC:

Yes, I did mean to refer to that, that is correct, it's there, I don't avoid it, it's just a question of striking the balance which recognises the interests of vulnerable New Zealand citizen children, in my submission. So then at paragraph 18(g), page 186, His Lordship says, "But the main importance of the case law is in illuminating the core value which Article 8 exists to protect. This is not perhaps hard to recognise human beings are social animals, they depend on others, their family or extended family is the group on which many people most heavily depend socially, emotionally and often financially. There comes a point at which for some prolonged and unavoidable separation from this group inhibits their ability to live full and fulfilling lives", and then there's a list of matters which are all relevant. "The Strasbourg Court has repeatedly recognised the general right of States to control entry and residents of non-nationals repeatedly acknowledged the convention confers right on individuals or families to choose where they prefer to live. In most cases where the applicants complain of a violation of their Article 8 rights in a case where the impugned decision is authorised by law…" because that's part of the subclause 2 of the right, "…for a legitimate object and the interference or lack of respect is of sufficient seriousness to engage Article 8. The crucial question is likely to be whether the interference or lack of respect complained of is proportionate to the legitimate end sought to be achieved." Then His Lordship goes on to deal with proportionality and you'll be familiar with the terms of the discussion which follows.

TIPPING J:

Isn't the key point in 20? This is what's picked up in the head note, "Prejudices family life of the applicant in a manner sufficiently serious to amount to a breach of the fundamental right protected by Article 8?"

MR HARRISON QC:

Yes. And that –

TIPPING J:

That is the ratio, is it not, on this point? This is how it's treated anyway.

MR HARRISON QC:

Yes.

ELIAS CJ:

That is the appellate question, isn't it?

MR HARRISON QC:

Yes.

ELIAS CJ:

How would you phrase the review question?

MR HARRISON QC:

Well we've got to look at it in terms of arbitrariness. Some of the later authorities seem to turn more to asking the question whether it is reasonable to expect –

ELIAS CJ:

Yes why do you say, why do you jump to arbitrariness as the standard?

MR HARRISON QC:

Well I'm just saying we're looking at the ICCPR, UNCROC right to family life which –

ELIAS CJ:

Can't be arbitrarily –

MR HARRISON QC:

Can't be arbitrarily deprived of and obviously I prefer the word wasn't there because it's a bit of a weasel word but it is there and so I acknowledge its existence.

ELIAS CJ:

I suppose if clear criteria are not being employed so that the area of discretion in these important areas is left too wide, there will inevitably be arbitrariness in application. Some children will be allowed to stay and some will not for no very good reason.

MR HARRISON QC:

That certainly, with respect, is a sound way, in my submission, of articulating why defects in a policy or questionnaire will potentially infringe the rights. So in any event the next case, *Beoku-Betts* tab 107. This clarified the law laying down the principle that you look at each individual family members right and not merely the one who's on the way out and there's a passage at para 4 in Baroness Hale's judgment where she says, rebutting the argument that was being advanced, "To insist that an appeal to the Tribunal consider only the effects on other family members as it affects the appellant, and that a judicial review brought by other family members considers only the effect on the appellant…" or judicial review plaintiff, "…as it affects them, is not only artificial and impracticable, it also risks missing the central point about family life which is that the whole is greater than the sum of the individual parts. The right to respect for the family life of one necessarily encompasses the right to respect for the family life of others, normally a spouse or minor children, with whom that family life is enjoyed." And that also tends to indicate that Her Lordship saw no problem with a judicial review brought by family members who were not in the firing line for removal and that relates to the Crown –

ELIAS CJ:

Well she's not referring to that question, is she? This is again an appeal and the ground of appeal is that the result is incompatible with convention rights?

MR HARRISON QC:

It's very much an arbiter but what she seems to be saying is that other family members who are not in jeopardy of removal, have a right which they could enforce by judicial review. They couldn't enforce it by an appeal within the immigration system because they're not parties to any procedure there and as I say it just relates to the fact that my clients have brought a, sought to participate as parties to this judicial review. The only other passage in *Beoku-Betts*, paragraph 35, citing with approval apparently the Court of Appeal decision in *AB (Jamaica)* and this was, and this relates Justice McGrath to the citizenship point. The fact says she's a Jamaican woman, overstayed, joined by her two daughters, met and married a British citizen and the passage quoted over the page is, "In substance, albeit not in form, the husband was a party to the proceedings. It was as much his marriage as the appellant's which was in jeopardy, and the impact of removal on him rather than on her which, given the lapse of years since the marriage, was now critical. From Strasbourg's point of view, his convention rights were as fully engaged as hers. He was entitled to something better than the cavalier treatment he received … It cannot be permissible to give less than detailed and anxious consideration to the situation of a British citizen who has lived here all his life, before it is held reasonable and proportionate to expect him to emigrate to a foreign country in order to keep his marriage intact." Substitute New Zealand for British and family or relationship with parent or marriage and I adopt that statement.

And then there's an approval of – there's approval at para 38 of a case of *Sezen* which was pronounced in the Netherlands where the judgment says at F, "The court has previously held that domestic measure which prevent family members from living together constitute an interference with the right protected by Article 8 … and that to split up a family is an interference of a very serious order."

Moving on to *EB (Kosovo)* at tab 111. Go to paragraph 14. This case is – approves the earlier authorities. It's about delay and there was a degree of institutional delay. Delay as a pejorative sense but I make the same point for

simply the passage of time in terms of the present case. I don't, in other words, I don't accuse the New Zealand authority of any delay but what they say of delay is worth consideration.

At paragraph 14, it is said by Lord Bingham, "It does not, however, follow that delay in the decision making process is necessarily irrelevant to the decision. It may, depending on the facts, be relevant in any one of three ways. First, the appellant may, during the period of any delay, develop close personal and social ties, establish deeper roots in the community than he would have shown earlier. The longer the period of delay, the likelier this is to be true. To the extent that it is true, the applicants claim under Article 8 will necessarily be strengthened. Fifteen, delay may be relevant in a second, less obvious way. An immigrant without leave to enter or remain is in a very precarious position, liable to be removed at any time." This is more about domestic relationships between couples, so I don't need to pursue that.

Sixteen, "Delay may be relevant thirdly in reducing the weight otherwise to be accorded to the requirements of firm and fair immigration control if the delay is to be shown to be the result of a dysfunctional system which yields unpredictable and inconsistent and unfair –

ELIAS CJ:

That's the point on which Lord Brown dissented isn't it?

MR HARRISON QC:

Yes, yes. And that's not the kind of – that third kind of delay is not something I'm arguing happened here in the sense that it's the result of a dysfunctional system but the first kind of delay is relevant and the point that is there made is worth noting.

ELIAS CJ:

You jumped over paragraph 9 which struck me, in reading it last night as quite important for your, that that approach was quite important for your criticism of

the questionnaire and the assessment that was made, that it was insufficiently fact-specific.

MR HARRISON QC:

Yes, I ought perhaps to have drawn attention to that.

BLANCHARD J:

I thought you might get a bit of help from paragraph 42, which Lord Brown doesn't put on the basis of delay but simply the passage of time.

MR HARRISON QC:

Yes, yes, it's one of the paragraphs I've cited in my written submissions and that too I would rely on, and it draws, I submit, a reasonable balance with a nod towards the compliance narrative.

Then we've also got, by way of the add-ins, *EM (Lebanon)* which is at 112. This case is a foreign case and so described in the judgments, but I'll come to that. Paragraph 7, Lord Hope says, "It seems to me that the Strasbourg Courts jurisprudence indicates that, in the absence of very exceptional circumstances, aliens, and I stress the word, cannot claim any entitlement under the conventions remain here or escape from the discriminatory effects of the system of family law in their country of origin." Now this case is relied on by the Crown to say that the very exceptional circumstances test is appropriately applied to, in this case, my argument is that no, the very exceptional circumstances test is a test developed to deal with foreign cases, where, as I analysed earlier, the enquiry is into what kind of family life will be faced when a family, all of whom are illegal, are otherwise to be removed, because none of them has a right to stay. It's not a test to be imported in the other type of case and I've cited authority from these judgments which expresses it quite differently in such cases.

So we go then to 13 and there's a statement about the guarantees and then over the page just below (b), between fundamental guarantees, which Article 8 isn't, and qualified rights of a civil or political nature, which on a

purely pragmatic basis, the contracting states cannot be required to guarantee for the rest of the world outside the umbrella of the convention, that includes the Article 8 right.

Then there's a discussion of the position of non-Convention States and at 15 it said, "The guidance indicates that the Strasbourg Court would be likely to hold that except in wholly exceptional cases, aliens, again, who are subject to expulsion cannot claim an entitlement to remain in the territory of a contracting state in order to benefit from the quality of treatment as to respect for the family life they would receive there which would be denied to them in the receiving state and the exception is wholly exceptional circumstances."

Then the conclusion is at 18, is it, "As I said, at the outset of this opinion, the case for allowing the appellant and her son to remain in this country on humanitarian grounds is compelling. This is particularly so when the effects on the child are taken into account. The mother's cared for him since birth, he has a settled, happy relationship with her in this country. Life with his mother is the only family life he knows. Life with his father would be totally alien to him." And I'm not saying that the facts are the same, they're strikingly different. So that's the reasoning of Lord Hope.

Lord Bingham talks more in paragraph 19 of –

ELIAS CJ:

Why is the test flagrancy? I'm sorry, I can't remember why it should be, flagrant breach.

MR HARRISON QC:

Well my argument is that it is a test that's only applied when you are looking at the removal of aliens. That is to say, only those who have – as a family, every member of the family have no right to remain and in that event because –

ELIAS CJ:

But where does it come from, flagrancy? Is that the European Court?

MR HARRISON QC:

Well, what seemed to have developed before this case is that some judgments and Judges spoke of very exceptional circumstances, some spoke of flagrant.

ELIAS CJ:

Is that in the context of review or – what's it, where does it come from, the standard?

MR HARRISON QC:

I think it's a substantive test to determine what should happen to this category of alien claiming a right to family life, and what this case says is, there's no difference between, it's not cumulative and there's no difference between flagrancy and very exceptional. It's, in essence, it's the same test.

TIPPING J:

But it's a different situation from the present case.

MR HARRISON QC:

Yes, my only point is to deal with it to get rid of it, in a way, get rid of the test and say, isn't the test that's applied across the board, so that that –

TIPPING J:

Well we've got a statutory test.

MR HARRISON QC:

We've got the test of arbitrariness.

TIPPING J:

All right, I won't go down that road again.

MR HARRISON QC:

Well we have a statutory test, yes.

TIPPING J:

And you want some glosses on it.

MR HARRISON QC:

Which I don't want applied to section 54, yes, let's not go back there Your Honour.

McGRATH J:

Article 14 of the European Convention has something to do with this, doesn't it, this flagrancy issue? I'm just looking at paragraph 2 of Lord Hope's judgment.

TIPPING J:

It's the matter at 17, the cases where that assessment shows that the violation will be flagrant will be very exceptional. So it's really the same word for very exceptional, as you said, it's just a terminological flourish.

MR HARRISON QC:

Yes, and one of the other judgments says that in as many words.

BLANCHARD J:

But your point here is that this is a case about aliens and our case isn't, insofar as the interests of the children is concerned.

TIPPING J:

And you're heading off something that you think the Crown is going to say?

MR HARRISON QC:

Well they do say –

TIPPING J:

They do say, yes.

MR HARRISON QC:

– in their submissions and it's easy to read this and say, test of very exceptional circumstances, I just want to – want that to be avoided assuming I'm right in my analysis. Tab 108, the *Chikwamba* case –

BLANCHARD J:

This is Kafka?

MR HARRISON QC:

Yes this is Kafka.

BLANCHARD J:

You don't really need to say much more about it, do you? This is a ridiculous case.

MR HARRISON QC:

Yes.

BLANCHARD J:

Ridiculous in the sense that I would share Their Lordship's surprise the case had even got to them.

MR HARRISON QC:

The point though is that it's a case where you've got –

TIPPING J:

We've read the case. I mean it really doesn't add anything Mr Harrison, does it, unless there's some striking passage, other than those in Lord Scott's opinion, that add to the sum of human knowledge.

ANDERSON J:

It says that it's not proportional to be stupid.

MR HARRISON QC:

Yes well I did want to come back to, I did want to cite Lord Brown at paragraph 40 because it –

BLANCHARD J:

This is the queue jumping?

MR HARRISON QC:

Yes the queue jumping rejoinder. If Your Honours have read 40 and 41 that's my response to, also to the queue jumping complaint.

TIPPING J:

The queue becomes shorter or something?

MR HARRISON QC:

Well the queue, yes, well they're not in the queue so they therefore don't jump it. There may be a slightly jesuitical approach.

TIPPING J:

Well I don't think I want to engage on this. I think it's really rather silly.

MR HARRISON QC:

And there's finally there's *AF (Jamaica)* at tab 106 and what this is, as well as summarising where they seem to be at in England, it's also interesting to note the age related rules of thumb that apply progressively and if I may just take a moment on that. We start at paragraph 9 of that judgment. There's a summary of *Huang* and *Beoku-Betts.*

ELIAS CJ:

Sorry, which tab are we at?

MR HARRISON QC:

This is tab 106, the latest decision in *AF (Jamaica)* December – well there may be a later decision but this is the latest of those that are cited and so

summarises *Huang* and *Beoku-Betts* in 9 and 10. Eleven, *Huang* suggests that for these purposes one of the guiding principles is whether the family life cannot reasonably be expected to be enjoyed elsewhere and that's the kind of test that I would argue for at Immigration Officer decision making level. And they cite from a recent *Uner v Netherlands* and at the bottom of that page the Grand Chamber continued, "58 the Court would wish to make explicit two criteria which already may be explicit with those identified in the earlier judgment. One, the best interests and the wellbeing of the children in particular the seriousness of the difficulties to which any children of the applicant are likely to encounter in the country to which the applicant is to be expelled."

Of course that takes us back to the debate with Justice Blanchard about the overlap between the right to family life and best interests. And secondly, "The solidity of social culture and family ties with the host country and with the country of destination." Here I say of the children. Then you've got a discussion at 14 of guidelines and over the page where there's a heading children and the figure 7, factors to be considered included the age of the child in most cases a child of 10 or younger could reasonably be expected to adapt to life abroad and then it's noted that another of these guideline rules originally referred to children as being aged 10 or over, were issued in February 1999 to refer to children aged seven or over it was the policy decision was that it's under seven that the adaptability is more likely to be present and thus the default rule was aged seven or over we're not going to remove the family. Then para 16 is more on the same theme.

In 18 the issue in this case was that none of AF's children were seven or older at the time of the decisions in question. Then they go through the determination of the Immigration Judge in some detail. They summarise an aspect of her consideration at para 26 and 27 and then it is noted at para 29 that there was a focus on the adequacy of the Judge's consideration of family life and then the conclusion is at 33. "Although reference is made to AF's wife and children the matter has been looked at through the eyes of AF alone and not as though, as *Beoku-Betts* now teaches his wife and children have to be

considered as potential victims themselves. As for his wife it's true on the findings there are no insurmountable obstacles to her being able to accompany AF, who was a serious criminal offender being deported, to Jamaica. That does not answer the question as to whether it is reasonable to expect her to do so. The no insurmountable obstacle test rather seeks to answer the separate question as to the relevance of difficulty she might encounter upon relocation. It does not conclude the subsequent or higher category question of whether it is reasonable to expect her to go to Jamaica which is part of proportionality."

Then at 38, mention of the children and they say there, "However, especially given the fact that the elder of those children had already turned seven by the time of the publication of the determination, the Immigration Judge ought to have taken account of the fact he'd grown up in this country where he was born and to have reached an age which DP5/96 has amended indicated was a significant milestone for the purpose of Article 8 considerations."

Para 40. "In some what Lord Justice Sedley said in *AB (Jamaica)* …" and that's a passage that I cited earlier.

ELIAS CJ:

One that Lord Bingham approves in *Huang*?

MR HARRISON QC:

Yes, yes. And again at 41, this is about what I term the Crown's rejoinder. A few lines up, "This Court upheld in another case the AIT's determinations in each of these cases that such considerations outweigh any interference with family life. I would accept that AF's criminality may well at the end of the day prove to be the decisive factor. Nevertheless, I would not hold the result as inevitable. AF's wife and children are not responsible for AF's criminal conduct and they're entitled to have their own rights to family life properly considered and in balance" and there's a bit more in 42. Thanks for your patience Your Honours, I've finished that analysis.

Now where to from here. I want just to go back to my submissions, refer Your Honours to the key passages of Justice Glazebrook's reasoning because I'm in my fallback phase of relying on Her Honour's approach. Her Honour's judgment is long and I really only came to grips with it on a second reading right through. I've tried, in my submissions, to point to the key passages which in my submission – well I relied on and in my submission ought to be studied more closely if I may say so. If we go to para 83 of my written submissions. This is part of the, my discussion of the citizenship dimension and I note there the paragraphs at which Her Honour discusses the competing submissions and just going to volume 1 of the case the key passages are para 110, this is Justice Glazebrook's judgment, which is the passage I have quoted, then 113, there's discussion of case law right through of course, including at 111.

TIPPING J:

What page of volume 1 are you at?

MR HARRISON QC:

Volume 1 of the case?

TIPPING J:

Yes.

MR HARRISON QC:

It's not paginated, it's tab 1, and paragraph 110.

TIPPING J:

Is this whole volume devoted to Justice Glazebrook?

ANDERSON J:

It's page 37.

MR HARRISON QC:

Sorry, it is paginated at the bottom, thank you Sir. So the passage, para 110 is a passage that's contained in my submissions, there's a reference at 111 to Baroness Hale in *Naidike* and in turn, Baroness Hale, who had relied on Her Honour Justice Gaudron in *Teoh*. This is my argument about the State owing obligations to the child citizen.

TIPPING J:

Is there any doubt about the proposition in 110? No one's suggesting it should not be taken into account.

MR HARRISON QC:

Well the Crown is, the Crown doesn't accept that it's – not only doesn't accept that it's a separate relevant consideration, it doesn't even accept that there's a distinction to be drawn between the citizen and non-citizen child.

TIPPING J:

All right.

MR HARRISON QC:

I can cite the chapter, it's there.

TIPPING J:

There's so much paper in this case, it's very hard to –

MR HARRISON QC:

I accept that Your Honour and I can only apologise –

ANDERSON J:

Well you didn't create all of it Mr Harrison.

MR HARRISON QC:

Quite. I don't want to get too defensive but adopt that comment. So at 111, Justice Glazebrook's relying on Baroness Hale and that's back a bit earlier,

but she summarises, “Baroness Hale held that although the protection of the citizen child did not lead to the conclusion that no foreign parent of a citizen child could ever be deported, it was an important part of the decision not properly considered.” And she’s relying on – she notes that Baroness Hale saw citizenship as significant in her own right, because she cites Justice Gaudron in *Teoh* in a passage which I have identified and then at 112 there’s more authorities cited. At 113, there’s European authorities cited including *Chen*, which is in the casebook and so Her Honour goes on to, and I cite also 123.

TIPPING J:

You’re simply referring to this in support of the view that the rights of the citizenship issue is a relevant consideration?

MR HARRISON QC:

Yes, separate and important, standing apart. And of course, one doesn’t want to be discriminating, but it’s logical, practical and policy centred to attach weight to citizenship, independently, and will distinguish between those cases that arise in the future where the child or other family members don’t have citizenship. So then at 123, Her Honour identifies the various factors to be balanced and goes through these. At 130 to 133, Her Honour looks at the weighting to be attached to citizenship. She says at 130, looking again at *Schier*, the case of the Germans that I mentioned, “Even in cases where the detriment is greater, though it would not constitute a significant and sustained breach of the child’s basic rights –

BLANCHARD J:

Isn’t it the key point of 132, the opening two sentences of 132?

MR HARRISON QC:

That’s key, yes. So those are all passages that I’ve cited, I would like to – Her Honour mentions *Al-Hosan*, which is a recent Court of Appeal decision, volume 2 of the authorities and that’s worth a look, just to interrupt the flow, if Your Honours could look at volume 2 of the authorities, tab 68. This is an

appeal on point of law from a decision of the Deportation Review Tribunal and with the no doubt considerable assistance of my learned friend Mr Carter and Mr Haines QC, the Court of Appeal embarked on a somewhat similar exercise to the one we are in a slightly different legal context, and there were a number of issues discussed.

If we go to paragraph 52 of the unreported judgment, there's the heading "Did the DRT Have Proper Regard to the Interest of Mr Al-Hosan's Family?" and then over the page, para 53, "The major criticism made by Mr Haines of the DRT was that it had failed to address the rights of Ms Aldayeh and the children as New Zealand citizens. He said the DRT was required to give genuine and not merely token or superficial regard to this factor", citing an earlier judgment of Justice Randerson. Further down in 55, last sentence, "We do, however, emphasise the need for the analysis to focus on universal rights and then a comparison of the rights available to New Zealand citizens with those available to citizens in another country is being undertaken." Then there's a discussion about the interests of the children, at 58, it's said, "We do not consider that it was unfair of the DRT to see the interests of the children being closely tied to those of their parents, given that both Ms Aldayeh and the children have New Zealand citizenship." Then there's a comment which the Crown has relied on at para 59, "We do not think it fair to criticise the DRT for giving little weight to unprocessed generic country information not directed to particular circumstances." Of course, that's the, directed to particular circumstances information is what we've sought to introduce but that's objected to.

So then at 62, "As to the two remaining options, the task of the DRT was to evaluate each of these against the outcome which was sought by Mr Al-Hosan, namely that the revocation be cancelled, family allowed to remain together. While Ms Aldayeh will have a choice whether she and the children return to Jordan with Mr Al-Hosan or remain apart from New Zealand, it is something of a Hobson's choice because she's required to choose between two unattractive options for her and the children." Then I omit a sentence or two, "We agree with Mr Haines that the fact that two unattractive

options are available does not diminish their unattractiveness and the DRT was required to consider the impact of both these options on the family and, to the extent that their interests differ from the rest of the family, the children. It's obvious that the assessment will lead to a conclusion but there is a real detriment for Ms Aldayeh and for each of the children if Mr Al-Hosan's permit remains revoked, unless…" and this is a side issue, "…they go to Canada, that is not the end of the matter." Rather what must follow is an evaluation of that detriment against the importance to New Zealand of the integrity of its immigration system being maintained, after proper evaluation of the factors.

Sixty four, "We have found the description of the task to be performed given by Baroness Hale in *Naidike* very helpful. Having emphasised the importance that the rights and interests of children are taken seriously by parties to the Convention on the Rights of the Child, she pointed to the substantial body of case law under Article 8 dealing with conflict between the right of the State to exclude or deport and the right to respect for family life. She described the task of the decision maker in these circumstances in these terms, the decision maker has to balance the reason for the expulsion against the impact upon the other family members, including any alternative means of preserving family ties. The reason for deporting may be comparatively weak, while the impact on the rest of the family either of being left behind or being forced to leave may be severe. On the other hand…" and I needn't read the rest of it. "We respectfully adopt that description." So that's the Court of Appeal in a different statutory context, looking at citizenship.

At para 73 there's a few miscellaneous matters, if I may call it that, including at (b), "Justice Harrison observed that New Zealand had a duty to Mr Al-Hosan's children as citizens. As we've commented earlier, we see the position of the children as citizens of New Zealand as very important matters which must be treated as a primary consideration. We did not see them as trump cards, rather they must be given appropriate weight in the balancing exercise described above." Then looking at the gravity of the breach, that's by the proposed deportee, the breach of immigration laws or other laws, "The gravity of the breach will vary from case to case and in that context the

interests of the children will be a matter of importance but those interests may be outweighed by the need to control the border and provide a disincentive for dishonest action on the part of immigration applicants." So, that's one of the decisions relied on by Justice Glazebrook, it came out after the argument in the Court of Appeal.

The other key passages from Justice Glazebrook which Your Honours are invited to read because I place considerable reliance on them, are at paragraphs 105 to 108. I don't want to go – just before leaving the citizenship issue and at the risk of stirring up a hornets' nest, I do want to refer to Mr Delamere's affidavit.

ELIAS CJ:

Is there anything in the affidavits that were for the Court of Appeal that you want to refer us to?

MR HARRISON QC:

No. The affidavit – as Mr Delamere explains, there are two documents –

ELIAS CJ:

I wasn't trying to forestall you going to that, I was just enquiring whether there is anything?

MR HARRISON QC:

The answer is that there are two documents, both of which have come into being this year. Obviously they weren't before the Court of Appeal because the material didn't exist and was not known to Mr Delamere, let alone to me, until very recently. Mr Delamere explains that, I think the date was 1 April, that I was given the information. If we just quickly go to the two exhibits, A and B, exhibit A to the affidavit is a letter from the Minister of Foreign Affairs. Mr Delamere says that each of these documents, A and B, relates to a separate case in which he is acting for the client and he briefly outlines the circumstances of the case. The Minister of Foreign Affairs letter

concerns an Eric Wu, a New Zealand citizen child who was sent back to China by his overstayer parent or parents to reside with grandparents –

TIPPING J:

I'm just going to listen. I don't think I've ever seen this affidavit, frankly no. You just carry on but I signal it is not in front of me.

ELIAS CJ:

I will give it to you, I haven't looked at it until now.

MR HARRISON QC:

The point is, the narrative of the information gleaned from China, from the Minister of Foreign Affairs, he says in the second paragraph, "Eric entered China on a Chinese travel document, he did not at that time have a passport," Mr Delamere says, in his affidavit. "As the Chinese government does not recognise dual nationality, Eric a New Zealand citizen who has a New Zealand passport by now, must depart China on a valid Chinese travel document and cannot travel on his New Zealand passport. This is in accordance with Chinese law. The Public Security Bureau advise that Eric's family need to obtain a hukou or residential permit for Eric and then apply for a Chinese passport. Once Eric has a Chinese passport, he would then require a visa from Immigration New Zealand to enable him to return to New Zealand."

BLANCHARD J:

That was the statement that I found quite amazing.

MR HARRISON QC:

Yes.

BLANCHARD J:

He's got a New Zealand passport.

McGRATH J:

But we're talking about to get out of China, aren't we, we're not talking about to get into New Zealand?

BLANCHARD J:

But this sentence is talking about getting into New Zealand.

MR HARRISON QC:

Yes, yes. We're talking about –

McGRATH J:

They would return to New Zealand.

MR HARRISON QC:

We are talking about the Chinese government's treatment of the New Zealand citizenship, not New Zealand's treatment.

BLANCHARD J:

It may be that it's only directed at the practicalities of getting out of China, where you have to use the Chinese passport and presumably the airline is going to say well, you haven't got a New Zealand visa in this passport and he can't produce his New Zealand passport. So, it may be that there's no great substance in this point but on the face of it, it looked very strange.

ELIAS CJ:

Where is the Universal Human Rights complaint in this? Just picking up on Justice Glazebrook's comment in the unreported case, where she said it is important to take it right back to that. This isn't about jingoistic clashes between two legal systems. If that's the Chinese domestic law requirement for exit from China, where is the Human Rights dimension that you are pointing to?

MR HARRISON QC:

Before answering that, can I take you to B, exhibit B. This is a separate case, it's a file note by an Immigration Officer who meets with a Chinese Consulate official on 12 February this year, in the company of Philip Zhou who features in our case and it concerns an expulsion that's in train of a Chinese family, this is all in Mr Delamere's affidavit –

ELIAS CJ:

These citizenship matters, I'm just grasping for why – what's an issue here?

MR HARRISON QC:

Can I just go through this and then I'll respond because it's slightly different what is said in this case.

ELIAS CJ:

Yes, all right.

MR HARRISON QC:

It's in the big paragraph, "As neither of Eason's parents", Eason is the New Zealand citizen child, "...in New Zealand had residence for New Zealand, or were citizens of New Zealand and that they were unlawfully in New Zealand, the Chinese Consulate did not recognise the child as being a New Zealand citizen, despite having been born here prior to 2006. Therefore, when Eason arrived in China he would be landed in that country as a..." Chinese citizen obviously and that, "...the family would then have regularise Eason's status in China" and we're not sure how that process went.

Again, just before coming to respond to Your Honour's query, at paragraph 83 of the Crown's submissions, we find this statement in relation to my clients, "Citizenship status is not lost by removal of parents and the child's right to freely enter or leave New Zealand is unrestricted." Now that's true of New Zealand law but it is not the consequence that these children will face if sent to China to join their mother according to Mr Delamere's affidavit and this is the main reason why I'm straggling to get this in because we have the

statement by the Crown with no factual backing, asserting on the citizenship front all will be well, they keep their New Zealand citizenship and when a bit older they can come back here and resume life as New Zealand citizens but if the effect of the Chinese system is to strip them of their New Zealand citizenship at the Chinese end, if you value citizenship and regard New Zealand is under a duty to protect it, that is a significant consequence.

TIPPING J:

Would it stop them from leaving China and coming back to New Zealand? Doesn't seem so, they just need this visa to which my brother drew attention.

MR HARRISON QC:

They need to regularise their status in China and then apply for a travel document. They also need to, at the end of the day, to be in a position to travel. I'm no expert –

ELIAS CJ:

Why isn't that a matter to be taken up between governments, why is it a Humans Rights issue? I'm not saying that I don't think it necessarily is but I'm struggling to understand the point you're making here.

MR HARRISON QC:

It's part of the right to identity and it's part of the issue of freedom of movement.

BLANCHARD J:

Isn't the point that it's a practical reduction in New Zealand citizenship? It doesn't remove it but it creates a practical problem in exercising rights as a New Zealand citizen. I'm trying to help.

MR HARRISON QC:

Thank you. It certainly does that much but I would go further and say well, of course we can say don't worry, under New Zealand law you will always be a citizen although you'll need a visa to come back in.

BLANCHARD J:

No, you will need a visa to come out of China. You won't need the visa to come into New Zealand.

MR HARRISON QC:

Well, Mr McCully seems to say the visa is for entry purposes –

BLANCHARD J:

No. That's why I was drawing attention to that sentence, to tease it out because I don't think he's expressed himself very well. I think what he's saying is, as a practical measure you will have to have a visa in your China passport in order to be able to use it to exit China. I don't think he's going on to say, or intending to go on to say and you'll need to use that visa to come into New Zealand because he's addressing the situation of a chap who has got a New Zealand passport.

MR HARRISON QC:

Yes and if –

BLANCHARD J:

At least, I hope I'm right.

MR HARRISON QC:

If your New Zealand passport hasn't expired or hasn't been confiscated by the Chinese authorities because they don't recognise it and you are a Chinese citizen, you might even use your New Zealand passport at the frontier here. I can't help thinking of Boston Legal last night, it involved the firm –

BLANCHARD J:

Sorry, I was reading your cases.

ELIAS CJ:

We were reading your cases.

TIPPING J:

I was reading your wretched cases Mr Harrison, don't be provocative.

MR HARRISON QC:

They were faced with a merger with a Chinese firm and the whole Chinese Human Rights record was up for grabs.

BLANCHARD J:

Have you got a citation for us?

TIPPING J:

I need a cup of tea.

MR HARRISON QC:

I will come back to – if I can give you chapter and verse Your Honour about the International Convenance but really what I'm saying is, it's another significant detriment at the Chinese end. We can't just overlook it.

ANDERSON J:

It is a barrier to entry into New Zealand created by the Chinese requirements.

MR HARRISON QC:

Yes, it is a series of barriers by the looks, not just one.

ELIAS CJ:

All right, we will take the adjournment now.

COURT ADJOURNS: 11.33 AM

COURT RESUMES: 11.55 AM

MR HARRISON QC:

As Your Honours please, a very quick response to Your Honour the Chief Justice and the enquiries about the International Human Rights aspect of what we were arguing about in terms of the Chinese treatment of the New Zealand citizenship. It looks as though the focus is on one, the freedom of movement entry and exit from one's own country and the right to a nationality. In the Universal Declaration of Human Rights, those rights are recognised in Articles 13 and 15. In the International Convenant on Civil and Political Rights, we have Article 12(4) which says, "No one shall be arbitrarily deprived of the right to enter his own country." In UNCROC, we have Articles 7(1) and 8(1), Article 7(1) says, "The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality..." and I omit words "...State shall ensure the implementation of these rights." Article 8(1) states, "Parties undertake to respect the right of the child, to preserve his or her identity including nationality."

ELIAS CJ:

No one is suggesting stripping these children of the right to nationality or anything of that sort and there are plenty of countries in the world where dual nationality is not permitted.

MR HARRISON QC:

Yes but those countries would say to the New Zealand citizen child I anticipate, you come here as a New Zealand citizen child, you cannot be also a Hungarian citizen at the same time, you are going to have to choose which you ultimately end up as being. What China appears to be saying on the Delamere material is, you come here because your parents were overstayers in New Zealand, we will not recognise your New Zealand citizenship and thus your New Zealand nationality. That's really the point that I'll be exchange – but I do want to move on if I may. I'm conscious of the time. If we go back to my – I can wrap this up fairly quickly. Go back to my submissions at page 32, para 105. This is Justice Glazebrook's analysis of the primary consideration, the quote that weight is built in, it's a substantive and not merely procedural

requirement. I know the Crown cites academic writing to contrary effect, I just cannot accept it, with respect, you can't possibly read that Article 3(1) is merely a process. So, there's the analysis, the passages are referred to in para 107 of my submissions. Please add in a look at paras 180 to 183 of Her Honour's judgment and at 108. I'm not going to take you to them, I don't have time, they are at the heart of the fallback argument. I was asked yesterday, in effect to put some flesh on the bones with standards and weightings and so on, it's all in there. I'm not saying I adopt every single word but nonetheless there is a lot of guidance, if Your Honours are going to go down this path. At paragraph 125 of my submissions, I'm here dealing with what I've called the Crown rejoinder and I refer to *Kaufusi* which is set out, it's not in the casebooks, set up in Justice Baragwanath's judgment and *Teoh*. As I say there, I won't take Your Honours to it, top of page 41, "The majority of the High Court interpreted action concerning children in Article 3 as extending to a deportation." That is to say, it's not the parents, solely the parents action, it can be a State action. Just going back to paragraph 114 of the submissions, at paragraphs 114 and 115, I rehearsed the evidence on the best interests facts. I'm not taking Your Honours through those unless invited. You will remember I was asked to summarise those facts yesterday afternoon and attempted to do so but it's there with chapter and verse. The final point I would make on this aspect is this, that –

ELIAS CJ:

What age are the children now?

MR HARRISON QC:

Their ages are set out at the very beginning of the submissions. Para 1, "They are now aged 12, 10 years, five months and almost nine" and then at the last sentence, their ages at the time of the decisions are set out.

My submission is that if there – just coming back to that reference to evidence which I'm not taking you through. The evidence is essentially irrelevant if there's an unlawfulness aspect. If the test doesn't comply with the law, then there's really no issue around that. It's only if you are looking at an

unreasonableness, a component to the decision that we need to get into that evidence and I just want to stress that. Although I answered the question yesterday, I did want to stress that it's in that context. Then the submissions deal with the natural justice process issues. I'll leave them to be taken as read but it's not because I lack confidence in them, or am not willing to defend them, it's just the time constraint. Unless Your Honours have any questions, those are my submissions.

ELIAS CJ:

Thank you Mr Harrison. Mr Mahon, are we to hear from you next?

MR MAHON:

As I understand the order Your Honour, it's Mr Bassett for Ms Ding.

ELIAS CJ:

Yes, I realise that there was an agreed order and we are happy to go along with that, thank you. Yes Mr Bassett.

MR BASSETT:

May it please the Court, I appear for Ms Ding who is the second respondent in Supreme Court case 53/2008. The second respondent has not appealed but does wish to be heard in support of the Court of Appeal finding in relation to invalidity and in particular, in relation to unreasonableness.

The majority of the Court of Appeal held, that was Justices Glazebrook, Hammond and Wilson upheld the appellants' third ground of review in the children's statement of claim and that is to be found at volume 2 of the case, at page 360 and in particular paragraph 26. Paragraph 26, on page 360, volume 2, outlines three allegations, 26.1, 26.2 and 26.3 and I shall take you to them shortly but that, I just note, that the statement of claim filed on behalf of Ms Ding mirrors that unreasonableness allegation word for word at page 337 of the same volume of the case, at paragraph 13.3, 1, 2 and 3. If I can just ask the Court to refer back to the children's statement of claim, that's paragraph 26 at page 360 and also at the same time, refer to exhibit H at

page 296 of the same volume, sorry page 295 and 296. The Court will see that paragraph 26.1 of the children's statement of claim makes the allegation that the Immigration Officer's reasoning and conclusion that if the first plaintiff and the second plaintiff return to China they would have the support of an extended family and the immediate family, it would be reunited, was a conclusion that was unsupported and inconsistent with the available evidence. The finding of the Immigration Officer to which that allegation relates, is to be found at page 295 in the last two sentences, or the second to last sentence on page 295. The allegation at paragraph 26.2 of the statement of claim is that the Immigration Officer's reasoning and conclusion that the contents of the psychiatric report in relation to the first plaintiff should be dismissed. It was also a conclusion that was reached on a flawed basis and was unsupported by the evidence and that allegation relates to the conclusion reached by the Immigration Officer which is recorded on page 296, that's the second paragraph on page 296, where the Immigration Officer makes a decision to reject the psychiatric report on the grounds including that the allegations that Ms Ding was suffering from a depressive disorder were recent, they were recent claims and they had never been put forward before. The third allegation, on page 360, paragraph 26.3, relates to the Immigration Officer's reasoning and conclusion, that it would be in the best interests of all three New Zealand born children to return to China with their mother and join their father and the rest of the family. That allegation relates to the last sentence of the Immigration Officer's decision which is recorded at page 296, the last sentence of that page. If I can take those allegations in reverse order by commencing with allegation 26.3 in the statement of claim. It is my submission that the available evidence is that as at the 23rd of August 2005, the Immigration Officer knew that the children would not be going back to China. Mr Harrison has already taken the Court through the humanitarian questionnaire and I don't propose to go through each segment of it but I do wish to draw the Court's attention to one page in particular. If I can draw the Court's attention to page 292 and there are three boxes, box number, there are four boxes, I'm speaking regarding the second box. In answer to a question, Ms Ding is recorded as saying, that the client has three New Zealand born, sorry, the Immigration Officer records that Ms Ding had

said that she had three New Zealand born citizens and that the client, that's Ms Ding, does not wish to take the three children back to China. In the second box, sorry, I've got the order wrong there, the second box, Ms Ding is saying that she claimed her three New Zealand born citizens are not going with her. The third box, she is saying that she has three New Zealand born citizens and she does not wish to take them back to China. In the fourth box, the recorded answer was that NZIS has arranged with CYF to make arrangements to take care of the children. So, as at the date of that humanitarian interview on the 23rd of August, the Immigration Officer knew that the children were remaining in New Zealand.

If I can just refer the Court just to two other exhibits and that is an email by Mr Zhou in volume 3 of the case, at page 661. This is an email written by, or typed and sent by Mr Zhou sent to Nicola Scotland, who I understand is an associate in the Minister's office, where as at the date of 25 August 2005 the Immigration Officer records that Mrs Ding has advised that she does not wish to take her three children back to China with her and that CYFS is making arrangements to have the children attended to by way of guardianship arrangements.

If I can just refer to one other document in relation to supporting evidence for the allegation and that is a letter sent by Mr Zhou which is at page 665 in volume 3 of the case, just a few pages over, and this is a letter written by Mr Zhou on 29 August 2005 to the Consulate-General of the People's Republic of China, where again, as at the 29th of August, he's also recording that NZIS has made arrangements with CYFS, Children, Youth and Family to take care of three New Zealand born citizens when Mrs Ding is sent back to China on the 1st of September.

It's my submission as at the date Mr Zhou signs the decision, 31 August 2005, there was a clear error recorded in his decision and that he based his reasoning upon that factual error. In my submission, Mr Zhou should have ascertained the facts correctly and he should have reached his decision on the basis and at the time, considering the plight of the children remaining in

New Zealand and how their interests would be affected by being deprived of the care and affection of their mother.

TIPPING J:

You're doing this very well and I'm always delighted to go to the statement of claim and it's all extraordinarily helpful, very seldom people do it, now, this is the last sentence in the reasoning, isn't it, you're referring to here? Is it necessarily inconsistent where he says she should be returned, this is not Mr Harrison's point, you're saying he's working on a false factual premise? He knows that they're going to stay, at least in the short term, is he perhaps saying but despite that, it would be in the best interests of them to go, is that your point? That's not the way you'd want it read.

MR BASSETT:

I've got two points Your Honour, the first point is that he's making a factual error, the second point is the effect of the factual error.

TIPPING J:

What is the factual error?

MR BASSETT:

The factual error is that he knows that as at the 31st of August 2005, he knows the children are remaining in New Zealand, they're not going back to China, as it were, they've never been to China.

ELIAS CJ:

I thought the indication was that CYFS would secure their return to China, I thought there was some indication perhaps in the judgments of that, that that was the plan?

MR BASSETT:

I don't understand there to be any indication to that effect.

ELIAS CJ:

I must have that wrong.

MR BASSETT:

My understanding was that they were wards of the Court and that there had not yet been a determination by a Family Court to that effect.

ELIAS CJ:

No I understand that, but was that what was in prospect that an application would be made to the Court for consent to them being sent to join their parents?

MR BASSETT:

My understanding Your Honour is that in October 2005, there were some affidavits filed, there are two affidavits filed which outline, put that possibility.

TIPPING J:

He's not actually stating a fact when he says, "and that it would be of the best interests to return to China for the children", he's saying that that is, in his view, what's in their best interests. I'm just not quite sure exactly what this factual error is. He must have been aware that in the short term they were going to stay in New Zealand, otherwise he's very detached from reality.

MR BASSETT:

My point is Your Honour that by making that assumption or making that statement in his reasoning process diverted him from the critical question which he had to undertake, which was he had to identify whether or not there was going to be a humanitarian prejudice as a result of removal.

TIPPING J:

You're really making this perhaps in a slightly different way the same point as Mr Harrison made on this last paragraph are you? That he's put the cart before the horse, as it were. That he's assumed the mother's going.

MR BASSETT:

Perhaps if I can, if you'll allow me just to finish my sentence, and it is as follows Sir, that what he needed to do was he needed to identify that there was going to be – sorry, he needed to identify if there was going to be a humanitarian prejudice as a result of not cancelling the removal order, that's the first step. The second step is, once he had identified that there was going to be a humanitarian prejudice as a result of not cancelling the removal order, and in my submission he could only have reached the conclusion that there was going to be significant humanitarian prejudice as a result of not cancelling the removal order, he couldn't reach any other conclusion, in my submission. That's the second step.

Once he had completed that second step and identified that there was going to be a major significant humanitarian prejudice as a result of not cancelling, he then needed to weigh that prejudice against the border compliance issues –

TIPPING J:

I'm with you, I understand entirely what your point is.

MR BASSETT:

And then make his decision.

TIPPING J:

So it's an error in the reasoning process rather than a factual misinterpretation?

MR BASSETT:

Well one leads to the other Your Honour, in my submission. The fact that there is an embedded error of fact in that final sentence, enables him to avoid the critical humanitarian question. It's the effect of the error that the allegation is concerned with. So the effect of the error enables him to avoid the elephant in the room, if you like.

ANDERSON J:

If I just summarise it with this sentence and you tell me if it gets close to it, the Immigration Officer erred in making the assumption that the children would go to China and this deflected him from examining the position of the children remaining in New Zealand either with or without their mother.

MR BASSETT:

And the prejudice that would result as a result of that.

ANDERSON J:

That follows on, yes.

MR BASSETT:

And I would make the further comment in addition Sir, is that where the rights and futures of New Zealand born citizens are at stake, he may make no assumption.

ANDERSON J:

Where it leads to, the assumption he made leads to him neglecting to examine matters that he should have examined.

MR BASSETT:

And then weighed.

TIPPING J:

I understand your point now exactly.

ELIAS CJ:

Mr Bassett, you took us to this letter from Mr Zhou to the Consul-General, which – there were two psychiatric reports were there, one was the one that Mr Zhou dismisses and then she co-operated with the Immigration Service arrangement to have a second psychiatrist who refers to her distress?

MR BASSETT:

I shall come to that in relation to the allegation 26.2 if I may Your Honour.

ELIAS CJ:

Yes.

MR BASSETT:

The answer to your question is yes. Just in relation to that paragraph 26.3 in the statement of claim, my submission is that that error alleged to paragraph 26.3 would be sufficient for invalidity, establishing invalidity, even based on a *Puli'uvea* interpretation and even based on a simple *Wednesbury* test. I will be addressing the Court shortly in relation to intensity, but in my submission, we don't need to go to high intensity necessarily in order to find invalidity in relation to the allegation at 26.3.

TIPPING J:

Well if he's adopted the wrong reasoning process in law, you're not really unreasonableness at all, you're error of law.

MR BASSETT:

And the error of law and unreasonableness, it depends how it's characterised.

TIPPING J:

But it's not an evaluative question as to how unreasonable, if you like, if you've got an error of law, that's the advantage for you of having it as an error of law, it's either an error or it isn't.

MR BASSETT:

In my submission, it qualifies as both Your Honour. Perhaps if I can now, in answer to the Chief Justice's comment, just move to the second allegation which is at paragraph 26.2 of the children's statement of claim, and that related to the psychiatric report. This third ground of review at paragraph 26.2 challenges the Immigration Officer's reasoning and conclusion that the contents of the psychiatric report in relation to the first plaintiff should be

dismissed. If I can just refer back to page 296 of the case, and in particular the second paragraph on that page, Mr Zhou refers to the recent submission from her legal representative, that's Mr Foliaki and I will take the Court to that reference in a moment, in which was a letter that he had enclosed a psychiatric report which claimed that Mrs Ding was suffering from a depressive order and Mr Zhou rejects these claims as being recent when in fact there is evidence that Mr Zhou knew as at the 31st and indeed at the 23rd of October 2005 that the claims were not recent. Sorry, August 2005.

ELIAS CJ:

He doesn't make reference to the acute distress at all as found by the NZIS psychiatrist.

MR BASSETT:

Indeed Ma'am. Perhaps if I can take the Court through in a chronological order, just referring to the 2004 incident, because it's not just the 2005 situation but also 2004, if I can refer the Court to volume 3 of the case at page 653. This is an email sent by Mr Zhou where he refers to an incident that occurred, a suicide attempt in fact in November 2004. I can give the Court also the references to Mr Zhou's affidavit in this regard, although I won't be going to the affidavit, the affidavit reference is of the case, volume 4, page 723.

Also in his second affidavit in volume 4, page 779, and there's also an incident report which relates to that 2004 incident which is at volume 4, page 967. Now I don't intend to go to all of those references but those references do show clearly that Mr Zhou was closely involved with that incident, the previous suicide attempt by Mrs Ding in 2004 and indeed he, as is recorded in page 653 which I've referred the Court to in this email, Mr Zhou refers to the fact that he rushed into the area, the toilet cubicle where Mrs Ding was found and he opened the door and found her on the floor, so he had first hand knowledge of the suicide attempt in 2004.

If I can also take the Court to the humanitarian questionnaire on the 11th of June 2004, which is at volume 4 of the case at page 933. This was the second humanitarian interview.

ELIAS CJ:

Sorry, what page?

MR BASSETT:

933. This is a record also where Mrs Ding, in answer to a question, "What effect will your removal from New Zealand have upon your family?", her answer is recorded as "It's better I die, I can't support them." That's 11 June 2004. Then if I can come chronologically to the next point, and that is volume 4, page 980, this is the report that the Chief Justice was referring to a moment ago where there is a record by the CAT team of St. Luke's, which I understand is Crisis Action Team, 23 August 2005 which records, in the middle of the page in handwriting that Mrs Ding is acutely distressed and therefore remains at risk of self-harm, has one previous self-harm attempt but no other psychiatric input. There's also a reference to the earlier suicide attempt in the next box that immediately follows.

TIPPING J:

This is at the time that he made his decision isn't it, approximately?

MR BASSETT:

Yes Sir, this is 23 August 2005.

TIPPING J:

23 August, that same day?

MR BASSETT:

Yes Sir.

TIPPING J:

That he had that interview with her?

MR BASSETT:

Yes Sir.

TIPPING J:

And there's evidence he knew of this is there?

MR BASSETT:

Yes Sir, if one goes to page 293 of the, sorry, volume 2, page 293, that's the humanitarian interview on that day, he records, this is Mr Zhou bear in mind, "Client is under emotional distress and has a risk of self-harm." If I can also just give the Court the page references which relate to the receipt by Mr Zhou of the psychiatric report from Mr Foliaki, who's Mrs Ding's solicitor, I won't take the Court to these references but they are at volume 4 of the case, page 762 and 782. Mr Foliaki wrote a letter dated 30 August 2005, referring to Dr Foliaki's psychiatric report, that's a clear indication that as at the 30th of August 2005, there's an acknowledged earlier receipt.

Mr Zhou also had an email that he sent which is at volume 3 at page 661 of the case and I would like to take the Court to that email. I've already referred –

ELIAS CJ:

Page?

MR BASSETT:

661, volume 3. This is the same email that I referred to the Court to five minutes ago but for a different purpose. This is the email that Mr Zhou sent to Nicola Scotland on the 25th of August 2005, where in the last sentence of that email, he says, "I have also received a copy of the psychiatric report dated 4 August 2005 this morning from Mrs Ding's lawyer." So as at the 25th of August, he's acknowledging receipt of it.

ELIAS CJ:

Do we have that psychiatric report?

MR BASSETT:

Yes you do Ma'am, I believe it's at page – perhaps if I can find that reference, 757, it's exhibit I Ma'am. In particular, I'd like to refer to the passage that's –

TIPPING J:

Well the end of it's got some handwritten notes, presumably Mr Zhou's handwriting where he's actually, in effect, drafted the contents of his written reasons then in part, hasn't he?

MR BASSETT:

It's very difficult to read Sir.

TIPPING J:

The first one says, "Have taken info supplied into consideration."

ELIAS CJ:

And secondly, "Never previously was mentioned", those references, yes.

TIPPING J:

These are his notes on the very document. Sorry, you were going to refer us to a particular?

MR BASSETT:

There is a particular portion there where it's, I'm just finding it.

TIPPING J:

Clinical opinion, 759.

MR BASSETT:

"Mrs Ye is suffering from a significant major depressive disorder which and a very real concern of suicide." That's the fifth paragraph down on page three of the report, page 759 of the case.

ANDERSON J:

The point isn't so much whether they were recent or not, it's whether they existed, isn't it? One would imagine her distress would increase as the crisis became more acute, but recency seems of little relevance if the condition exists at the time of evaluation.

MR BASSETT:

I'm simply raising that for the purposes of showing that Mr Zhou made another error in terms of his reason for dismissing it, he dismissed it because it was not recent.

TIPPING J:

It's arguably a very illogical reason.

MR BASSETT:

He said that the allegations were recent.

TIPPING J:

It was written on the 4th of August so it was pretty recent from that point of view, I don't quite know what he meant by not recent. Presumably it was a suggestion that the condition hadn't been made known earlier, that's presumably what he was trying to get it, it isn't something that has arisen until late in the day. But my brother's point is still valid, isn't it, that it's there, it's a fact.

ANDERSON J:

He says these claims are recent, that's at page 296, the implication being that the recency has some relevance and affects the quality of the –

TIPPING J:

Yes, the recent invention sort of idea.

MR BASSETT:

As I understand it Sir, it's not only – the recency is in relation to the domestic violence and the other aspects as well.

ANDERSON J:

All of them, yes.

TIPPING J:

At the moment, we're just dealing with the psychiatric, you're saying it's wholly illogical to dismiss it on the ground that it's recent?

ANDERSON J:

Yes, the domestic violence, sexual and emotional abuse were recent allegations, weren't they? But the psychiatric condition –

MR BASSETT:

The psychiatric condition was not recent.

ANDERSON J:

May not have been.

MR BASSETT:

And I'm about to make a submission that there is a very good reason why Mrs Ding may not have raised the issue of marital breakdown and the abuse in the marriage on the previous occasions, and that is that on the previous occasions when she was interviewed which was June and November 2004, Mr Ding, the perpetrator, was still in the country. He was removed in December 2004. Once he was removed, then at that point, presumably she was able to feel free to make the allegations of sexual and other abuse within the family and marital context.

ANDERSON J:

Well if she'd made them at the time of the first interview, it wouldn't have helped the husband.

MR BASSETT:

It wouldn't have helped her ultimately either.

ANDERSON J:

It may have. Send the husband away and keep her here with the children but that's not how the psychology of those relationships works.

MR BASSETT:

In summary, my submission is that, contrary to what Mr Zhou says at page 296, the assertions of mental distress were not recent, they hadn't just been raised, Mr Zhou knew to the contrary and there was a very good reason in relation to the other allegations why she hadn't raised them up until 2005.

TIPPING J:

What is the provenance, I'm sorry, I've just closed my book and I shouldn't have, what was the page of that psychiatric report again?

MR BASSETT:

757 I think Sir.

TIPPING J:

And the provenance of it is from –

ELIAS CJ:

It's from Manukau, Counties Manukau.

TIPPING J:

Counties Manukau, written by senior psychiatric registrar to say that this was a claim which claims that Ms Ding was suffering from a depressive disorder, seems to be a rather dismissive way of putting it.

ELIAS CJ:

There's also the – although the psychiatrist doesn't accept necessarily the history of abuse, saying that more history would need to be taken, he does refer to the reports of those who have been caring for her in the Chinese and Tongan community and the way she's been presenting.

MR BASSETT:

Yes Ma'am. My submission in relation to that second ground, 26.2 is simply that the evidence was available as at August 2005 and that as a result of that, his finding in the second paragraph at page 296 is fatally flawed, and that is an independent ground for invalidity.

If I can just move now to paragraph 26.1 of the statement of claim, my submission is that, in that regard, Mr Zhou made a further error. In the penultimate sentence on page 295, volume 2 of the case, Mr Zhou records that Mrs Ding and the three New Zealand born children would have the support of the family members in China. In my submission, that is, or was then, unsupported by and inconsistent with the available evidence.

If I can just take the Court to the available evidence in 2005 and refer to the humanitarian questionnaire, volume 2, page 285, question 16, the question was asked, "Why have you not returned to your home country?", the answer was recorded as, "I can't survive with three children with me and I can't leave them alone here." Question 17, her answer is recorded, "I won't be able to survive back in China." Question 18, in answer to the question, "Where will you live in your home country and who will support you?", her answer was, "I will live with my mother, I don't know how I will support myself." Question 22 over the page, in answer to a question about accessing educational and medical services, the answer was, "They're all available but at a high price if you're not a citizen." Then if I can just jump two pages over to page 288, question 41, in answer to a question as to what effect will removal have, the answer was, "If they come back with me…", referring to the children, "If they

come back with me to China, I don't know how we will survive. If they stay here in New Zealand, I don't know how they will survive."

Question 55, if I can just ask Your Honours to turn the page to page 289 which relates to the support or otherwise that she might be expected to receive from family. The answer to that question, question 55 regarding her mother she, Ms Ding answers that she, her mother, is in poor health. Question 56, Ms Ding advises that her mother is not at work, she's retired. And one further reference, that's at 291, supplementary – in answer to a supplementary question she's recorded the second entry there as saying, "I want to take them back with me to China but I don't know how I will support them, send them to school back in China." It's not quite clear but there is certainly her statement that she will be unable to support them.

Now if I can just refer the Court also to the earlier humanitarian interview, that's on the 11th of June 2004 just quickly, volume 4 of the case at page 933. There is also a similar reference at the earlier humanitarian assessment. Again in answer to a question about the children she says, "No, if I take them back I can't support them to go to school. Nobody will look after them." Now Ms Ding does also provide a supplementary amount of detail in her affidavit, which the Chief Justice referred to or asked Mr Harrison about earlier. If I can just refer the Court to volume 3 of the case at page 532, this is pertinent as to what support if any she'll receive from her husband. Paragraph 7, Ms Ding gives evidence that since her husband's removal, her husband has been in contact by telephone only two or three times. I have not heard from him for several months. Paragraph 8, first line, "If I am forced to return to China I will never live with my husband again. He has made it very clear to me that he does not want me back and he does not want the children. The marriage is now at an end." It's quite clear that, in fact, Ms Ding was not going to have the support of her husband.

There is also a reference at paragraph 6 on that previous page as to the attitude of Ms Ding's husband's parents. "My husband's parents are already looking after my two older children and are not willing to do more than that.

they have always disliked me." So clearly there wasn't going to be any support from that quarter either.

ELIAS CJ:

She does give that history to the psychiatrist too, in August.

MR BASSETT:

There is also reference in paragraph 5 to the lack of contact with the other brothers and sisters who have been left back in China. There is also reference, just one final point at paragraph 21, which is that her evidence is, "Apart from my mother's support there is no possibility at all that we will receive support from my family. As I have already said I have had no contact with them for over 10 years and I do not even know where they live at present. They are all living their own lives and are not interested in me at all."

ANDERSON J:

This information wasn't available to Mr Zhou was it?

MR BASSETT:

No Your Honour.

ANDERSON J:

Months later or something like that?

MR BASSETT:

Yes Sir but I will be submitting when I come to the point in relation to high intensity review, it's my submission that in a very, very serious context such as this it would be permissible in such a context for the Court to look past the evidence that was only, only the evidence that was available to the Immigration Officer and possibly to look at the broader context in other evidence that is now available.

ELIAS CJ:

Without going that far however, even if the Immigration Officer was required to accept what the mother said, none of his questions seems to have been directed at the nature of the relationship with the family members in China, just identifying that there are brothers and sisters. There don't seem to have been any questions asked that go – that probe, even if he was entitled to rely on a self-report, there's not much there?

MR BASSETT:

No indeed Ma'am he has again made an assumption effectively. An assumption of support.

ELIAS CJ:

And if one considers the fact that in the psychiatric report which is contemporaneous, effectively with his assessment, she is reporting lack of family support. One would have thought that information was there to have been had if he'd asked her the questions?

MR BASSETT:

Yes Ma'am.

TIPPING J:

Well in a sense it's information already before him.

ELIAS CJ:

Yes it is, yes it is, because it's in the psychiatric report, yes.

MR BASSETT:

Certainly this evidence has not been contested by the Crown neither has been any application to cross-examine or test the evidence.

ELIAS CJ:

They really can't effectively test it however.

MR BASSETT:

Certainly Ma'am there is no, Your Honours, there is no evidence or suggestion of Ms Ding being reunited upon return with her wider family.

TIPPING J:

So this leads to the same consequences 26(2)?

MR BASSETT:

Yes Sir. Those are my submissions in relation to the question of unreasonableness. There is just one further note that I'd like to make in that regard and that is that the facts in this case are apt, in my submission, to demonstrate the dangers of an update humanitarian assessment. It has been suggested by Justices Wilson and Hammond in the Court of Appeal level that an update will do. Now I accept Justice Anderson's comment earlier yesterday, that if there had been a decision five minutes before then that may well be appropriate. But it just does show the problem of any direction to an Immigration Officer that all that is required is an update because once that indication is given, in my submission, to an official, there is a real danger at that point that that official then makes assumptions that somebody else on an earlier occasion has carried out a full and proper humanitarian assessment.

TIPPING J:

The update would have run, logically I would have thought, only if there had been a previous appeal and then this proximity of the – the thing to the appeal might justify it but if there's been no appeal, then you can't assume there's been some full and thorough examination?

MR BASSETT:

Exactly Sir. Or if, as in this case, the appeal was five years before –

TIPPING J:

Yes.

MR BASSETT:

I mean the change in circumstances from the year 2000 to the year 2005 in terms of the children getting into school, growing up –

TIPPING J:

That was the refugee appeal, wasn't it?

MR BASSETT:

Yes Sir.

TIPPING J:

And the RRA appeal never proceeded?

MR BASSETT:

The 47(3) appeal never proceeded.

TIPPING J:

Didn't proceed, no.

MR BASSETT:

Through no fault of the children obviously, the same point.

If I now can move just to the question of intensity of review, my submission is that this case could have been, and still can be, decided on the application of orthodox judicial review principles, however it is my submission that a hard look approach or a heightened level of intensity of review is nevertheless appropriate in a case such as this, notwithstanding that on a straightforward *Wednesbury* analysis, Mr Zhou's actions are unreasonable and irrational in the administrative law sense. Justice Glazebrook at paragraph 303 referred to this case as being one which involved fundamental human rights of children and accordingly, she was of the view that this is a case where the Court should apply a standard of anxious scrutiny.

I'd just like to make one or two brief comments about intensity of review which Your Honours will all be familiar with, but the basic proposition is that the level

of intensity depends upon the nature of the right being interfered with by the decision making process and that the more fundamental the right, the higher the intensity of review and in this case, the right at issue is the right of a child to be looked after by its natural parents which, in my submission, is an important right and just a matter of basic humanity, even though it's not a right protected by the New Zealand Bill of Rights Act 1990.

TIPPING J:

I would hope I would always have a hard look, the question is more, isn't it, to the standard to which you hold the decision making? I don't think it's going to matter much in this case, but honestly, I can't resist the temptation because you obviously have a good grip of this Mr Bassett, to put it to you that the degree of hardness of the look, I wouldn't have thought was the point, it was the degree of the standard to which, in other words, it's almost like degrees of reasonableness, the more fundamental the right, the more reasonable the decision must be. The idea that you look at it more closely, I've never found very helpful.

ELIAS CJ:

I don't know that degrees of reasonableness help either.

TIPPING J:

No.

ELIAS CJ:

It's just, it's got to be contextual. What is reasonable takes its colour from the context. Really, there's so much dancing around on the heads of pins in this area.

MR BASSETT:

I think the lingo, if you like, Your Honour, is a question of deference, less deference where the rights are more fundamental and more deference where it's –

ELIAS CJ:

That's a dreadful word.

TIPPING J:

It's a controversial word. I understand the concept, you're more exacting, if you like, the more fundamental – it's a more exacting test, or –

ANDERSON J:

It connotes the extent to which a Court's prepared to interfere.

TIPPING J:

Yes.

ANDERSON J:

However you describe it.

TIPPING J:

And the Court must interfere where it must.

TIPPING J:

You either feel driven to interfere or you don't, and that will depend on what sort of a right it is and what the whole shebang is, I think this is a –

ANDERSON J:

It's really intensity of anxiety.

MR BASSETT:

As has just been commented, the reason it's being raised Your Honours is because Justice Chambers and Justice Robertson in the Court of Appeal said that, and indeed Justice Chambers in *Huang* said that the intensity would be light, to use that adjective, and I think that that – the lightness of review or the lightness of intensity is to some extent bound up with the fact that they, in *Huang*, let section 47(3) occupy the field, if you like. As I understand it, the Court appears to be taking a different view.

TIPPING J:

Please don't think I'm personally being critical of you at all, I think it's very important that you've raised it, but I'm just saying, I, together with I think the Chief Justice, I think there's a lot of nonsense talked in this area and it's unhelpful to start trying these adjectival or adverbial adornments of the sort of review you're undertaking.

MR BASSETT:

Well perhaps, if you ask me the reason why I'm raising it –

ANDERSON J:

We can see why you're raising it.

TIPPING J:

We can understand it, I can understand why.

McGRATH J:

It was a ground, it was specified in the grounds, and no one's blaming you for it.

TIPPING J:

Yes, no one's blaming you for one moment, we're just – if you can shed some further light on this, but it really does seem to be a more semantic issue that in the end, you interfere if you think you should.

MR BASSETT:

There are – perhaps if I could just refer very quickly the Court to two decisions and the reason I'm doing that is because the Crown, as I understand it, in their submissions endeavour to put the cases to one side on the basis that the UK cases relate to convention aspects or convention questions, in particular I'm referring to *Mahmood*, which is the decision at volume 5 at tab 126, which is a decision that Justice Glazebrook referred to.

McGRATH J:

Volume 5, page?

MR BASSETT:

Tab 126, paragraph 18. It's volume 5, tab 126 at page 18 – sorry paragraph 18. There is a reference there to, it is page 847 of the report, there's a reference there or a statement made by Lord Justice Laws who said that "However, the application of a standard review…", and referring there to the *Wednesbury* standard in the previous paragraph, "…would in my judgment involve a failure to recognise what has become a settled principle of the common law…", and I stress that, "…one which is entirely independent of our incorporation of the Convention on the Human Rights Act 1998. It is that, the intensity of review in a public law case will depend upon the subject matter in hand and so in particular, any interference by the action of a public body with a fundamental right will require a substantial objective justification."

I do just wish to note, or draw Your Honours' attention to the fact that that particular statement is positively affirmed by Lord Steyn in the *ex parte Daly* case, which is at tab 125.

ELIAS CJ:

You don't need to take us to these authorities, they're very well known to us.

MR BASSETT:

There are obviously other references in New Zealand which I won't bother to refer Your Honours to, set out in the – a wonderful commentary in that regard just in Professor Taggart's 2007 Judicial Review Intensive. I don't propose to say anymore on that.

If I can just address one further question, that is the question of costs. If the appellants succeed on appeal, then in my submission, costs should follow the event, and that costs should be awarded in favour of Mrs Ding. If Mrs Ding is, or the appellants are unsuccessful, then in my submission there should be no costs awarded against Mrs Ding, in my submission, the Crown can hardly

complain about the fact that I've attended because the Crown says that I am, in fact, the only person entitled to be heard on behalf of the children. That's why I'm here.

ELIAS CJ:

So there are no issues of legal aid?

MR BASSETT:

No, Mrs Ding is not legally aided.

ANDERSON J:

She's not eligible is she?

MR BASSETT:

She's not eligible and she has no means whatsoever.

TIPPING J:

That seems to me to be a very compelling proposition, that you're here only because they said you're the only person who could be here.

ANDERSON J:

You might like to consider Mr Bassett whether, even if the appellants lose, you might have an entitlement to costs, as a matter of public interest.

MR BASSETT:

Certainly if the Court was prepared to entertain that, I would certainly be making an application on that basis.

ANDERSON J:

I'll leave you with the idea, there are precedents.

ELIAS CJ:

We certainly appreciate your being here Mr Bassett.

MR BASSETT:

Thank you Your Honours, those are my submissions.

ELIAS CJ:

Thank you. Yes, Mr Mahon. It's just about lunchtime, yes, quite right, it's so engrossing I keep missing all the adjournments. Mr Mahon, we'll hear you at 2.15. Thank you.

COURT ADJOURNS: 12.59 PM

COURT RESUMES: 2.18 PM

ELIAS CJ:

Yes, Mr Mahon.

MR MAHON:

I have been Court appointed counsel for the Qiu children. As Your Honours will note from my submissions Mr Harrison and I have discussed the matter, we're both court appointed counsel, and significant matters which I would have raised have already been raised. And while there are issues of degree of relevance to the Qiu facts, I will not seek to traverse again the matters that have been raised by my learned friend Mr Harrison.

You actually have a plethora of documents Your Honours, as you've noted, by contrast you have a paucity of pleadings on the part of the Qiu children. You will have noted from my submissions the background to that situation and I will now address first the issue of the traditional *Puli'uvea* test and the issue of reasonableness as it applies to the interview of Mr Qiu on behalf of the Qiu children and I refer Your Honours to volume 2 of the case on appeal and it's tab 5, page 297.

I will first be addressing the questionnaire itself and I will then turn Your Honours to the affidavit of the Immigration Officer Mr Wang. It's necessary to of course state at the outset that this is a situation of an interview

of Mr Qiu without the specific ingredients that applied to Ms Ding. However, in my submission from the point of view of the children, that issue is, in terms of the outcome, is not of particular relevance. I will first take you to page 297 which is the commencement of the interview which took place, and in my submission this is relevant to matters that I will address later in terms of what, in my submission, should be the nature of the best interests enquiry. It took place in Auckland Central Police Station and if I just turn to page 298 there is a discussion about whether or not Mr Qiu needs an interpreter. Of course the interviewing officer is also Chinese, unlike the Ding/Ye case the first language of the Qiu children is in fact Mandarin.

I then would like to turn to page 299 where the officer asks Mr Qiu why have you not returned to your home country and his answer, which seems to be an ingredient of Immigration Officers, they write a little bit like doctors, but I think he says, because my first child, it's very hard to read –

ANDERSON J:
Was just.

MR MAHON:
Was just born and that relates – then he moves on to I'm afraid of taking him back to China because of the one child policy in China. He then says, "What effect will it have on you if you are returned to your home country?" And his reply is, "I don't want to go back to China. My two New Zealand born children will not have a future in China." And then he's asked where he will live in his home country and how he will support himself and his answer is, "I don't know."

Further down he refers to the fact that his wife is also an overstayer and of course it's important to remember at this point that while the removal order has been issued, there is still, as of today, been no section 58 humanitarian interview of Ms Qiu. In paragraph 21 he's asked if there's anything else you wish to tell me and he says, 'My New Zealand born children won't have a future in China. They can't go to school in China. They can't support

themselves. My wife and I are afraid …" and I think it's talking about can't get jobs in China, it's hard to read the bottom of that page.

TIPPING J:

Can't find jobs in China.

MR MAHON:

Find jobs in China. Then moving to the next page he goes to stage 2 of the questionnaire and just finds out of course with those standard questions what Ms Qiu does and how long they've been in a relationship. And then on paragraph 32 of the next page he's asked Mr Qiu, will your partner accompany you back to your home country and his answer is that he doesn't know. And then in paragraph 33 asked what effect it will have on Ms Qiu if Mr Qiu is removed, both if she accompanies him and also if she remains in New Zealand. He states that she doesn't want to go back either as she has some problems with officials in China and she's wanted back in China and of course in the casebook that's been the subject of a prior hearing and the refugee ground was dismissed.

Then in paragraph 37, asked about the immigration status in New Zealand of the children. It's noted that they are New Zealand citizens. They have no health problems and he and his wife take care of the children. Again he's asked on the next page whether the children will accompany Mr Qiu back to China and his answer is that he doesn't know. In my submission question 41 is particularly relevant. When he's asked what effect it will have on the children if Mr Qiu is removed from New Zealand, both if they accompanied him and if they remained in New Zealand, and he again raises the issue of hardship for the children in China.

Turning to page 303, again it's very difficult to read this copy, but there's a question in number 50 which asks what his father's full name is and the answer I think is, "I don't want to talk about my parents. They live in another place in China." In my submission it clearly is an issue that's been raised in

the answer to that question, but there's been no further follow up to that answer.

Turning to page 304, continuing the stage 1 interview, they talk about the family in China and he explains he has two brothers and one sister. And he doesn't know what the siblings' current circumstances are in paragraph 62 and I think it's important to remember here, it's now some 12 years at the date of this appeal, since Mr and Ms Qiu have lived in China. At that date of course it was some eight years since they had lived in China.

If you turn to page 305 Your Honours there were no –

ELIAS CJ:

When did they leave China, 1997 was it?

MR MAHON:

In 1997, that's correct Your Honour. If you turn to page 304 in the paginated numbers, there have been some answers given which in my submission warranted supplementary questions. There are no supplementary questions arising from the answers given, either in relation to the hardship for the children, the situation in terms of Mr Qiu's family in children or any other respect.

Then moving to the stage 3 part of the enquiry on page 306. The - Mr Qiu responds where there's been a removal order served on Mr Qiu. He notes that that's occurred. Again he notes that the children are New Zealand citizens and this is of course the, Mr Wang's notes here, he notes that they are New Zealand citizens and it's relevant that he notes that the effect on the children of effectively his removal will be separation. He sees no effect removal will have on the wider family and of course we're aware that Ms Qiu is still in New Zealand and then if one moves to the last page 308. With that information and no other comment the conclusion of Mr Wang is that Mr Qiu is a failed refugee claimant. There are no compelling reasons why a custodial removal should not take place. It should – it's actually been corrected in his

affidavit, it's actually should not. I'm reading it from my note here but it was actually written "there is no reason why a removal should take place" which of course the Qui children would be happy to adopt but he actually corrects that in his affidavit.

Now it is my submission Your Honors that that process at interview shows that he says there are no compelling reasons. In my submission clearly compelling reasons have been raised whether they, when balancing other factors, remain as compelling is another issue but the officer has not made the necessary enquiry to actually come to the conclusion whether or not those reasons meet the necessary standard and without the enquiry he has come directly to a conclusion that there are no compelling reasons for allowing Mr Qui to stay.

TIPPING J:
Well it's just a conclusory statement, isn't it?

MR MAHON:
Yes.

TIPPING J:
It doesn't demonstrate any attempt to weigh the factors on either side?

MR MAHON:
No and the flavour of the submissions you've heard over the last couple of days have been that one cannot make a conclusion until one's actually made an enquiry and gone through a process of weighing the relevant factors and in my submission there are not the factors that Mr Bassett has put to you in submission on behalf of Ms Ding. But nevertheless, given the effect on these children as we're saying, they are going to be losing one of their parents, the outcome justifies a much higher standard of analysis than has been shown on page 308. My friends, Your Honours, of course have addressed the principles of judicial review as they apply to these type of cases and for the Qiu children, I adopt the submissions of both Mr Harrison and Mr Bassett in this respect.

TIPPING J:

Because of the paucity of reasoning, if you like, or the lack of reasoning, I suppose you're driven to argue that this is, a), there's an insufficient mental engagement with the necessary process, and b), it's unreasonable in any event. Is that the essence of your clients argument?

MR MAHON:

That is the essence and so for that reason, Your Honour, I don't need the factual matrix, if you see that it's relevant for Mrs Ding in this area, it's as simple as that.

For the sake of completeness, I will refer Your Honours to the affidavit made by the Immigration Officer and that's volume 1 of the case at tab 23 and it's page 1042. Sorry it's volume 5 Your Honours, the exhibits of course are in a separate volume to the affidavits and it is at page 1042 of volume 5. The first point to make is evident from page 1048, is the affidavit of Mr Wang was sworn on the 23rd of June 2005, the humanitarian interview took place on the 15th of June, so this affidavit was sworn and filed shortly after.

The relevant part of the affidavit is on page 1045 and it starts at paragraph, I will start at paragraph 16 and the previous paragraphs, the Immigration Officer has merely set the scene for the Qiu family as it relates to the immigration matters.

He deposes in paragraph 16 the purpose of his interview with Mr Qiu was to consider all the circumstances and evaluate the personal factors of Mr Qiu and the public interest factors in play before making a decision is what should happen with regards to the proposed execution of the removal order. He notes in paragraph 17 what he recorded on the form in terms of the concerns disclosed by Mr Qiu in relation to no future in China, schooling difficulties and the fact that he notes that Mr Qiu didn't refer to other children in China at the time of the humanitarian interview which of course is in the evidence that he actually does have two other children in China. He concludes in paragraph 18

that in making his decision as to whether to continue with the removal, he took into account the ICCPR and the UNCROC obligations and also the interests of the children as a primary consideration. Also, he took into account the young age of the Qiu children and the fact that their language they speak at home is Mandarin, and of course –

TIPPING J:

So one child was 5 or thereabouts and the other was –

MR MAHON:

I think two months Your Honour, very small, only just born. And he then notes and I think particularly paragraph 21 is relevant, he looks at public interest factors and of particular importance to this officer is his view that Mr Qiu has been unlawfully in New Zealand for almost five years and he's not taken up the opportunities he's been previously given to leave the country. Those are particular matters for Mr Qiu, those are not, in terms of the public interest issues in terms of the Qiu children matters which should be visited on them. They had been here in respect of Alan for five years and, in fact, one of the Qiu parents was legally present when Alan was born, neither of Mr or Mrs Qiu were legally here when Stanley, the youngest child was born.

So there is nothing further, in my submission, that's shown on the face of the affidavit –

ELIAS CJ:

But the indication that he requires a Mandarin interpreter is relevant to the circumstances of whether the family culturally relate to New Zealand or to China, so it's a bit unfair to say that it's got nothing to do with the Qiu children, it's a measure of where they're settled.

MR MAHON:

That's correct Your Honour, the only point I would make there is that one can look back at immigrants to countries over many years where a first generation will not be that fluent in the language.

ELIAS CJ:

Yes, absolutely.

MR MAHON:

But I take your point. So I don't wish to take the matter of the humanitarian interview further than that, but in my submission, I don't need to take the matter further than that in terms of the failure to effectively work out the factors which will weigh – to weigh, and in fact weigh them, and so one can't presume, in my submission, merely from the outcome which is recorded by the Immigration Officer that he's met his legal requirements.

For the sake of completeness in this area Your Honours, I'm now going to refer you to where in the Court of Appeal decision the issue of –

ELIAS CJ:

Is that all you're taking us to in terms of the facts, Mr Mahon? There's nothing further in affidavits that we should be looking at? We don't have any details about what the position is of the five year old.

MR MAHON:

There is no evidence before the Court in respect of the position of the five year old.

ELIAS CJ:

Right.

MR MAHON:

I have filed a memorandum of my meetings with the children before each of these appeals, that's not, of course, evidence, that is for the purposes of alerting the Court to the fact that things do change and I'll be addressing the

issue of that addendum at the stage I deal with the parens patriae issue later.

The affidavit evidence filed on the judicial review really, in a general sense, adds to the evidence given by the parties as to the concern they have about the effect on them and their ability to maintain the children as a result of a return for both of them and the concern in relation to the black children policy as identified in the affidavit evidence. It's obviously necessary to note at this stage of course, there was no 47(3) process undertaken by Mr Qiu and he's gone right to the end of the process.

If I could just refer Your Honours to the case on appeal, volume 1, Justice Glazebrook's conclusions in relation to the Qiu children are at paragraph 316 of that volume which is page 92, and it's, of course, Her Honour's judgment the Qiu children rely on, she found at paragraph 316 that while the case with regards to the Qiu children is not as strong as that of the Ye children, nevertheless the decision to remove Mr Qiu can be impugned on ordinary administrative law grounds of failing to consider relevant considerations. The Qiu children's citizenship was mentioned but there was no attempt to assess that as a separate consideration. Further, the Qiu children's views were not sought and there was inadequate information as to their situation in New Zealand and likely situation in China. She finds that she doesn't need to decide if those factors would have led to the appeal being allowed, because the Qiu children's status as black children raised a real issue as to the possible detriment to them of Mr Qiu's removal. Their status as black children received no consideration at all. Their Honours Justices Hammond and Wilson at page 120 at the foot of the page, paragraph 419, they record that the circumstances of the Qiu family were set out concisely in Justice Glazebrook's judgment and they deal with the Qiu children very briefly in his humanitarian interview. Mr Qiu stated he was afraid of taking his two children born back to China because of the so called one child Chinese policy. He was concerned about his children's futures as they would not be able to attend school in China. He had concerns at being able to find employment for himself and Ms Qiu. The particular Immigration Officer reached the

conclusion that there were no compelling reasons why a custodial removal of Mr Qiu couldn't take place and Their Honours found no proper basis on which the Court could intervene on public law grounds in that decision.

Finally Justices Chambers and Robertson on page 151 of the appeal, they find in one paragraph, at paragraph 545, there was no dispute that Messrs Zhou and Wang who made the Qiu removal orders, that's the Mr Zhou who's in the other case, and Mr Wang who is a section 58 interviewer, were satisfied that 52(1) applied to Mr and Mrs Qiu and that they were correct to be so satisfied. That also means that the Qiu appeal must fail. And there is – that therein lies the extent of the discussion in the Court of Appeal on the position for the Qiu children.

What comes out of the questionnaire in my submission is the issue clearly of the black children which has been addressed in previous submissions and I will return to later. There are also issues that arise in terms of Mr Qiu's family back in China. There are some question marks in terms of the relationship he has with his own family. And the difficulty in advocating for the Qiu children of course is that Ms Qiu hasn't had the section 58 stage interview. In my submission it's a situation where on the basis of the interview of Mr Qiu the loss of one parent can effectively be taken to mean a loss of both parents at the end of the day and that's how Mr Qiu saw it when he was being interviewed. That's not to minimise, in my submission, the fact that losing one parent is significant and relevant to this Court's consideration. As there was no information about the Qiu children, how does one know whether there wasn't a particularly important relationship between, for example, Mr Qiu and his five year old son? A significant relationship that could have become a compelling matter and dependent of the usual relationship between a father and child. It was simply the Immigration Officer did not know.

Before I leave the evidence to deal with some other issues, I would just draw Your Honour's attention to case on appeal volume 5 and it's page 1025. If you go to 1024 the intituling is the affidavit of Mr Qiu in support of his judicial review application. It's paragraphs 11 to 18 where Mr Qiu records what on his

evidence is the effect for him of a return to China and I refer particularly on page 1026 to what he perceived or understood to be the effect on the children of being forced to return. In paragraph 14 he says, as a non-hukou, that's a permanent resident registration, the children are not allowed to be recruited by primary or intermediate schools and can only be recruited after the usual recruitment time. There will be high fees, he records there, and if all the normal sites are full, these type of students are not permitted to enrol. Due to his financial circumstances he would be arrested because he would not be able to pay the fines and the children would suffer as a result of that, nor could they be guaranteed a Chinese visa as they don't have Chinese citizenship. In my submission the black children material referred to in my learned friend Mr Harrison's submissions and the matters dealt with in that area by Justice Glazebrook do point to some uncertainty as to whether it's an automatic result that children returning in these circumstances will be able to have Chinese citizenship. He further records the discrimination he perceives that the children will face and the economic pressure on him and of course by implication he is talking for both he and Ms Qiu in paragraph 18 because of breaking the one child policy their ability to support the family.

As the major issues that are the subject of the matters before you for both children in these appeals have really already been addressed by other counsel, to a major extent in any event, what I would like to now briefly turn to, as it affects the Qiu children, is the issue of the nature of the best interest enquiry. In doing so I will be referring to some of the Crown's submissions in this area which would, to some extent, be dealt with otherwise in reply. But I think for the point of view of context for my submissions Your Honours it's necessary to refer specifically to some of the Crown substantive submissions.

It is accepted by all that the minimum standard is that the best interest of the children are a primary consideration in these decisions. One needs to be more specific than that however and I would first just refer to paragraph 8 of the substantive submissions of the Crown 9th of April 2009. Sorry page 8, paragraph 34. I am dealing with this area of the Crown's submissions in some depth because it's my premise on behalf of the Qiu children that the difficulty

the Crown has, that there is in fact no process of enquiry for the best interests of the children, and because there is no such process that's why there are so many difficulties with these cases. There is first a statement in paragraph 34 that administrative guidelines were developed following *Tavita* at all levels of immigration decision making, taking into account relevant international obligations. So that is accepted in that part of the submission.

But if one turns to paragraph 108 of the submissions, which is on page 30, with one hand the Crown has given an acknowledgement that the best interests of the children are considered at all stages in the enquiry and then in paragraph 108, "Interpreting legislation consistently with UNCROC does not require full consideration of the best interests of the children at every step in the process." So therein lies a difficulty, and the citation in support of that submission is *Zaoui (No 2).* Now of course, the difference for Mr Zaoui, he had significant differences to the Qiu children of course, relevant to the Court is that there's no best interests enquiry for Mr Zaoui. There are other factors that the Court dealt with here in respect of Mr Zaoui, but it wasn't a best interests enquiry. So, in my submission, that is not a case which fits neatly with the breadth of the enquiry being at all stages in the immigration process.

Your Honours have pointed out in response to submissions over the past couple of days that there will be times of course when there hasn't been a 47(3) enquiry which applies in this particular case for Mr Qiu, and there is then very little information available to the Immigration Officer. On the authority of *Baker*, the leading Canadian decision, it's accepted that the Immigration Officer needs to be alert, alive and sensitive to these issues and that case is at tab 142 in volume 6 of the casebook.

TIPPING J:

Is that neat phrase, "alert, alive and sensitive" yours Mr Mahon or is that taken from *Baker*?

MR MAHON:

It's taken from *Baker* Sir, I don't have such an original thought. It's referred to –

McGRATH J:

I think the passage was cited by Mr Harrison.

MR MAHON:

Yes, it was cited by Mr Harrison. It's also referred to in paragraph 113 of the Crown's submissions in page 32 of their principal submissions. So alert, alive and sensitive is, in my submission, an ongoing, continuing process that applies from the beginning of the immigration process until the end at the degree relevant to the particular case and the particular child involved. I just refer you briefly in support of that submission to paragraph 6 of the casebook, of the authorities, and it's tab 153 and it's the case of *El Sinth*, if that's how one pronounces it.

ELIAS CJ:

Is that volume 5?

MR MAHON:

Sorry, the Canadian cases are volume 6.

TIPPING J:

CK v Minister of Citizenship is that the one?

MR MAHON:

Sorry?

TIPPING J:

Did you say 153? I must have misheard you I think.

MR MAHON:

My apologies, the case I'm referring you to is in fact tab 154 and it's *Legault*, *Minster of Citizenship and Immigration v Legault* is the case, and this is the case Your Honours of a United States overstayer in Canada and I'm particularly, I'm referring you to paragraph 13 of the decision on page 148, Their Honours at the bottom of 147, they were answering questions 2 and 3 posed to them and question 2 was, "Is the mere mention of the children sufficient to fulfil the requirements of *Baker*?", and if one goes to the next page, 148, the answer is, "No, the mere mention of the children is not sufficient. The interests of the children are a factor that must be examined with care and weight with other factors. To mention is not to examine and to weigh." And in my submission, that's very much the factor in the interview of Mr Qiu as far as the children mentioned, but no examination or application of weight.

I'll shortly come to issues which, in my submission, are relevant from our jurisdiction to inform –

ELIAS CJ:

There are New Zealand authorities, of course, which say exactly the same thing.

MR MAHON:

There are. The reason I'm dealing with the overseas authorities Your Honour, I think it's important –

ELIAS CJ:

Yes.

MR MAHON:

– to clarify the continuity here, but yes I will be coming to those.

TIPPING J:

Have you finished with the Crown's submissions for the moment, Mr Mahon, or are you still –

MR MAHON:

I'm still actually with them for a short time Your Honour. The reason I need to address the overseas jurisdictions is that they're actually quite helpful to understanding that there is a level of enquiry in other parts of, particularly the commonwealth which is more than, in my submission, what has happened here, a ticking of the boxes. If one refers to the Australian High Court case of *Teoh*, the leading case, and that's number 7 of the authorities and it's tab number 167.

If I could ask you to cross-reference again to the Crown's submissions on page 30, the bottom of page 29, that's paragraph 106. A feature of the Crown's position in this case that –

BLANCHARD J:

I'm sorry, which page of the Crown's submissions?

MR MAHON:

Page 29 Your Honour, 106, it's at the bottom of page 29 of the substantive submissions of the 9th of April.

ELIAS CJ:

Where's *Teoh*, what tab?

MR MAHON:

Teoh Your Honour is tab 167 and that's in casebook 7. And the reason I'm raising *Teoh* is it's cited as an authority in this paragraph in relation to the further enquiry obligation and I think it's important to accept of course that other jurisdictions will have slightly different legislative provisions but also the factual differences, but the submission is that imposing a positive duty of enquiry on immigration decision makers beyond facilitate any articulation of those interests by parents is inconsistent with Article 18 of UNCROC. Then the proposition that such a duty exists, or it was rejected, and going to page 30, in *Teoh*. Well, if one looks under tab 167 and then turns to page 292 of

the High Court decision, this is a situation that one wonders whether Mr and Mrs Schier arrived at the immigration office with Eastlite folders of international conventions at the bottom of 292 the last paragraph says, "In other respects we did not consider that there was a failure to take relevant matters into account. It cannot be said that the delegate either failed to turn her mind to the hardship the family would face or failed to have regard to the consequences of the break up of the family unit. This is the relevant sentence. "She had a considerable amount of detailed information about the respondent's wife and children before her as Justice Carr noted her assessment of their plight was very gloomy indeed."

So the extent of the enquiry and to this extent I am relying significantly on Justice Glazebrook's detailed analysis here, one has to facilitate the information coming out. It is not an expectation that the Immigration Officer is going to search around for all the information but we're here talking about children and in our domestic jurisdiction in other areas, it is very much an inquisitorial process which is necessary to a certain degree and in my submission the Qiu children should not be disadvantaged by the ability or not of Mr Qiu to understand these processes and provide the information to the officer.

I pointed out to Your Honours a relevant part of the questionnaire was the fact that the interview with Mr Qiu took place in the Auckland Central Police Station. He was about to be placed on a plane for China. It is unrealistic to expect someone in Mr Qiu's position, unaware of the processes of the legal system in New Zealand, and the rights that his children may have, to give an informed response to the questions from the Immigration Officer about the effect of his removal from New Zealand on his New Zealand citizen children.

ELIAS CJ:

Sorry, can you just remind me, he arrived in 1997. This interview took place?

MR MAHON:

In 2005.

ELIAS CJ:

And in the meantime they'd applied for refugee status and that had been turned down when?

MR MAHON:

That was, in my submissions Your Honour it's in paragraph 2 of the short chronology.

ELIAS CJ:

Right, yes.

MR MAHON:

In my principal submissions. They arrived at separate times in New Zealand, only a few days apart. Ms Qiu at the end of 1996 and Mr Qiu – no, 12 months apart, in 1997. They had had their refugee claims turned down and Ms Qiu – Mr Qiu had in fact taken very little part in the processes through the immigration, it mostly had been Ms Qiu so he had not, if you look at the 11th of June 2001, the Removal Review Authority dismissed Ms Qiu's appeal and that then went to judicial review before Justice O'Regan on the 21st of December 2001 and the special direction request in July 2002 was declined.

TIPPING J:

So the father had been in New Zealand unlawfully for about four years?

MR MAHON:

Approximately, yes.

TIPPING J:

But he'd been here lawfully while all these other processes were going through for about, or approximately the same amount of time coincidentally?

MR MAHON:

Yes, I think that's the presumption one draws from the factual scenario. I can't actually give you right at the moment –

TIPPING J:

No, no.

MR MAHON:

– chapter and verse of that detail.

TIPPING J:

Broadly speaking, that looks – it seems to take a huge amount of time for these processes to be – the refugee thing took four years.

MR MAHON:

And in my submission Your Honour that is relevant to the children that these processes take so long.

TIPPING J:

Well they weren't born at this stage, were they?

MR MAHON:

They weren't born at this stage but they've actually, since then of course they've had a period of about four years in the court process and that must be relevant, a relevant factor.

ELIAS CJ:

I was just wondering why, I suppose it's somehow in the legislation, why this humanitarian interview was being conducted in the police station when he's been here so long and has a business. Why that process needed to be so pre-emptory…

MR MAHON:

And that's the difficulty for getting the right information. I don't know the answer to that Your Honour.

TIPPING J:

When they serve the order they take them into custody don't they?

MR MAHON:

That's what happened.

ELIAS CJ:

But there is still a section 35 route. Was any consideration given to that?

MR MAHON:

It appears there wasn't. And if one looks at that situation in the context and I refer you here to my written submissions. This is from the point of view of the children, page 11 of my substantive submissions in paragraph 27, it is my submission there that there's an analogy with the children in this case with what often happens for children in cases under the Children, Young Persons and Their Families Act. That Judge Moss was delivering a paper to the Family Law Conference in 2003 and she commented then about the regrettable fact that there was less well developed jurisprudence in respect of that Act. She suggested reasons for the state of affairs which also apply to immigration in my submission, where the powerless state of most families who come to require intervention, the impoverished state of most such families, the poor resourcing of legal services to such families, and finally the undeveloped state of our understanding of the rights of the child despite UNCROC.

Now when one looks at how the information from these children was taken in the cells of the police station, one looks at the children, and they are very much in the situation that Judge Moss describes and as New Zealand citizens it's, in my submission, a major concern that significant information required for that balancing exercise for the Immigration Officer is obtained in those circumstances and in that manner. You may well ask me how that information should be obtained and my answer would be that it is not necessary for Immigration Officers to be lawyers, nor that –

TIPPING J:

Probably a good thing they're not.

MR MAHON:

They should be doctors Your Honour with their handwriting. But really it's necessary as Justice Glazebrook points out, for the Immigration Officers or the Immigration Service generally, to have the knowledge of the relevant factors for children at particular ages and stages. It could be, for example, that the interview of Mr Qiu, if it had to take place in the police station, he'd be asked to have a support person with him for example, to assist him in that process. There are many different ways that one could ensure that the position of the children, and of course relevant matters for him personally, were obtained in a more reliable manner.

TIPPING J:

How would you put it? Would you put it that they must make reasonable enquiries or that they must – there's got to be some – and I feel the force of your submission that the process doesn't seem to be sufficiently geared towards uncovering or ascertaining what is best for the children but one has to be a bit practical about this. You can't expect to spend ages on every case. How would you formulate the requirement?

MR MAHON:

Well the word reasonable enquiry would probably be a good summary of what one would do. In most situations it's quite accepted that the parents are expected to provide the underlying information that will trigger that enquiry and I think that Mr Qiu did that.

ANDERSON J:

I just wonder whether that sits, as put, comfortably with the stress in the Act that the information has to come from the parent or applicant and I wonder whether it might really be a case of saying, yes, it has to come from them but realistically and in fairness they have to be assisted to provide that information by appropriate means.

MR MAHON:

I think Your Honour Justice Glazebrook talks about educating the parents to understand the relevant information that they have to give and that's perhaps the assistance.

ANDERSON J:

The result may be the same but that path may seem more consistent with the statutory scheme and reconcile it with the underlying point you're making I think.

TIPPING J:

Is there some force in the thought that without, it might need further definition, but the problem here is that they were reactive whereas they should have been, to an extent anyway, proactive in protecting or ascertaining what was best for the children.

ANDERSON J:

Facilitating the provision of information.

MR MAHON:

I think that's right Your Honour and I think that I suppose an analogy of social workers who have a particular knowledge of processes for children gets them at least some minimum information without any lawyer involvement until later when it's shown there are care and protection concerns at the level where intervention is required and some minimum enquiries, as for example to schooling issues for Alan may have brought up something particularly relevant and so in my submission there is an obligation to make a minimum reasonable enquiry but it's of course quite case specific –

TIPPING J:

That's the problem, isn't it, it's case specific and it's not easy to see what further could have been reasonably done here that might have made any difference.

MR MAHON:

Well of course –

TIPPING J:

It's a dangerous proposition to say that nothing would have made any difference because you don't know quite what it was.

MR MAHON:

We don't know. The family lawyer in the Family Court deals with different levels of enquiry in terms of for example a Care of Children Act case every day and a Family Court Judge –

TIPPING J:

But here we have children who were five and two months. Well the five year old, and he'd only just gone to school by the look of it, it's a bit fanciful, isn't it, to suggest that much more could have been done with him. Was it a him,? Yes.

MR MAHON:

It's a him, both boys.

TIPPING J:

I mean it's all very fine in theory but how is it actually going to be administerable?

MR MAHON:

Well the answer is that there are attempts in other jurisdictions to find a process for that enquiry. A starting point here of course is that section 141 process for alien children, there's at least an attempt to ask –

TIPPING J:

But let us assume I'm with you on the principle of the thing. That there ought to be some element of pro-action rather than just being reactive to whatever pathetic utterances come from the parent. It's going to be very hard to do anything other than give a very general statement of reasonable enquiries in the circumstances or something like that, isn't it?

MR MAHON:

Well if I take the example of the family in this particular situation. The claim of the black children concern has been raised for both the Ye and the Qiu children. It appears that the Immigration Service via government agencies will have some information in relation to that issue.

TIPPING J:

But in this case you've got the point that they didn't take that into account at all, or didn't appear to.

MR MAHON:

It was raised.

TIPPING J:

It was raised but it wasn't really brought to charge so to speak. But I'm more interested in trying to give some, if there is possible to give some general statement which is the role of this Court. It's all very well to say it's case specific but that doesn't give anyone any great help as to what's supposed to be done.

MR MAHON:

Perhaps if I can return to that point –

ELIAS CJ:

Perhaps take us back to the – I'm just thinking about the provisions of the Immigration Act which Mr Harrison took us to but with the benefit of I think developing understanding it occurs to me that the provisions there might be adapted in the case of New Zealand citizen children because they, although

they're about the representation of dependant children by parents, it seems to be in the context of dealing with dependant non-New Zealand citizen children, just looking at it again quickly, and it may be that the procedure in the Immigration Act with appointment of someone that if no other appropriate person is available, someone from CYPFS, is it? No, someone responsible for the administration of the Children Young Persons and Their Families Act. I mean we do have an awful lot of court appointed lawyers for all sorts of applications affecting the human rights of children. It may be that the correct process is simply to ensure that there is separate representation of New Zealand citizen children.

MR MAHON:

Well that would obviously be the ultimate outcome, that would be the optimum outcome. It may also be that the Immigration Service to actually understand the separate enquiry which, in my submission, permeates all of the immigration process when children are involved, employs social workers who have that particular knowledge, who are dealing with these files. So one point Your Honour is legal representation which of course would be the ultimate benefit for the children but there would also be the possibility in my submission of a greater knowledge within immigration in relation to these issues which would answer Your Honour's question in terms of what were the tests going to be.

In the Court of Appeal it was my submission, which again it is here, and I'm just being referred to by Mr Harrison to page 46 of volume 1 of the case of appeal which is Justice Glazebrook's comments here.

TIPPING J:

Is this at page 41?

MR MAHON:

This is page 46 Your Honour, paragraph 141. And that's consistent with the comments Your Honours have made in terms of the nature of that process.

There were legal specific rights which need to be assured of citizenship for these children and that process does mandate a very serious process to ensure that those rights are protected. As Her Honour says at paragraph 142, it's not that the alien children in 141B should not have the process which they have. A responsible adult et cetera and of course the Crown would say that responsible adult should be the parents in this case but I'm submitting that that's not necessarily the case. It's jut that Her Honour in my submissions correct them and it should be no lesser standard than those children are given.

TIPPING J:

That would really largely cover the natural justice point too, wouldn't it?

MR MAHON:

It would.

TIPPING J:

If it was, it should be part of the process that there is someone there, particularly with a New Zealand citizen child, to look at it specifically from the child's point of view?

MR MAHON:

And in my submission that's where our domestic law is of assistance because we have developed a very independent child enquiry within other areas in terms of the Family Court jurisdictions and of course the case of *D v S* the Court of Appeal decision was very clear about the separate nature of that child enquiry without a prior presumptions and not trying to link that in with the parent interests, how the parents perceive it.

ELIAS CJ:

Well indeed now that I look at it again the provision in section 141B envisages representation through the parents precisely because an alien child's interests are likely to coincide with those of a parent without a right to be in New Zealand. But the case may be quite different where one is dealing with a

New Zealand citizen child because the parents may well be using the children rather than considering the children's best interests and some sort of independent assessment may well be right.

MR MAHON:

And that's – of course we don't know until that independent assessment –

ELIAS CJ:

Yes.

MR MAHON:

– whether or not that is the case and so the – and it's not a situation where, as the Crown submits, that the fact that one gives these entitlements to citizen children is somehow in breach of UNCROC which doesn't differentiate between citizens and non-citizens. The UNCROC enquiry is an entitlement of all children, it's the enhancement issue, whether that's a separate right or whether it's an enhancement of the overall best interests enquiry for the children which citizenship brings, and in my submission, it's a significant matter and when we look at the cases in the United Kingdom and in Australia, we have to keep in mind of course that you are not a citizen by birth there in those two jurisdictions for over 20 years so there are no cases like this case that will arise in the United Kingdom and Australia.

TIPPING J:

And none after 2006 in New Zealand.

MR MAHON:

None after 2006 in New Zealand.

TIPPING J:

So we're not creating a – well, there may still be residual issues there, mightn't there, the fact they're born in New Zealand could be a relevant factor, quite apart from citizenship issues.

MR MAHON:

That's right, it still could be relevant to the best interests enquiry, and in fact if I could take the opportunity at that point Your Honours –

ELIAS CJ:

Well their guardianship is directly in issue here, I don't know whether the Qiu children perhaps aren't in exactly the same position, but the – because their mother has yet to be dealt with under these procedures, but the indication before the decision is taken under section 58 in respect of the Ye children that the department is about to have them, have CYFS step in, indicates that they're going to be embroiled in a New Zealand legal process in any event.

TIPPING J:

Unless they choose, the parent chooses to take them.

ELIAS CJ:

Yes.

TIPPING J:

But would the, what used to be called the Guardianship Act, what's it called now, the Care of Children Act?

MR MAHON:

Care of Children Act.

TIPPING J:

Would that apply to these children? It would, prima facie, wouldn't it?

ELIAS CJ:

Yes.

TIPPING J:

They were born in New Zealand so the parents are –

ELIAS CJ:

Well they're here, so it applies to them.

TIPPING J:

Mr Harrison talked a lot about paramount and so on but he didn't seek to draw any assistance, if you like, directly as I understood it from the application of the Care of Children Act to them, it was more by analogy. I wonder whether it doesn't actually directly bear on them.

MR MAHON:

We sought to draw that analogy in the Court of Appeal unsuccessfully directly, but it, I mean, the – if I could just refer to my submissions on that point.

TIPPING J:

This is more powerful than the parens patriae, if it runs, I would have thought, because parens patriae is rather valuable but rather amorphous.

MR MAHON:

In my submission, the parens patriae is a fallback position effectively, which is why, if other statutory provisions can deal with the matter, it's not invoked, but you do face a situation with all five of these children that they've been here with the Court's sanction, their parents, sorry, have been here with the Court's sanction on the basis that the Court process has to be completed and it's directly relevant to the Court to ensure that the best interests of these children are protected and I'm concerned that the Crown's submission is that these appeals merely dismiss and the implication is that parents are put on the plane, it just can't be.

I just refer Your Honours to page 13 of my substantive submissions where at least, on an indirect basis, in my submission, paragraph 13, the Care of Children Act is directly relevant to these children.

TIPPING J:

What page were you on?

MR MAHON:

Paragraph 32, page 13. Now there is of course a direct recognition of UNCROC rights in the Care of Children Act –

TIPPING J:

Sorry to interrupt again, but does the Care of Children Act make any point or distinction about the parents being unlawfully in New Zealand?

MR MAHON:

It makes no distinction, none at all.

TIPPING J:

It's got no reference to that dimension?

MR MAHON:

No, and I think Your Honour Justice Tipping did make a point that UNCROC is directly included in the definition of the Care of Children Act to some extent.

TIPPING J:

I doubt it was me, Mr Mahon.

ELIAS CJ:

I made the point.

MR MAHON:

Sorry Your Honour.

ELIAS CJ:

He always grabs my good ideas.

MR MAHON:

In fact, UNCROC has informed – the Guardianship Act didn't directly refer to rights of children as such like as the Care of Children Act does in its definition

clause, but in our cases under the Guardianship Act for a good decade, there's been specific reference to these rights of the children under the convention in the way in which we have applied our cases, so even there without a specific reference, these rights were seen as directly relevant to cases involving children.

TIPPING J:

It would seem a little odd, wouldn't it, if this issue was before a Family Court Judge, the Judge would have to direct him or herself by the first and paramount standard, but if it's in front of an Immigration Official, he has to direct him or herself according to a lower standard. I'm just thinking aloud Mr Mahon, but it just does introduce something a little strange.

MR MAHON:

I think, though, that the best interests enquiry for children Your Honour is a standard for children who are dependent, which is why they don't represent themselves in proceedings, so the level of the enquiry and the obligation for children enquiries, it mightn't be called paramount, if you find that that's not the situation notwithstanding the submissions on behalf of the appellants, but it's such a high level as a first level enquiry, sitting alongside once the enquiry's been completed, the enquiry in relation to border control and other factors, that in a way I wonder whether it actually matters because the onus on the person making that enquiry, particularly with citizen children, is so high in any event.

If I, just for the sake of finishing this particular point, I refer Your Honours on page 12 of my submissions, and I'm referring here to paragraph 31 on page 12, to the various practice notes, the foot there, and that last line should read 2006, not 2000, it was from 2000 that the UNCROC principles were in the practice notes and I won't go to them, but they are in the material before you, and they develop very much the focus on the separate nature of enquiry for children and the principles of UNCROC are directly referred to in those practice notes from 2000 for lawyers who are practising both under the Care of Children Act and the Children, Young Persons and their Families Act, and

of course the precursor to the Care of Children Act, the Guardianship Act applied for five years before these principles were more directly invoked into that legislation.

Referring back to page 13, paragraph 32, it is my submission therefore that the level of enquiry is at the very – a very high standard and I set out in paragraphs A to F the extent to which children are given rights and as Your Honour has mentioned, these are children who are not necessarily citizens under our Care of Children Act. Particularly in principle 5 for the Qiu children, their rights to the love and care of both their parents is one of the principles of that section in terms of the principle which guides the Judges in that legislation.

If I could just turn to number 9 of the – while we're talking about the nature of that enquiry, going back to section 141B, it's number 9 of the bundle of authorities and it's tab 238 – it's tab 239, and I just turn Your Honours briefly to, this is to elicit the information specifically for a child, and in page 3 of that form the attempt under section 141B to address the relevant issues for the dependant child. Now, I'm not saying that's –

ANDERSON J:
What tab again please?

MR MAHON:
Sorry it's tab 239 and it's page 3 of the form.

TIPPING J:
Has this been cited because it shows what can be done in another context?

MR MAHON:
I would say inadequately but at least something can be done and it would have to be in combination with other matters. There's also a brief mention in one of the Australian cases of an approach that the Australians have taken in this area and I could refer Your Honours to the authorities, number 7 and the

tab is 162 and that's at the beginning. Now just a brief factual background. This was a situation of a Korean citizen father being married to an Australian citizen mother.

ANDERSON J:

By the time we find the bundle we've forgotten what the tab number is.

MR MAHON:

Sorry the tab is 162 and bundle number 7. If I could just turn you to paragraph 13 which is the second main page of the decision on page, I think at the top it's page 4 of 16. There is an attempt, that starts paragraph 2.13 to 2.16 of the directions speak of the best interests of the child. There is an attempt, at least paragraphs 13A to 13J, to look at what the issues might be for the children in that particular context and I merely draw that to your attention to say that these things are possible. It might be that some expert advice will be required but it has definitely been dealt with in other jurisdictions and that's a case from Australia in 2005 so it's a very recent decision.

TIPPING J:

So your argument, as I perceive it in summary, is a matter of process, it was an inadequate, and as a matter of actuality, in your case it was inadequate?

MR MAHON:

That's correct Your Honour. That's the summary of the position. Just moving to the matter of the issue raised as to the relevance of the five year old's view. Referring to the decision of Justice Glazebrook in volume 1 of the case on appeal, paragraph 145. In my submission here, just briefly read the paragraph, "Any removal decision is one with significant effects on the child and in particular a citizen child in light of this and New Zealand's obligation under UNCROC to take into account the best interests of any child as a primary consideration, Immigration Officers must ensure that any representative of the child, usually the parents, is informed of his or her role and the questions put to the representative are specifically directed to ascertain the views of the child particularly with regards to the child's situation

in New Zealand and the likely future situation should the parent or parents be removed. A proper opportunity will be afforded to the representative to ascertain the child's views in a child friendly manner."

It is very common now for five year old children to be interviewed about their perception from the perspective of their world, of their life at any particular time in family court cases and in my view it was an obligation on the Immigration Officer to make that enquiry in a child friendly manner, at least obviously only in respect of Alan the five year old.

Now the weights to be given to what Alan says. There will be some relevant weight. Who knows what the proper interview will uncover for Alan in respect of his experience in New Zealand. As I say in my addendum in terms of my interview with Alan of course he doesn't understand what living in China means and it's quite accepted that that second phase of the enquiry would be a matter that would be unlikely a five year old would understand in a way that would be relevant to the Court.

Just briefly turning to the issue further in terms of the nature of that enquiry. There is the suggestion that to some extent one can have a presumptive enquiry. One can presume that it's best for these children to remain in New Zealand and I think in many cases that would be correct. What the leading case in the Court of Appeal of *D v S* the relocation decisions tell us is we don't have presumptions and it's very important that we're very careful to consider it may in fact be in the best interests of children where the issue is whether they live here or in Johannesburg or Kuala Lumpur that, there may be reasons why it's very much in their best interests to live in some other city. There are particular factors in poor countries, especially with the risks, in our submissions, for both appellants for China, but there can be no presumption necessarily that that is the best for the children, that they remain here. It will nearly always, one would hope, be the case and – Alan was a very promising opening batsman, I think we would be obliged to retain him here. But otherwise it's a situation where until you've undertaken that enquiry you don't know and the proper process is to make the enquiry without presumptions.

To look at the particular circumstances of the children and to understand and this goes back to the fact that the best interests enquiry permeates the whole immigration process, the children, their experience and their views are constantly changing. I think many Family Court Judges would love to have the principle of res judicata in Family Court cases but unfortunately for the Judges these cases come back to them over and over again if the situation for the children changes in a relevant way. That's why one can't actually limit that enquiry if we're actually carrying out the legal obligations imposed and accepted in *Tavita* from UNCROC in respect of children. And that applies of course to citizen and non-citizen children.

I think that the Immigration Officer in the case Mr Wang for Mr Qiu had the same danger that he made, I submit, it can be drawn into the comment he makes, it's the fact that Mr Qiu has been an overstayer for five years, from his point of view, which is the only factor, it's the only factor he mentions, and he's really going back to –

TIPPING J:

But he seems to be – the first thing he mentions, as I recall, is failed refugee claim. Well that's all very splendid vis-à-vis him but it's not quite so splendid vis-à-vis the children.

MR MAHON:

He starts and finishes with that –

TIPPING J:

Yes.

MR MAHON:

– and again that is why when I referred you to the section 141B form you cannot have an enquiry for children, in my submission, which is credible unless it's a separate enquiry because it gets moulded into that adult enquiry, so adult interests in fact become the main focus. I won't go to it in detail but in

number 3 of the authorities I put in a case, and you may wonder about the relevance of this case as – sorry I'll just check the reference. It is, it's tab 98 and the casebook is number 3. This is actually a case from 1923 and I don't seek to rely on it in a significant way.

ELIAS CJ:

I wondered why that was there.

MR MAHON:

But this is a case of Justice Adams in 1923 and I'm only bringing this to your attention to actually make the point that for children we have to constantly focus not on our own views of accepted behaviour or not, like the immigration's view of an overstayer, but the interests of the children. This is a case Your Honours where during the First World War the husband, the father had gone away to fight with the Australian forces from a New Zealand part of them and while he is away his wife had had an affair with a man who had not gone away to the First World War and this is a situation where His Honour makes a point, if I can turn you to page 94, it's only a very brief case.

ELIAS CJ:

What is the point of your taking us to this case really?

MR MAHON:

I just very briefly to say in that case it was the view of the Judge that the totally unacceptable behaviour of a woman having an affair justified changing custody for the children to the care of their father and the Judge made the comment that he had no doubt that this was in the welfare and the best interests of the children and that's an extreme example but I'm just saying that we are constantly trying to improve our processes for children and it's a situation which has been ongoing for some time.

TIPPING J:

It's one of the best cases to come out of Christchurch in a long time.

ANDERSON J:

Isn't the point really in this area that more so than what the subjective and uninformed views of a young child might be, that the process that's laid down with this template, just in fact doesn't give proper opportunity to find out information relevant to the welfare of the children. It's as simple as that. it doesn't say are they at school, how are they doing at school, do they have friends, how do they get on with other people there, can you tell me anything about it that says what's their health like, how well they get on if they get to China? I mean these are all highly speculative aspects. There's no facilitation of relevant information and that's the core of the complaint I would have thought.

MR MAHON:

It is Your Honour and their views are part of forming that process for the older children.

ANDERSON J:

Well it may or may not have some –

MR MAHON:

May or may not.

ANDERSON J:

– relevance but there's just no opportunity to find out. Now the parents may have to provide the information but it's an empty gesture if you don't facilitate their provision of it and you impede the provision of it if they're frightened they're going to go out on the next plane. They're people from a society that's perhaps less – more threatening than ours in relation to official processes and they're asked template questions of considerable significance to their children, and then those shallow answers then form the basis of some quick analysis. That's what happens.

MR MAHON:

And that is not an enquiry.

ANDERSON J:

Well it's implicit in that but I'm just saying is that really the essence of it?

MR MAHON:

It is the essence Your Honour and I've – that's where –

ELIAS CJ:

Mr Mahon I wonder whether I can just ask you where you want to take us now because I'm acutely conscious of the fact that the Crown needs a decent opportunity to reply. What other topics did you want to address?

MR MAHON:

Your Honour I have nearly finished with my submissions and there are aspects which of course will be left for reply. In terms of the time, and I'm very conscious that it's necessary that the Crown has the full day starting tomorrow morning.

ELIAS CJ:

Well I don't know why you thought that we would – if you're talking about reply I'm a bit concerned that the Crown has a full day at least to reply after all the appellant's have effectively had two days. Is there much more you want to develop tonight because it would be useful for us to get the Crown case underway?

MR MAHON:

I think I could leave –

ELIAS CJ:

I don't want to inhibit you developing anything you need to put before us.

TIPPING J:

It's here in the written submission.

MR MAHON:

The only matter which I would put before you but I don't really need to go there and this was the last area that I was going to address, is the philosophical underpinning of the best interests enquiry. Is there such a thing as a best interest enquiry? It's a matter that I don't think is actually an issue for the Court. You deal with what is reasonableness in judicial review every day. There is a best interest enquiry and it's mandated and we have to go forward with it. There's a suggestion in the Crown submissions, and I'm referring here to paragraphs 101 onwards, that we somehow dumb down what that means. That we can't do it.

TIPPING J:

Well the Crown seems to me, subject to further argument, to be taking some very high ground in one or two respects Mr Mahon. I don't know whether that will help you to –

BLANCHARD J:

To be fair they're not alone.

TIPPING J:

No, no both sides.

MR MAHON:

Well I think we're dealing with concepts and we're talking about absolutes on occasions and it's quite a difficult to focus so I don't need to go further there.

The only other matter I was going to deal with is a matter of citizenship and what the meaning of that is and I feel that's also further been sufficiently addressed so unless you have further questions of me I have no further matters to add to my written submissions.

ELIAS CJ:

Thank you Mr Mahon. Mr Carter I don't suggest that you're going to get very far but it would help, I think, if you were able to at least give us an overview of

the topics that you want to be addressing and address any preliminary, at least, remarks that you want, to us. It may perhaps be good for you to come sooner rather than later to the facts which, as you can tell, have been troubling the Court today.

MR CARTER:

Yes thank you Your Honour. There are one or two specific aspects of the facts that I may be able to get to relatively quickly subject to Your Honours of course what I was proposing to do was follow the order of the first respondent's submissions, the substantive submissions and then finish with the points in the cross-appeal submissions. I'm obviously not intending to read through everything but just to highlight some specific points. In relation to the statutory scheme I think that's already been canvassed quite a lot in the oral submissions so far and in the written submissions including on behalf of the first respondent. But there are one or two specific aspects I'd like to go into there and I thought I may be able to get through in what remains of this afternoon, just a specific issue in relation to Hei Haizi, and excuse my poor pronunciation, the black children phenomenon because that seems to have assumed a prominence that perhaps – that in my submission on the facts here, and the information so far as it is known, is perhaps not deserved.

I want to address, as a separate topic, the status of New Zealand citizenship and then of course the standard of enquiry and the mandatory relevant considerations under ICCPR and Article 3 of the Convention on the Rights of the Child and the processes of hearing enquiry which is the section 54, section 58, section 35A added into the mix and another section that of course, as luck would have it, isn't in the materials, in the already voluminous volumes of authorities, but does have some significance in this context.

ELIAS CJ:

What's that, what section's that?

MR CARTER:

I could hand that up now Your Honour, it's section 34(a) to (f) which concerns limited purpose permits. The reason I'm highlighting that is I do mention in the first respondent's submissions that a key section of course is section 35A but I do mention that if the discretion under section 35A after a humanitarian interview is – if the discretion is exercised to cancel a removal order following a humanitarian interview, the next step is to grant a permit of some description under section 35A, because, as was observed by the Court of Appeal in *Huang*, the Act doesn't contemplate that a person liable to removal will be left in limbo, if they're unlawfully present, they're either going to be removed or if they're not removed, they're going to be granted a permit of some description. I've mentioned in the submissions that that's not necessarily a residence permit, it could be a temporary permit and in the category of temporary permit that it will often be is a limited purpose permit under these provisions in section 34(a) to (f). Now, the most significant feature of this category of permit is that it does not confer any right to a further permit –

ELIAS CJ:

In fact, you can't apply.

MR CARTER:

There is that formula of language used again which Your Honours are already familiar with, but the key feature of it is in section 34(f), that you may not appeal to the Removal Review Authority under section 47, and on the expiry of the limited purpose permit, you're back into the compulsory removal procedure. So that's the sort of permit that could be granted, for example, where following a humanitarian interview, there were some circumstance that required a temporary halting of the process, perhaps to make further enquiry or, as in one of the Canadian cases mentioned, if it's necessary in particular circumstances for a child to finish a school term or something like that.

ANDERSON J:

Does an Immigration Officer have power to issue such a permit of his or her own motion, as it were?

MR CARTER:

Yes.

ANDERSON J:

Where is the provision for that?

MR CARTER:

Well it's delegated –

ANDERSON J:

If it's independently, do you have a right to apply for one?

MR CARTER:

I'm just trying to see, there is a reference to a Minister or appropriate Immigration Officer in 34(b)(3).

ANDERSON J:

It says, "No one may…", the applicants in this case couldn't apply for one because they weren't on a current visa?

BLANCHARD J:

And on the face of what you've given us, there's no equivalent of section 58(1), which gives the Immigration Officer the power to cancel a removal order. Where's the Immigration Officer's power to issue a limited purpose permit?

MR CARTER:

All powers to issue permits under the Act are generally conferred on the Minister and there are some that are specifically conferred on Immigration Officers but generally, it's to the Minister of Immigration and then for some of those powers, there are delegations down to Immigration Officers, but these powers are exercised and exercisable by Immigration Officers by virtue of delegated authorities. There's certainly no right to apply, but that's the same

position under section 35A, and section 58(4) I think it is, with the same formula of language.

One key point that I would like to raise with the Court is whatever the outcome of these appeals on the particular facts of the Ye and Ding families and the Qiu families, what the Minister and the Department of Labour, as the department responsible for administering the Immigration Act are seeking is practical achievable guidance for frontline public servants, that is Immigration Officers, who do an important job in the difficult circumstances of immigration removals.

ELIAS CJ:

Can I have some indication of the scale of the practical problem? How many interviews are conducted every day by each officer? The form is so brief that it looks like an Ellis Island exercise but presumably it's nothing like that.

MR CARTER:

I don't have statistics on how many interviews are held per annum or every day, or statistics as to how many permits are granted as a result, but it is, there is quite a lot, I can't be any more specific than that but I can say that according to the last couple of annual reports of the Removal Review Authority and this is consistent with the submission of Mr Harrison, according to the last couple of annual reports of the Removal Review Authority, the number of appeals to that Authority has actually been relatively low in the last couple of years, it's a matter of perhaps a couple of hundred per year out of, as you'll see from paragraph 29, of the first respondent's submissions, when the pool is currently estimated to be about 15 and a half thousand unlawfully present persons in New Zealand of which approximately 2000 are from the People's Republic of China and it's possible that part of the reason for there being a fewer number of appeals than perhaps one might expect and fewer than previous years is the use of the section 35A discretion.

I should mention –

McGRATH J:

If I can get this explained to me a little bit further, Mr Carter why that is, I mean I was just pondering how extraordinarily unworkable the system must be if there are only 200 Removal Authority appeals each year out of 15,000, how is it that the section 35 procedure helps explain that?

MR CARTER:

Well, there are, as I have mentioned in the submissions the exercise of the 35A discretion is not occurring only in the context of compulsory removals by any means. Where you do get, quite commonly, situations – commonly, perhaps surprisingly in the context of the facts of this case, you do have a degree of voluntary compliance where persons whose permits have expired approach Immigration New Zealand officials and enquire as to whether there is some way of regularising their immigration status and if, having gone through the humanitarian interview procedure it transpires that, but for the fact they have no permit, they would qualify for residence under one or other of the categories of government residence policy, then I think it's fair to say that a pragmatic approach is taken to exercising the discretion under section 35A rather than insisting on strict compliance with all the statutory provisions. As I said, I don't have statistics or an analysis to make the link so it's somewhat, it's slightly speculative but one possible reason for the lower number of appeals to the specialist tribunal, the Removal Review Authority, is the existence of the section 35A discretion. Of course, another reason, no doubt, as touched upon by Mr Harrison, is that the appeal period or the right to appeal is triggered by operation of law and that's from the moment that the last permit has expired and generally, as a matter of practice in communication and correspondence between permit applicants and Immigration New Zealand, there will be a notice going from Immigration New Zealand to an affected person to say, "Your permit has expired and you have a right of appeal and you have to exercise it within 42 days", but nevertheless, even though notice is actually affected in most cases, as long as a communication is maintained through a current address being notified to Immigration New Zealand and the department, then generally speaking, as a matter of practice, people will receive notice of the existence of the – well, the

fact that their permit is about to expire, the existence of the right of appeal to the Removal Review Authority and the time period within which to exercise it.

ELIAS CJ:

Thank you for getting underway, we'll take the adjournment now.

MR CARTER:

I should indicate Your Honours that with the fortuitous luxury of a night to collect my thoughts in the light of my learned friends' submissions, I don't expect to take anywhere near the full day tomorrow.

ELIAS CJ:

I think it may be that we should get underway early if that's not too inconvenient for counsel. We'd be seriously embarrassed if the matter was not concluded tomorrow, so perhaps we could resume at 9.30 but thank you for that indication Mr Carter. All right, we'll take the adjournment now.

COURT ADJOURNS: 4.05 PM

COURT RESUMES ON THURSDAY 23 APRIL 2009 AT 9.40 AM

ELIAS CJ:

I'm sorry we're late, my fault I'm afraid. Yes, Mr Carter.

MR CARTER:

Thank you Your Honour. Just first of all to tidy up my response to His Honour Justice McGrath's question yesterday afternoon, I do have a little more specific information than I had yesterday. In relation to the number of removal orders served in the 2008 calendar year, the total figure was 1,082. For the same year, the total number of humanitarian interviews conducted was 1,044. In relation to the point that I addressed, perhaps misunderstanding the question, the number of section 35A permits granted in the financial year ended, it must be the 30th of June 2008, the total number of section 35A permits granted was 7,828, and of course there's four classes of permit, at least four classes dealt with in the table, resident, student, visitors, work, and for the three classes of temporary permits, student, visitors, work, it was roughly 2,000 each and for resident's permits, a much smaller number of 77.

McGRATH J:

Thank you Mr Carter, that's helpful. Just going back then, if we look at the number of removal orders served, and that's dealing with the post-appeal right process, that figure of 1082 can be compared, can it not, with the figure of 200, approximately, of Removal Review Authority decisions? In a sense, we're trying to find some understanding of the extent to which the statutory process in section 47 in particular is being used.

MR CARTER:

Yes, and I have some specific figures just taken from an appendix to the last annual report of the Removal Review Authority, that's for the year to June 2008. The total number of appeals to the authority that were received was 195. There were some that were late, invalid or withdrawn, so the actual number of appeals that was decided was 133, and of those, 28 were allowed in some form or another. Just before leaving the Removal Review Authority –

ELIAS CJ:

So would some of the removal orders have been orders made after appeals were unsuccessful?

MR CARTER:

No, well possibly yes, depends on this –

McGRATH J:

Well they surely would be, wouldn't they, I mean, the statute provides for that, doesn't it, a removal order can be made seven days after an unsuccessful appeal?

ELIAS CJ:

Unless they went voluntarily, I suppose.

MR CARTER:

What Your Honour is referring to is the old scheme and the obligation to leave is triggered immediately on the expiry of the last permit and a removal order can be served at any time after the 42 day period for exercising the right of appeal to the authority has expired.

McGRATH J:

You were going to take us to the statutes, I think you signalled so perhaps we'll – I'll hold my peace until there.

MR CARTER:

Now, I thought I would begin by attempting to state the first respondent's case in a nutshell, perhaps that's sort of adding summary to summary because there's already several attempts at summaries in the written submissions for the first respondent, but distilling the essentials down even further, the first respondent's case is that there is no paramountcy principle as far as best interests of the children are concerned. That was argued in both the High Court and the Court of Appeal, that the standard for the best interests

enquiry was paramountcy and that was rejected by all the Judges who considered it in the High Court and the Court of Appeal and that aspect was abandoned by the appellants in this appeal and was not the subject of the grant of leave. The standard in relation to the best interests of children enquiry is that the Convention on the Rights of the Child requires that the best interests is a primary consideration and in the words of Justice Tipping yesterday, I think, an important factor but which may be outweighed by other factors. Citizenship is a relevant factor but one among many.

The weight attributed to different factors is for the decision maker. In the immigration context, any detriment to a child or children arising from removal of a parent is to be identified and substantiated by a parent.

ELIAS CJ:

That last proposition is based on what?

MR CARTER:

That is based on an interpretation of provisions of the Convention on the Rights of the Child and the way that has been interpreted internationally, both by international tribunals.

ELIAS CJ:

And will you take us to that?

MR CARTER:

Yes.

ELIAS CJ:

Yes, thank you.

TIPPING J:

Does that really mean that all the decision maker has to do, is take, at face value, whatever is said by the parent? No further obligation at all?

MR CARTER:

Correct. The minimum threshold is the exceptional circumstances test in section 47(3).

ELIAS CJ:

You say that that's the threshold for the primary decision maker as well as the appellate decision maker?

MR CARTER:

Well, part of our case is that the primary decision maker ought to be the specialist tribunal given the task of making the humanitarian enquiry, which is the Removal Review Authority.

ELIAS CJ:

But where it is not, as in this case, what's the standard for – is that the standard, you say, for the primary decision maker?

MR CARTER:

For an Immigration Officer conducting a humanitarian interview, that is the minimum threshold, so the Immigration Officer can't apply a more generous or more favourable standard than section 47(3).

ELIAS CJ:

And do you get to that simply through section 47?

MR CARTER:

Section 47(3) read in the light of the scheme of the Act as a whole.

TIPPING J:

So a decision under 34, that is the minimum? It can't be more favourable than that? I'm sorry, 54.

MR CARTER:

Well our case is that the relevant decision is, in this case, is section 58 for cancellation.

TIPPING J:

Which – either one, or other or both together?

MR CARTER:

It can't be more favourable than section 47(3).

BLANCHARD J:

Presumably the Minister could be more generous under 35A?

MR CARTER:

The Minister himself could because –

ELIAS CJ:

Why, if you say that this comes from the scheme of the Act?

MR CARTER:

Well the Minister has, in relation to certain powers to do a variety of things under the Act, which is not just limited to the grant of permits. The Minister has the power under section 130 to grant a special direction which is not constrained in the way that I'm suggesting that an Immigration Officer is as part of the compulsory removal process. However, all of that is not to say that an Immigration Officer should be expected to assume the role of carrying out a full RRA humanitarian enquiry which leads to the – so that's under, in terms of the approved grounds of appeal, that's under the standard, in terms of process of hearing and enquiry, the Immigration Officer is to consider whether there is something exceptional that is new or has been overlooked that justifies the postponement of removal. So what I'm suggesting, is that the –

ELIAS CJ:

Why new? Where does that come in?

MR CARTER:

Well because there is an opportunity for an appeal –

ELIAS CJ:

Only if you know about the time and make application in time.

MR CARTER:

Well there is no issue about that in either of these cases Your Honour, because in both cases, it's manifest that the relevant parties knew of their unlawful status because they both exercised their right of appeal.

BLANCHARD J:

What if somebody didn't? We've got to look at a test which will apply across the board. I can understand your use of the term new where somebody has gone to the RRA and then this is being looked at a while later, but what should the test be if this is the first time the humanitarian questions are being considered?

MR CARTER:

Well in my submission, it is, as I've stated, something exceptional that is new or has been overlooked, and the reason –

BLANCHARD J:

Well everything will be new in that instance.

TIPPING J:

Nothing will have been overlooked.

MR CARTER:

Yes, but you have a procedural provision in section 50 of the Act, which perhaps if I take Your Honours to that in the first volume of the authorities, which is tab 12, the Immigration Act provisions.

BLANCHARD J:

That only relates to appeals. I'm interested in –

McGRATH J:

Can we look at the provision first? I don't know what –

MR CARTER:

Yes you're quite right, it only relates to appeals but what I want to draw from it is if Your Honour has a look at subsection (4), this is dealing with he procedural powers of the authority, and in particular subparagraph (b). The authority may not consider any information which relates to matters arising after the date the appeal was lodged unless it is satisfied that there are exceptional circumstances that justify the consideration of such matters. So you also have a provision earlier on in the section, in subsection (2), which is a further time-limiting provision, which says in 52(a), well basically without reading it out, you have to get all your information and everything you want considered into the authority within 42 days of bringing the appeal. And so then you go over the page to the subparagraph I've already referred to and basically if you want to get in anything else after that initial period has expired, you have to establish exceptional circumstances. So there's exceptional, exceptional, exceptional and if you don't –

ELIAS CJ:

Which is a relative term in itself.

MR CARTER:

Yes, it's been defined in a number of different contexts, the Immigration Act section 47(3) provision being one of them, but a similar term is dotted throughout the statute book, including the Income Tax Act and there will be a variety of definitions but probably puts the standard pretty high as to –

ELIAS CJ:

Well I wonder really, I hope you're going to come back on to the meaning of section 47(3), because I'm wondering how high it is when you have

circumstances of a humanitarian nature. They don't say exceptional humanitarian reasons, they say exceptional circumstances of a humanitarian nature. One quite tenable meaning of that would be that if there are humanitarian considerations which must be a reference to the humanitarian documents one is able to look to, I would have thought that if there are humanitarian issues which make it unjust or unduly harsh for a person to be removed, and this second test is met, that's the standard.

MR CARTER:

But the context is that you have an obligation to leave triggered immediately by operation of law on the expiry of your last –

ELIAS CJ:

That would apply to cases where there is no humanitarian dimension.

MR CARTER:

It applies to all cases where a permit has expired.

ELIAS CJ:

Yes, as well.

MR CARTER:

Yes, that's true.

ELIAS CJ:

So humanitarian cases, quite tenably, it seems to me, may be exceptional cases within the scheme of this provision.

MR CARTER:

Well the provision provides for a right of appeal to a specialist tribunal on the grounds of exceptional humanitarian circumstances. If you want to avail yourself –

ELIAS CJ:

Not – where?

McGRATH J:

It's not a right of appeal really, Mr Carter, is it?

MR CARTER:

Section 47(3).

McGRATH J:

It's not a right of appeal really, is it? You have a rule of law and then you provide – you're really having an ability to review its application, it's not a right of appeal in the sense that it's a consideration of whether a first instance decision is wrong. It's really – should be looked at as a, I think, despite the language of the Act, as a review of whether or not in exceptional humanitarian circumstances a different decision should be reached.

MR CARTER:

Yes, in a sense, the word appeal is a misnomer, it's a fresh enquiry, it's not an enquiry into whether previous immigration decisions are right or wrong.

McGRATH J:

And as the Act stands, you only have a right to that review of the general law provision if you make your application within 42 days of being illegally in New Zealand, and I take it there is no way you can have that 42 day limit extended?

MR CARTER:

No, there isn't.

McGRATH J:

Now we then, I suggest, really have to decide whether, under section 58, the end, what implicitly matters, what implicitly must be taken into account having regard to the review procedure in section 47(3) not having been applied at all

and we have to, in particular I suppose, look at how to read that statute in light of New Zealand's international obligations. We should read in some qualifications. Now, we don't necessarily have to read in everything in section 50 amongst the restraints on a review procedure.

MR CARTER:

No I accept that Sir, but what you have is a scheme whereby you have an initial limited timeframe for exercising the right of review, you have a further limited timeframe within which to get additional information or get the information in before the authority that you want to have considered concerning the humanitarian circumstances you are advancing and after that, you have to show exceptional circumstances before you can get anything else in before the –

BLANCHARD J:

That can't, surely, in a case under section 54 of someone whose position hasn't been considered previously shut out an ability to consider anything. I just don't understand the argument you're making in that context.

MR CARTER:

Well it's not a shutting out, I've accepted that new information –

BLANCHARD J:

But Mr Carter, you don't seem to be understanding the point I'm making. Assume that your overstayer dilly-dallies for eight weeks so the 42 days have gone. They're unlawfully in New Zealand merely by having overstayed, their position has never been considered. The immigration people may not appreciate that they're still in New Zealand. They can't go to the Removal Review Authority because the 42 day time limit has expired, so their position is being considered under section 54 –

MR CARTER:

The first respondent says section 58, for the purposes of this case.

BLANCHARD J:

Section?

MR CARTER:

58.

BLANCHARD J:

There's been no order, no removal order.

MR CARTER:

In your hypothetical, yes.

BLANCHARD J:

Yes. So it's being considered for the first time, I think you accept that humanitarian considerations have to be factored in at that point, and it's the first point that they can be factored in. Now, you'd have to look at the whole picture, you can't say, "Because you didn't go under section 47, all or most of it is shut out."

MR CARTER:

Well the problem with that is that if you are going to transfer what was supposed to occur at the Removal Review Authority stage to this last stage when the person liable to removal eventually comes to the attention of Immigration New Zealand, then you emasculate the statute in that you provide a perverse incentive for everyone to ignore the right of appeal –

BLANCHARD J:

Well no, I'm not in that camp. At the moment, I would accept, subject to hearing further argument, that the section 47(3) standard does apply. All I was being critical about was the suggestion that section 50(4) gave guidance, because it can't in those circumstances. Section 50(4) says there have to be exceptional circumstances to require consideration of matters arising after the appeal was lodged. In other words, get it in in your appeal documents. But if there hasn't been an appeal and the person concerned may not even know

they could have appealed, you can hardly apply that kind of rule, it would result in nonsense.

MR CARTER:

What I'm driving at Sir is that if you just apply – if you just have an Immigration Officer at the removal stage, being asked to apply the section 47(3) test, you're effectively requiring the Immigration Officer to perform the role of the Removal Review Authority and an Immigration Officer is not the Removal Review Authority.

BLANCHARD J:

Well it may be that there can't be anywhere near the same intensity of look at the circumstances, but there has to be some sort of standard, otherwise we'd be completely lacking any compliance with the UNCROC –

ELIAS CJ:

And the department seems to accept that, because why else does it require the officers to go through the humanitarian questionnaire?

MR CARTER:

Well in the situation where there's been no previous consideration at all, in the scenario that Your Honour Justice Blanchard has posed, then I accept that the word new is inapt, but nevertheless, as Your Honour observed, it can't be the sort of full scale enquiry that the Removal Review Authority engages in, because an Immigration Officer is not the Removal Review Authority.

BLANCHARD J:

Well I would accept that as a general proposition, the question we've got to decide is, to what extent must an enquiry go to under section 54?

McGRATH J:

It really comes down to the extent in interpreting section 58, if you want to focus on that, the extent to which international obligations should qualify the apparently unqualified power of the Immigration Officer to make reading the

statute consistently. I think your argument would be, well, section 50 and section 47(3) reduce the extent to which the – it can be implied to section 58, that the Immigration Officer takes into regard these considerations, but we have responsibility to interpret section 58 consistently with international obligations and in a particular, I suggest, as reflected in section 47(3), to the extent that the language of section 58 allows. Thereafter, it's really for Immigration to make sure it has appropriate Immigration Officers to address those matters.

MR CARTER:

It is accepted and has been since 1993, post-*Tavita*, it's accepted by the first respondent and the department that Article 3, Convention on the Rights of the Child and Article 23 of ICCPR are a mandatory relevant consideration and so there's no issue about that and the humanitarian interview itself reflects that.

TIPPING J:

But the humanitarian interview form doesn't in any way suggest that you've got to confine yourself to matters that arose since the hypothetical, non-existent appeal.

ANDERSON J:

The disadvantage that one suffers through not having recourse to the RRA, is that one has the decision made by an administrative official, probably with less training and time to devote to it than the RRA would. You have a less convenient or less reliable forum.

MR CARTER:

Well that's why the statute has provided for the right of appeal to the RRA.

ANDERSON J:

I was making that observation in response to your suggestion that it provides a perverse incentive. It would only provide a perverse incentive if you were getting more, you had a better prospect or a better consideration by an Immigration Officer than by the RRA, and that won't necessarily be so.

MR CARTER:

Well but in terms of how the – parts of the appellants' case has been advanced, what is being sought is quite an elaborate enquiry by the administrative official at this last stage, when often it is in less than ideal circumstances, often as in Ms Ding's case where a person is in custody and the humanitarian interview is conducted in that context.

ANDERSON J:

Well the appellants might possibly be expecting too much.

TIPPING J:

Well I would agree with you, it needn't be as elaborate, but what I find difficult is that it must be constrained as to time. You have to acknowledge, don't you, that if you're going to do it at all, you've got to do it properly, you can't, sort of, hypothesise a notional appeal date and say well ignore everything that came before that.

MR CARTER:

In the situation posed by His Honour Justice Blanchard where there has been no previous consideration, yes I've accepted that the use of the word new is inapt in that situation, but we don't have that situation here.

ELIAS CJ:

In any event, if one reads the statute and all these provisions together, surely in context, section 54(b) points to, if there are humanitarian circumstances which would make it unjust or unduly unjust for the person to be removed picking up on the wording of 47(3), that information must come in.

MR CARTER:

Well Your Honour, if you don't know –

ELIAS CJ:

One has to look at this as a matter of substance.

MR CARTER:

But you don't know if there are exceptional circumstances of humanitarian nature until you've got the information.

ELIAS CJ:

I'm talking about your argument which would confine the enquiry under section 50, and then you're transposing of that into these conditions. I don't see section 54(b) as a substantial limit if you have got humanitarian considerations which would make it unjust or unduly harsh to export somebody. Those must be exceptional circumstances within the meaning of that subsection. It just seems to me that perhaps this is a bit simplistic but if section, even if one does take section 47(3) as describing the substance of the enquiry that has to be addressed, how elaborate it is in the addressing may depend on whether you're before the Removal Authority or you haven't got before the Removal Authority but at least that is what the Act is envisaging, that there will be a confrontation of the question whether there are humanitarian circumstances which would make it unjust or unduly harsh for the person to be removed. If that's so, the question in this case, it seems to me, boils down to, did the Immigration Officer fairly address that issue? And that's a question of whether the process he went through was adequate.

MR CARTER:

Well the difficulty with that Your Honour is that the exceptional circumstances test is not straightforward, it's not just exceptional circumstances, it's exceptional circumstances of a humanitarian nature.

ELIAS CJ:

You've got to read that whole phrase together, it's exceptional circumstances of a humanitarian nature that would make it unjust or unduly harsh for a person to be removed, you have to look at the whole.

MR CARTER:

But there's a second limb.

ELIAS CJ:

Yes, then of course they have to go onto the second –

MR CARTER:

There's the public interest.

ELIAS CJ:

The public interest limb.

MR CARTER:

The second limb, yes.

ELIAS CJ:

But in the case of these people, there's no – well there are a number of indications I suppose there that would have to be balanced.

MR CARTER:

But what we're – what I was suggesting in, rather than applying the 47(3) test directly and so we have the Immigration Officer grappling with that test, it's not, in my submission, very practical or realistic, given the situation in which an Immigration Officer will be asked to exercise the discretion as in the case of Ms Ding, we have somebody who has evaded contact with Immigration New Zealand for quite some time and then finally located and taken into custody, and an Immigration Officer then conducts a humanitarian interview in that situation where there is a short period of time to deal with the matter because either, once a person is arrested, under the authority of a removal order, they have to be put on a plane within 72 hours, or if that's not possible, the committal warrant procedure in the District Court under section 60 is triggered whereby the person must be brought before a District Court Judge within seven days.

TIPPING J:

Does that mean if you can't get them on the plane within 72 hours, you've got to bring them before the District Court, is that –

MR CARTER:

To get a further authority to detain them for a further period of time, that's the procedure under section 60. So you've got a tight timeframe, less than ideal circumstances, an administrative official with no legal training, no minimum requirement such as there is for the members of the Removal Review Authority to have at least five years legal experience as a qualified barrister and solicitor, and so why I was suggesting a simpler test drawing on the word "exceptional" at that stage, was on the basis that it's unrealistic to expect an Immigration Officer in this kind of situation to act as though he or she is the Removal Review Authority.

ELIAS CJ:

Well that's to say that he can act in a way that's almost unconstrained, that the discretion is not controlled.

MR CARTER:

No, the word exceptional –

ELIAS CJ:

Which use of the word exceptional are you now focusing on in section 58? Is it there?

McGRATH J:

It's been imported, hasn't it?

BLANCHARD J:

Section 47.

ELIAS CJ:

Well if you're importing it through 47(3), isn't that an acknowledgement that that's what the enquiry is being directed at?

MR CARTER:

Well it is in a sense, but the Immigration Officer, in my submission, can't reasonably expect to just apply the section 47(3) test, as if he was –

ELIAS CJ:

Well then why are we looking at it, in your submission?

MR CARTER:

Well because that's part of the source of the word exceptional and the formulation that I'm proposing.

ELIAS CJ:

Well I don't think you can have it in for some purposes but not others.

MR CARTER:

Well perhaps if I finish my attempt at capturing the essence of the first respondent's case. My next point, this was still under the heading of "Process of Hearing and Enquiry" was that under the scheme of the Act, the Immigration Officer is not required to interview children. That's primarily based on, again, if you'll allow me to go back to the provisions dealing with the Removal Review Authority, the Removal Review Authority can only deal with matters before it on the papers, there is no interview at all, no oral hearing, and that's section 50(1). So although, under the administrative procedure adopted by the department, namely the humanitarian interview, there is an interview, it seems, in my submission, inconsistent to extend that interview process beyond the person liable to removal, to any child or children of that person.

TIPPING J:

In other words, you're saying if it's not necessary for the RRA, a fortiori, it's not necessary for the officer?

MR CARTER:

Correct, Sir. And finally, under the process of –

ELIAS CJ:

What authority was the Immigration Officer acting under in the Act in obtaining the psychiatric assessment? Are there powers to do that?

BLANCHARD J:

Wasn't it forwarded, or was it applied?

ELIAS CJ:

No, no, the one where she was also examined in the police cells.

MR CARTER:

I think that is more likely to be sourced in either statutory powers concerning the police or just an administrative arrangement that the police may have for a, I think it was a nurse who gave that report. So I don't think the report was actually sought by the Immigration Officer.

TIPPING J:

One of the great difficulties of this is that the section 58, the cancellation section, gives in itself no clue whatever as to the grounds upon which you can cancel an order that's already been made, it's just very bizarre isn't it? That you suddenly find that here all this has happened and an order has been made and then suddenly, there's some amorphous power to cancel with no guidance at all as to the circumstances. There must have to be some principled basis coming from somewhere, mustn't there? On which you'd exercise or not exercise the power to cancel. But then you've got this no review, not having to consider and all the rest of it, so whoever's drafted this has had a very mixed conception in its birth, is the power that then apparently

you don't have to exercise it and no one can ask you to exercise it, but you can exercise it spontaneously for no apparent reason.

MR CARTER:

Well you don't exercise it spontaneously for no apparent reason, the –

TIPPING J:

Well no reason apparent on the face of the section.

MR CARTER:

From the section, yes. But there are – it's necessary to have a wide power to cancel to deal with the myriad situations that might arise, a removal order may have been made for –

TIPPING J:

But it is an extraordinary place to find a high level, wouldn't you normally have expected to find it much earlier in the process, somewhere? Is this just because in practical terms, because of the difficulties you've explained about having to find people and then arresting them, there has to be an order before you can arrest them?

MR CARTER:

Yes.

TIPPING J:

And is this just the consequences of the practicalities, if you like, that it's coming at this last ditch stage?

MR CARTER:

Yes, well absent voluntary compliance, and it may be a radical proposition, but as I mentioned to His Honour Justice McGrath yesterday afternoon, there are actually are a lot of people that do voluntarily comply and engage with Immigration New Zealand to regularise their status.

TIPPING J:

I'm not wanting to sound critical of you or your submissions, I'm just thinking aloud as to why it has to be at this very end of the chain situation. And why would they have put in all this business about not being able to ask for it and so forth?

MR CARTER:

Well because if you didn't have that limitation, then there would be a further layer of process on process, and a right to apply would no doubt be inferred from the –

TIPPING J:

But if you haven't considered it before, you've got to consider it, haven't you? Apparently, Parliament has said you don't have to consider it, someone's asked for it.

MR CARTER:

Well that's because the humanitarian interview could occur at any stage of the process, it doesn't have to occur at the section 58 stage. For the purposes of this case, the first respondent submits that section 58 is the discretionary power that is being exercised in the particular circumstances of this case, but in other cases, the humanitarian interview could occur at a range of different periods.

TIPPING J:

Of course, I accept that entirely. So they're criticising you for failing to exercise the power, it must be?

MR CARTER:

Yes, well they, I guess an alternative for the appellants is they're attacking the failure to cancel the removal order following the –

TIPPING J:

Failing to exercise the power to cancel.

MR CARTER:

Yes, but their primary submission before that is that there's a – the duty to conduct the humanitarian interview occurs earlier under section 54.

TIPPING J:

Like the Chief Justice, I think if you're going to do one of these things, never mind at what stage, you've got to do it properly, and the question is, have you done it properly? I see that as the ultimate, simple issue in this case, before you get to the question of reasonableness, which is, I suppose, another way of putting it.

BLANCHARD J:

Yes I would respectfully agree with that view, and it seems to me the nub of the particular cases will be, how did what occurred measure up to what was required? Accepting, as I personally accept, that you can't expect the Immigration Officer to act as a complete substitute for the Appeal Authority.

MR CARTER:

Yes.

TIPPING J:

He's got to direct himself correctly in law though, hasn't he?

MR CARTER:

Yes.

TIPPING J:

Never mind all else, he's got to direct himself correctly in law, he's got to come at it with the correct legal mindset, particularly vis-à-vis children.

MR CARTER:

Yes, which could be, for example, in terms of the first respondent's position, could be that he is required to direct himself that the best interests of children

is an important factor that must be considered. For example, rather than just setting out in the form as it currently stands, just setting out the language of Article 3 of the Convention on the Rights of the Child or Article 23 of ICCPR.

TIPPING J:

And in case it be of any further assistance, I think, right or wrongly at the moment, that the real focus of this case is on that questionnaire and the reason, and all the rest of it is collateral. You've got to get the right framework and you've got to get the right tests, but really, when it boils itself down, that's what's going to count in this case, in my opinion.

MR CARTER:

Yes I accept that, but I go further and say, the answer to the question of whether it's been done properly has to be answered in context, in the context we're dealing with here, which is last stage, less than ideal conditions, history of non-compliance.

TIPPING J:

But how much, when you're dealing with children, can you take into account that the parents are the authors of their own misfortune? That seems to me to be a very crunch point in this case, because the parents are the authors of their own misfortune to a large extent if they've been ducking and diving and keeping out of sight and all the rest of it. How should that bear on the children?

MR CARTER:

Well, that's the sins of the parents should not be visited on the children theme, which is throughout the appellants' submissions.

TIPPING J:

Well I've deliberately put it neutrally. I'm asking you how that matter should properly be handled in law.

MR CARTER:

Well it must be a – it is simplistic to, as a matter of law, in my submission, to suggest that the conduct of the parents is not a relevant factor because just as a matter of domestic law under section 47(3), the interpretation of the exceptional circumstances test by the Court of Appeal in the *Patel* case, is along the lines that all the circumstances are to be considered and of course, in section 47(3), as I mentioned to the Chief Justice earlier, there's the second limb which is the public interest limb.

ANDERSON J:

Really comes under that doesn't it? But it interferes on the integrity –

ELIAS CJ:

But the public interest limb in itself has to be assessed in all the circumstances, which I would suggest also include any humanitarian reasons. So first, find your humanitarian reasons and then by all means look at them in the round with other public interest factors.

MR CARTER:

Well that may be something of a double up, Your Honour, in that the structure –

ELIAS CJ:

No, one's a threshold. You have to have exceptional circumstances of a humanitarian nature which make it unjust, et cetera.

MR CARTER:

Well the structure of the subsection is that there are two limbs and the first one is the humanitarian enquiry as to whether it would make it unjust or unduly harsh for the person to be removed, so the authority makes its determination under that limb, so it decides that there are exceptional circumstances and so on, so the person liable to removal has overcome the first hurdle, the first limb, then the Authority goes on to consider public interest factors against that.

ELIAS CJ:

Including in that all the circumstances which must also include the humanitarian reasons. In other words, it has to be a proportionate response to export people taking into account the other public interest elements.

MR CARTER:

Well in my submission, on the structure of the subsection, that mixing and matching isn't open.

ELIAS CJ:

Well, it's a doubling, it's "and", both have to happen.

McGRATH J:

I would be helped Mr Carter if you could just talk a bit more about this, we've had two and a bit days on the humanitarian circumstances and I'd just like to know a bit more about what, in your submission, is the context intended by Parliament in relation to the not contrary to the public interest limb. I mean, what you seem to be saying is that that's where you can take into account the need for firmer immigration control which is a policy of the Act, is that right, is that what you're saying is part of the public interest in a case like this?

MR CARTER:

The public interest is a deliberately wide term and it's difficult to come up with any precise reformulation of it, but an aspect of the public interest is immigration control and compliance considerations.

McGRATH J:

Has the Removal Review Authority itself delivered any considered decisions on this? Do we have some, I know we do from the Refugee Status Appeal Authority have some very thoughtful decisions on their issues, but is there anything in the reasons of the Removal Review Authority that can help us as to the content of that phrase?

MR CARTER:

Well there are a number of decisions of the Courts dealing with the correct interpretation of the section 47(3) test, there's the *Patel* decision in the Court of Appeal, there are a large number of High Court decisions, including decisions to the effect that you can, it's lawful for the Authority to consider just one limb in some situations, so that there have been cases where the decision is based entirely on the public interest limb, for example, the *Mwai* decision in the Court of Appeal, which was involving removal of a person who had been convicted of deliberately infecting other people with HIV.

TIPPING J:

Well one can see that as obviously, but in this particular case, is there any other public interest factor than firm border control and all that goes with that, you know, not encouraging people to go to ground and all that sort of thing, is there any other public interest dimension that weighs in the equation? Nothing I could see in the reasoning of the – we said failed refugee claimant, now that doesn't seem to have a huge, the fact that he failed to get a refugee thing, may be you want to leave that until you come on to examine the actual reasons, but I mean, I couldn't see that as being a great public interest factor.

ANDERSON J:

If he'd succeeded, you wouldn't be dealing with the section.

MR CARTER:

Well the relevance of – well first of all, to answer the first part of the question first, the public interest factors, the factor is immigration control.

ELIAS CJ:

Well I really question whether that can be said, the public interest, as you've said, embrace – is a very wide category. I would have thought it includes compliance with international conventions in itself. What you're really concentrating on and it's perfectly valid are the contrary public interest factors. It's not to say they take up all the ground, those that are contrary to retention.

TIPPING J:

But that's rather what I meant, one of the ones that, if you like, weigh against the – that might be put in the scales against, and I'm talking theoretically at the moment, and then I asked to focus on this particular case, but theoretically, I suppose it could be a lot of things, but in this particular case, it seems that the primary one at least would be firm border control, and that's not to be underestimated.

MR CARTER:

And an important part of that is that the parents, that's two parents in both cases, have never been eligible for any aspect of government residence policy, so I suppose that's under the umbrella of immigration control. None of them have ever satisfied any part of government residence policy.

ELIAS CJ:

Sorry, do we have that before us in some – that conclusion before us? I'm not asking you to take us to that policy, but has –

MR CARTER:

It's part of the submissions, I have included that in the submissions, but the actual content of government policy I don't think is before Your Honours, either in the casebook, at case on appeal, or in the volumes of authorities.

TIPPING J:

Won't that always be the case though, because if they had qualified, presumably the problem wouldn't have arisen.

MR CARTER:

Well of course, as I've mentioned in the first respondent's written submissions, all of these families, or the parents, I should say, have completely bypassed the usual route, they've never actually applied for residence under normal residence policy.

TIPPING J:

But one of them went to the Ministry six times, one assumes that if they had qualified that that would have come to light. I mean, they may not have gone through the right channels strictly, but it's self-evident, isn't it, that people will not find themselves in this position normally if they qualify for residence.

ELIAS CJ:

Well is that right? Because I would have thought that if people were not going through the proper channels, even if they would have qualified if they'd made application in the proper way, you might remove them. Isn't that the position?

MR CARTER:

Well that can be the position Your Honour and –

ELIAS CJ:

And they'd normally leave voluntarily in order to be able to make an application because once compulsorily removed, they're banned for, what, five years, isn't it?

MR CARTER:

Yes, so that's the incentive for the voluntary –

TIPPING J:

I may have been a bit too – yes.

MR CARTER:

Voluntary compliance. And just while we're on this, one provision does require mention in section 47, which is section 47(4), which is basically the point that Your Honour the Chief Justice has just mentioned that just because somebody happens to comply with or appear to meet government residence policy after they have become unlawfully present does not, in itself, constitute an exceptional circumstance, and that is directed at, again, trying to eliminate a perverse incentive of people just remaining for as long as they can in the hope that government policy might be relaxed and in the past, I think mainly in

the late `80s and `90s, there was the phenomenon of immigration amnesties where, for certain categories of persons unlawfully present, there was an amnesty and an opportunity to apply for a residence permit.

TIPPING J:

Well thank you for that, yes that puts my – on the right line.

MR CARTER:

Just on that, before leaving that particular point, that – this provision also should be considered when dealing, or when considering the two cases that Your Honours have already seen where there has been a sort of form over substance approach and one is the *Chikwamba* case, and the other is the *Winata* decision before the Human Rights Committee and if I just take you to the *Winata* decision just briefly. It's volume 7, tab 178. Now that case it was not just – that was the Committee identifying an element of arbitrary exercise of power by the State and the point I wanted to draw from it is that it is not just about the length of time that the son was present in Australia, which I think was 12 years, but another factor which led to the arbitrariness finding was that the parents actually qualified for residence in Australia but they had to on a strict application of the law they had to depart Australia in order to make that application and the problem with that was, as set out in paragraph 5.3, that they'd have to wait possibly several years before an offshore application was actually considered. So in 5.3 it's noted that the authors would have to leave Australia pending determination of the application where even if successful they would have to remain for several years before returning to Australia. So that's the – that's an element of –

ELIAS CJ:

What are you drawing from this of relevance to us?

MR CARTER:

Well *Winata* was not just about time but it's an example where in the particular circumstances of that case there was arbitrariness found because of the requirement to leave in order to make an application. But it's not, it's not as

simple as, you can't say in the context of the New Zealand statutory scheme that because somebody happens to qualify for residence they should be allowed to remain and that's because of section 47(4). Now there could be in particular factual circumstances a situation arises where –

TIPPING J:

If it helps I've completely repented any implication there might have been in my remarks but it's obviously wrong.

MR CARTER:

Well, I won't pursue that then.

ELIAS CJ:

Well this was another reason, wasn't it, that it would just be a needless disruption to the children because ultimately they'd probably be able to get back in after a period in which they'd been taken out and their lives had been totally disrupted, may be for some years.

TIPPING J:

And it's similar to the Kafka case.

MR CARTER:

Yes. Now just dealing a little more with the statutory scheme. Section 18D of the Act on page 9, this is the same, this is volume 1 of the authorities, tab 12. I mention this in the written submissions but this is concerning the powers of the Resident Review and of course the, as I've already mentioned, the parents of this case at no stage applied for residence. They bypassed that through the refugee status applications.

ANDERSON J:

What section are we looking at Mr Carter?

MR CARTER:

Section 18D beginning on page 8.

ANDERSON J:

Thank you.

MR CARTER:

And another expression that is used in section 18D(1)(f) is in the context of the Review Board having a discretion. If it's decided on a resident's appeal that an immigration decision is correct in terms of government residence policy, the Board may recommend that the special circumstances of the applicant are such as to warrant consideration by the Minister as an exception to that government residence policy. So that's a further avenue for a humanitarian enquiry.

ELIAS CJ:

But it's not confined to humanitarian considerations?

MR CARTER:

No it's not. It's not confined to humanitarian considerations. It's just using the words special circumstances but nevertheless there is a word that requires something more than the norm, the word "special", which in my submission is another part of the mix of the statutory scheme that gives some light on the nature of the enquiry that the Immigration Officer has to embark on at the very end of the process as distinct from the beginning which is what this is dealing with.

Now in relation to aspects of the factual background, I wanted to address –

ELIAS CJ:

Just before you leave the statute, is there anything in the legislative history which sheds any light on the meaning of section 47(3)?

MR CARTER:

Well as I was saying earlier, section 47(3) has been interpreted in many cases. I'm not sure that there's anything particular in the legislative history.

ELIAS CJ:

Thank you.

McGRATH J:

Have you looked at the, for example, the Select Committee report? On the Bill or the Amendment Bill?

MR CARTER:

Well the terminology of section 47 was actually present in the 1991 version of the Act. It was then section 63B.

McGRATH J:

63 capital B?

MR CARTER:

Capital B, yes.

McGRATH J:

In 1991?

MR CARTER:

Yes and prior to that it was section 63 where the decisions were actually made by the Minister rather than the, rather than by an independent tribunal.

McGRATH J:

That's under the original Act, the 1987 Act?

MR CARTER:

The 1987 Act.

McGRATH J:

Thank you. But anyway there's nothing in the legislative history that you know of that you think would help us?

MR CARTER:

No Sir. Now there are some parts of the, particularly arising from the submissions of Mr Mahon and Mr Bassett yesterday. Parts of the evidence that I wish to take Your Honours to and that concerns the psychiatric report that – and the way in which that was taken into account by the Immigration Officer in Ms Ding's case. Perhaps if you just open up the, in volume 2 of the case on appeal, and it's the decision relating to Ms Ding itself at tab 4, which Your Honours have already been through but at page 295 and 296 criticism was made of the way in which the Immigration Officer had addressed the psychiatric report which appears in a number of places but I'm looking at the copy that appears in volume 3 of the case on appeal at tab 46, page 498.

ELIAS CJ:

I don't think it was the one that we were referred to before so we'll have a different version marked.

BLANCHARD J:

It would be helpful if we did look at the same version because similarly I've marked it –

ELIAS CJ:

Yes, the other one also had the Immigration Officer's notes on it. Can anyone identify…

MR CARTER:

Well I was just –

BLANCHARD J:

Yes it's at volume 4, page 757.

MR CARTER:

Now the part of the officer's decision that was criticised was the paragraph on the last page, that's page 296. I have also considered the recent submission

from a legal representative in the form of a psychiatric report which claims that Ms Ding is suffering from a depressive disorder. And then it goes on to say, however these claims are recent.

TIPPING J:

If you just help me with where you are. This is on the report of 4th of August and which page is it, just talk about first or second?

ELIAS CJ:

It's humanitarian interview at page 296 of volume 2.

MR CARTER:

I'm actually inviting Your Honours to open two things at the same time.

TIPPING J:

Yes. So we're back on the decision now?

MR CARTER:

One is the decision and also at the same time if you open up the –

TIPPING J:

I'm with you now. I see it's 296, thank you.

MR CARTER:

Now the criticism concerned in the decision concerned the words "recent" and "claims". The word "claims" suggesting a degree of scepticism. But in my submission both of those words are understandable in the circumstances. If you look – of course the date of the decision is the 31st of August. The humanitarian interview was on the 23rd of August. If you look at the date of the psychiatric report from Counties Manukau, that's the 4th of August. However, that report was not actually forwarded to or received by the Immigration Officer until the 29th of August and the source of that is, and I apologise for this, but it's yet another volume of the case on appeal –

ELIAS CJ:

Well what is the point you're making to us?

MR CARTER:

The psychiatric report, although dated the 4th of August, which is two and a half weeks before the date of the humanitarian interview, and virtually nothing in the psychiatric report is referred to in the humanitarian interview conducted by the Immigration Officer on the 23rd of August. Then the Immigration Officer receives for the first time the psychiatric report by fax from Ms Ding's solicitor on the 29th of –

TIPPING J:

He received it recently, there's no doubt about that, but the burden of the complaint is that it seems to be suggested that because this has only come to light recently, it's not so. I may be anticipating you wrongly but it's not a timing issue per se. It's a discounting the professional opinion of the senior registrar because the report has only recently been received. I think it's the gravamen of the complaint about the use of the word "recent", as I understood it anyway. I mean obviously it was recently received in literal terms.

MR CARTER:

The main point which explains the unwillingness of the Immigration Officer to accept the psychiatric report at its face value is, as I said before, that nothing in the report, the factual matters in the report, that's the self reported matters by Ms Ding, given to the psychiatric registrar, none of that is covered. None of it comes out in the humanitarian interview conducted two weeks later. So with the background of evasion and non-compliance of Ms Ding, and the fact that his psychiatric report appears to have been done more than a fortnight before the humanitarian interview, but the information in it hasn't filtered in, in any way into the humanitarian interview.

ELIAS CJ:

But the psychiatric report itself doesn't really rely on the reported history as to what's triggered all of this. I'm – having looked at it again, but it notes that

more investigation would be required to look into those causes but it describes a present position where you have an acutely distressed person who the registrar says is depressed. I mean that's the datum surely that the Immigration Officer had to deal with?

BLANCHARD J:

And the Immigration Officer knew that there had been a previous attempt at suicide because he'd been there when it happened.

MR CARTER:

A year before.

BLANCHARD J:

Well nevertheless. You have somebody who's suicidal a year before and now you have a senior medical person saying the person is suicidal now, and he simply says oh, this is recent.

MR CARTER:

Well in my submission the reference, using the word "recent" and "claim" suggesting a degree of skepticism in the circumstances in which he received –

ELIAS CJ:

He wasn't entitled to be sceptical, it seems to me, about the assessment of the woman's psychiatric state. That's the point.

TIPPING J:

Never mind how she got there.

ELIAS CJ:

Yes.

TIPPING J:

I mean, a significant major depressive disorder, one is used to reading a lot of these things, perhaps in other contexts but that's quite a substantial mental illness?

MR CARTER:

Well there is a, also as part of the mix, there is another psychiatric assessment which is by a nurse which is more recent.

ELIAS CJ:

Was this the one in the police –

TIPPING J:

A nurse against a senior psychiatrist, really Mr Carter.

MR CARTER:

Well if I can take you to the documents, again mixing our volumes, but it's volume 3 of the case on appeal, tab 46, page 519.

ELIAS CJ:

Oh here's the answer to the question I posed earlier but it was at the request of police and counsel.

TIPPING J:

What page is it?

ELIAS CJ:

Page 519.

TIPPING J:

Thank you.

MR CARTER:

This report is dated the 24th of August and states in the third to last paragraph, well the second paragraph, "In the presence of counsel, Chinese interpreter and the writer, the defendant responded minimally to the assessment. She appeared depressed, expressing shame, head bowed, little eye contact. The defendant was unable to give reassurance for her safety. She said that she did not want to go back to China. I will inform the medical unit at Womens Remand Prison of her ongoing potential for self-harm. I respectfully suggest that due legal process should continue." So that's the more recent assessment –

TIPPING J:

Well that's not in any way inconsistent with the senior registrar's assessment? In fact I would have thought it substantially backs it up.

ANDERSON J:

Reinforces it.

MR CARTER:

Well –

ELIAS CJ:

What is the point you're seeking to make with this?

MR CARTER:

Well a degree of scepticism was justified in the circumstances and so he said that he's considered the psychiatric report and he's entitled to consider it but that's not of itself sufficient to cause him to postpone removal.

ANDERSON J:

But many things might of themselves not be sufficient but cumulatively might be quite compelling. It's ticking off boxes saying that doesn't work, that doesn't work, that doesn't work, that isn't going to get one to the right result.

MR CARTER:

That's always the case Sir but this ticking the boxes is another –

ANDERSON J:

It's metaphoric.

MR CARTER:

It's another facet of scepticism Sir in that just because in the case before a Court a decision by an officer is against the applicant for review or appellant, doesn't necessarily mean that it's just been a ticking of the boxes exercise.

ANDERSON J:

I realise, a fair observation and of course there has to be some template to ensure consistency.

MR CARTER:

Yes.

TIPPING J:

Your point on this is that the degree of scepticism was justified?

MR CARTER:

And he was entitled not to see that as – the existence of the psychiatric report as the clincher justifying postponement of removal. Another criticism and another point is – another criticism that was made of his treatment of the psychiatric report was at the end of the same paragraph, this is in the officer's decision, the statement that Ms Ding, in relation to the allegations of abuse, and of course we all know that those were the – the psychiatric report are the first time these surface. There was criticism made on the suggestion by the officer that she could call on the protection of the Chinese authorities, that is police, once back in China should her husband try to abuse her and if you look at the, again at the Counties Manukau psychiatric report of 4 August 2005, it's recorded there on the first page, which is page 757 of volume 4, at the foot of the page, this is the self-reported material of Ms Ding, this marriage

turned out to be very abusive and Mrs Ye was regularly assaulted by her husband when he was intoxicated and often involved the local Chinese police intervening. So the – my point in summary in relation to this material is that the decision that the officer arrived at in relation to the psychiatric report was one that was reasonably open to him and there is no justification for seeing his treatment of that as at fault.

McGRATH J:

Mr Carter, sorry, I'm just trying to get these dates into my mind. This note of the humanitarian interview was signed off on the 31st of August, wasn't it?

MR CARTER:

Yes.

McGRATH J:

This is page 296. Now he had the psychiatric report at that stage but he hasn't at the interview at that date, is that right?

MR CARTER:

He didn't – he did have the psychiatric report by the date – by the 31st of August date because he received it on the 29th of August.

McGRATH J:

And so he is referring to it in the second paragraph on page 296?

MR CARTER:

Yes.

McGRATH J:

Even though – and you have already considered makes it plain that he's supplementing the notes of the interview at this stage?

MR CARTER:

Yes. Now the other aspect of the facts that I had started, or I had referred to yesterday afternoon and I wanted to address was the black children issue and perhaps if we just remain first with the –

ELIAS CJ:

Yes I wonder whether it would be sensible for us to take, since we started early, to take the adjournment now if that's convenient.

COURT ADJOURNS: 11.07 AM

COURT RESUMES: 11. 28 AM

MR CARTER:

Just a couple of points arising from the dialogue before the adjournment Your Honours in relation to the discussion about new information and how that should affect the approach to the humanitarian interview procedure. These, and I appreciate Justice Blanchard was referring to the situation where there has been no previous engagement with Immigration New Zealand but of course in these particular cases there has been a considerable amount of previous engagement and so the Immigration Officer, as is evident from the chronologies in both cases, knew that there had been previous approaches to the Minister seeking intervention and that the Minister or Associate Minister had declined and in relation to Ms Ding the most recent approach to the Minister was a few months before the – the decision of the Minister was a few months before the humanitarian interview. In the chronology at the back of my submissions that's the 21 March 2005 date when the Minister declined the latest approach then and in the Qiu chronology it was a little longer. It was the 16th of July 2002 when the last ministerial decline was made.

The other point I wanted to make was that the, in terms of the degree of process that the Immigration Officer should engage in at the humanitarian interview stage, and my point about not effectively trying to turn him or herself into a removal review authority. It needs to be borne in mind that if following a

humanitarian interview as a matter of practice if the Immigration Officer considers or reaches the conclusion that there is something that is exceptional, that's drawn out as part of the interview process, then his decision is limited to postponing or deferring the removal or I suppose first possibly cancelling the removal order under section 58. Possibly granting a permit under section 35A. Possibly not doing either of those things but just postponing the removal while the case is further investigated and then the compliance officer would refer the matter to another part of the department, the part that – an officer that would normally deal with permit applications and it's at that later stage that a, before that officer, that a fuller humanitarian enquiry can be made. So it's not all, it's not all or nothing at the humanitarian interview –

ELIAS CJ:

But what's the power to defer, what's it under, just tell me the section?

MR CARTER:

Well I suppose, actually I suppose if the person is in custody probably the only viable option would be to cancel the removal order because otherwise you would have to keep on detaining him and go through the procedure in section 60.

TIPPING J:

Sorry, so that would be cancel the removal order then grant a section 35A permit. Now this procedure's interesting. Is that before us in some way for example is it in the manual provisions we have or is it…

MR CARTER:

Ah, I don't believe it is.

TIPPING J:

So you're just really telling us from the bar?

MR CARTER:

Yes I suppose I'm advising you of that from the bar effectively.

ELIAS CJ:

You're saying that if there are circumstances that cause the Immigration Officer to believe there may be significant humanitarian problems, the matter can be further investigated –

MR CARTER:

Yes.

ELIAS CJ:

– by the department.

MR CARTER:

Essentially, yes. So it's not – that point, the point I'm making there is related to the – my point that there shouldn't be a burdensome process imposed on the Immigration Officer at this stage, the compliance officer.

ELIAS CJ:

Well there doesn't have to be if there's a process for a fuller look at the matter. Then the question surely would be pretty simple for us. Has he – I'm just trying to grasp for what you're telling us. That he doesn't have to make a determination, is that what you're saying?

MR CARTER:

Well he doesn't have to make the final determination for example to there and then at the end of the humanitarian interview he doesn't have to, there and then, grant a resident's permit. He can defer the removal process by cancelling the removal order under section 58, granting a temporary permit of some form or a limited purpose permit –

ELIAS CJ:

And are you saying that that is a course that is often followed?

MR CARTER:

Yes, yes.

ELIAS CJ:

Doesn't that suggest, I might be getting this totally wrong, but doesn't that suggest that the standard for him at section 58 or 54 stage is really quite a low one. It's sort of a prima facie enquiry?

MR CARTER:

Well I wouldn't have put it as low as that. There has to be – I have suggested that there has to be something exceptional, another way of putting it, it's a terminology that comes from a very experienced official in the department itself, there has to be something in the nature of a showstopper that causes the Immigration Officer to call a halt to the compulsory removal procedure. But then it can be further investigated by another part of Immigration New Zealand.

McGRATH J:

In this process, just take it through, section 35A permit, how would that come to an end in the sort of furthermore detailed consideration process you're contemplating? Heads off to someone else in the department for a temporary permit or the section 35A permit is given, but when if the departmental person says well I don't think that the process should follow its course, how does that work, how does the permit come to an end?

MR CARTER:

Well if, if as in many cases a limited purpose permit is granted of the kind in the, described in the sections I handed up yesterday afternoon, then that is a finite permit for a limited period of time.

McGRATH J:

I see. I think the phrase, yes, the limited purpose has come to an end.

MR CARTER:

Yes.

McGRATH J:

Now does that mean that section 54 can then be invoked again, does it? Is that what you go back to?

MR CARTER:

If the removal, yes, if the removal order was cancelled, as it would have been, and the limited purpose permit granted, but then the further humanitarian enquiry comes to nothing, then a further removal order would be made under section 54 –

McGRATH J:

And that would require the lapse of a certain period of time, would it, from the – the supporting two days run again or what?

MR CARTER:

Well no because that's the trick, as it were, with the limited purpose permit because the provision says that you're not entitled to any other permit and you don't have a right of appeal to the Removal Review Authority so once the limited purpose permit has come to an end, then it's not a matter of starting all over again with the whole procedure. It's just a removal order can be made –

McGRATH J:

Immediately?

MR CARTER:

Immediately under section 54.

McGRATH J:

I understand, thank you.

ELIAS CJ:

But if there is, on further enquiry, a substantial humanitarian concern which would make it unjust to remove, what happens then in the legislative scheme? You've got your limited purpose permit, it's about to expire because presumably it's until determination by the departmental officer, what are – that you're to get a 35A permit or what?

MR CARTER:

Well it could be expressed in those terms, that it's to last until determination by the, another officer of the humanitarian enquiry. I think in practice it's more likely to be just for a finite time period which would then be extended if required to complete the further investigation. But if the outcome of the further investigation by this other category of Immigration Officer was favourable to the person liable to removal, then a, well possibly a temporary permit of another kind might be issued but if it seems as though that removal just was not, not correct, having looked into the humanitarian circumstances, then in that situation the decision would probably be to grant under section 35A a resident's permit.

ELIAS CJ:

Yes you are sort of describing what the department might do. The legislative handles for, or levers for all of this, would have to be, I just want to understand, are they simply section 34A, which leaves the person affected in a very precarious position because they're not able to do anything themselves, once they're in that status.

MR CARTER:

Well it's less precarious than the position they were before the grant of the 34A permit.

ELIAS CJ:

Sorry, yes I understand that. And you say that section 34A could be used effectively to permit information to be gathered for the exercise ultimately of a section 35A permit?

MR CARTER:

Ye, of whatever kind but if the ultimate outcome of the exercise was to exercise the discretion favourably in the light of the section 47(3) guide and taking into account the best interests of children as a mandatory relevant consideration, then a resident's permit would probably be the ultimate outcome.

ELIAS CJ:

Is it consistent with New Zealand's humanitarian commitments for then a final determination to be made by an Immigration Officer under section 58 on imperfect information? In other words, if a tenable or a prima facie humanitarian case is identified which if accepted would make it unjust et cetera to remove, can the Immigration Officer ever fairly act to remove under – or decline to cancel a removal order under section 58 or make a removal order under section 54?

MR CARTER:

Yes, because – well two points. The compliance comes from compliance with international obligations under ICCPR and CRC comes from the existence of the alternative, the proper procedure under section 47 so that is the compliance.

ELIAS CJ:

I can understand that as a matter of preferable procedure but I'm looking at the substantive position where that procedure for one reason or not, has not been operative.

MR CARTER:

Well the Canadian cases, which I was intending to take Your Honours to a little later, do seem to, well in my submission, establish that the international obligations are met in the ways that I've described by the existence of an alternative procedure somewhere else. And also bearing in mind the other factor which the Canadians apply is a burden of proof concept which we have

here as I've set out in the extensive footnotes that the – or burden of proof is sometimes an unfashionable term in this area but is a responsibility on the applicant, that's a term that's used throughout the legislation and has been confirmed as a responsibility or onus if that's the correct terminology, in all areas of the immigration decision making starting with the very first engagement with applying for a permit of any kind.

ELIAS CJ:

Well you better then develop that but the solution or the path that you've outlined to us, which I must say hadn't really occurred to me to be one that the department was routinely using, that doesn't appear in guidance to using that route, section 34A, 35 route, in cases of section 54 and section 58 isn't adopted as practice in the departmental manual.

MR CARTER:

That's correct. It's not referred to in –

ELIAS CJ:

Thank you, that's very helpful.

MR CARTER:

I just wanted to address the black children issue because as I submitted yesterday in my submission it's assumed a prominence that isn't justified in the circumstances of this case. It's not specifically referred to in either of the Immigration Officer's decisions following the completion of the humanitarian interview process, but that's not surprising because the material that was provided to the Immigration Officer during the course of the humanitarian interview didn't raise a flag about it. There are some references to possible problems with access to health or education but not, and I think in the case of the humanitarian interview of Mr Qiu, there is a reference to the one child policy but there is nowhere a suggestion that the children, if they were to accompany either parent to China, would be subject to discrimination, if that's the correct word, on the basis of being children born of Chinese citizen parents –

BLANCHARD J:

Are you saying that it's necessary for these people to have pointed out the one child policy and well known consequences of the one child policy and that if they didn't bother to point that out, the Immigration Officer didn't have to take it into account?

MR CARTER:

Correct and –

BLANCHARD J:

That's an extraordinary submission.

MR CARTER:

No, no it's not extraordinary Sir because the – what's established in the refugee decisions dealing with the one child policy is that there is a considerable amount of variation in the implementation of the policy in different regions and provinces of China, remembering it's a huge country of I think at last count more than 300 million people and there is variable enforcement and approaches to the one child policy depending on where you happen to live and –

ELIAS CJ:

Are people who've been here for eight to 10 years going to be able to provide that sort of information?

MR CARTER:

Well with, I would have to accept, with difficulty because the – in reviewing the refugee and other decisions and the country information there isn't actually a clear bright light indication as to how the one child policy would necessarily be applied in relation to particular individuals.

ANDERSON J:

But it must always be a risk?

MR CARTER:

Well yes except the, what's established in the refugee decisions is that where it's enforced, and in some regions it's not, but where it's enforced the usual penalty is a fine.

ANDERSON J:

Which if it's not paid, results in imprisonment?

MR CARTER:

Well again it's variable –

ANDERSON J:

Anyway, on a refugee basis you might have to show a greater likelihood of prejudice than the risk of it whereas the risk of it might be a relevant consideration in the humanitarian context.

MR CARTER:

Well in some respects the, and it seems odd to say it, but in some respects the refugee enquiry is narrower than the general humanitarian enquiry because the refugee decision maker is looking to ascertain whether on particular facts there is a well founded fear of persecution for a convention reason and –

ANDERSON J:

Yes we understand that.

MR CARTER:

Yes and that's the – because of the slightly different requirements, that is why many applicants for refugee status that have based their claims on the one child policy have failed in New Zealand.

ANDERSON J:

Hence my observation a couple of minutes ago that the degree of risk may not be sufficient for refugee purposes but may still be a relevant consideration for humanitarian assessment purposes?

MR CARTER:

Ah yes, well I would have to accept that but there's still the problem with the paucity of information and –

ANDERSON J:

But these officers, they're often in contact with the Chinese Embassy.

MR CARTER:

Well it's not quite as simple as that Sir in that these – in these particular cases, yes, there's evidence before the Court that immigration compliance officers have had dealings with the Chinese Consulate –

ANDERSON J:

Which they have to if –

MR CARTER:

To make travel arrangements and –

ANDERSON J:

– they're going to have enforcement.

MR CARTER:

Yes but that doesn't mean to say they become, by any means, that they're experts on the one child policy.

ANDERSON J:

I certainly accept that. Well that they would get appropriate information if they asked.

MR CARTER:

Correct but a problem, another problem which I submit comes from the, arises out of the judgment of Justice Glazebrook on this topic is her suggestion that immigration compliance officers can make, if there's a one child policy issue, they ought to be able to go off and access Immigration New Zealand databases and get a whole lot of country information on the one child policy and analyse a whole lot of refugee decisions. She doesn't put it, I'm exaggerating, but that's the, that's what I suggest it would amount to.

ANDERSON J:

Well it could be information that's kept by the department couldn't it? I mean there could be just a couple of pages saying the areas of risk as at such and such a date are here, here, here and here and then find out from the applicant if you return to China where is your family based, where will you go and then relate that to known data.

MR CARTER:

Well the, yes the trouble is though that you're still reliant on what you get from the person liable to removal, the interviewee. You have to have basic information as to where they're likely to settle if they are returned in this case to China and what are the circumstances there. Because if it was a refugee enquiry that is precisely what a Refugee Status Officer or the Refugee Status Appeals Authority would do. They don't just sort of make decisions in a vacuum by reference to a bunch of country information, the US State Department reports or Amnesty International reports or Human Rights Watch reports, they have to link it back to the individual case and where someone's applying for refugee status they give all that information because they have to if they want to actually make out their claim for refugee status.

BLANCHARD J:

But surely as soon as you know that there are children involved, more than one child involved, I would have thought it would be natural for the Immigration Officer to ask whereabouts in China did you come from? Are you going back there? If not, where would you be going in China and I would

have thought that the department would have, as Justice Anderson suggests, some sort of running record of what's actually going on in relation to the implementation of the black child policy. It won't be perfect by any means and circumstances are probably changing all the time within China but surely some attempt has to be made to keep up to date so that the Immigration Officers are properly informed? It's not as though it's a rarity to be dealing with this situation.

MR CARTER:

Ah well no, yes I'd have to accept it won't be a, it won't be a rarity because in the statistics I set out at the beginning of the first respondent's submissions, there are estimated to be just over 2,000 unlawfully present persons from the People's Republic of China. But again general information only goes so far.

ELIAS CJ:

But general information, if you – I wouldn't have thought that what the Immigration Officer has to do is any sort of precise calculation about detriment, that would be ridiculous. Isn't the important thing that where you have children who are not of an age where movement is going to be inconsequential to them, who are at school and settled, it's important to take into account the fact that they will be, they are likely to be disadvantaged additionally by reason of the fact that they don't meet the one child policy.

MR CARTER:

Well –

ELIAS CJ:

So that comes into the calculation of what sort of humanitarian effect they're going to suffer. It adds to the problems of dislocation into a different cultural media, it's plus.

MR CARTER:

Well likely to be disadvantaged. It may be an overstatement I –

ELIAS CJ:

Well I would have thought, on the information that we've had, which may be imperfect of course, that they are likely to be disadvantaged. In fact they're very likely to be disadvantaged. It may only be that the parents will be fined, it may, but they're at risk, they're very likely to be at risk.

MR CARTER:

Well the imposition of a fine doesn't –

ELIAS CJ:

In circumstances where the family has no means of support.

MR CARTER:

If that is in fact the position, I know that is asserted in both of these cases, but the position – the position basically is uncertain and not aided by limited information provided by the interviewee and that's what we have here. The interviewee provided very limited information in both the, and I'm talking about both –

ELIAS CJ:

The uncertainty is in the enforcement but it's official policy?

MR CARTER:

Yes, which is variable.

ELIAS CJ:

Yes.

MR CARTER:

It's a national official policy but its implementation is regional and provincial –

ELIAS CJ:

Well I would have thought that one can infer from that that they are disadvantaged.

MR CARTER:

Well, perhaps at a general level although in this particular case it may be going a little too far to say that there's likely to be disadvantage here. I'm just looking for –

ELIAS CJ:

But they're children subject to an official stigma or the family is subject to an official stigma. That is not a disadvantage they are presently under in New Zealand. It adds to the disruption that they're going to face.

MR CARTER:

But the problem is on the facts of these appeals and the problem with the information that I have already identified, it's very, well I think I suggest it's impossible to actually determine precisely what is the nature and extent of the detriment.

ELIAS CJ:

Yes.

MR CARTER:

You're making a series of assumptions –

ELIAS CJ:

They may get schooling you mean?

MR CARTER:

May get schooling. May have access to health and there's also an assumption that children born of – foreign born children are in fact black children which may not necessarily be the case in terms of the way that the policy is implemented in the particular areas. If I could take you to a couple of the reports, recent reports that are in the volume of authorities and this is general country information so it's subject to the limitations that I've already described. But in volume 9 at tab 243 there's a home office country report. There don't

seem to be page numbers but on the third typewritten page at paragraph 6.262 stated that a China specialist at the US State Department told the RIC that his office presently had little information on the treatment of returning Chinese who had children while abroad. The specialist added that actual implementation of China's population control policy varies considerably throughout the country and that some people in southern Fujian and Guangdong provinces had reported no problems in returning after having children abroad. Now this is taken from a general website and that's a report of I guess a hearsay statement but nevertheless in these particular cases Ms Ding appears to have prior to arriving in New Zealand, appears to have come from Guangdong province and I get that from the Refugee Status Appeals Authority decision concerning Ms Ding which is in the case on appeal volume 4 at tab 57 and that's just –

ELIAS CJ:

But this – look I think there's an air of unreality about these submissions. There's no indication that the Immigration Officer pondered about where she was going and whether this policy would have – there's no consideration of it at all and that's really what we're principally concerned with. And if there is an official policy, I would have thought that the Court is entitled to operate in that knowledge and in the knowledge which we can accept from you that as to how it's applied varies. But it is an additional disadvantage that these children have because they –

MR CARTER:

May have, may have.

ELIAS CJ:

Well it is an existing disadvantage because it is official policy that families should have not more – should not have more than one child.

TIPPING J:

Could I just add to that Mr Carter? The vice alleged against you is not taking any account of the relevant consideration. It's clearly a relevant

consideration. Can you show, on the face of the reasoning, that they took account of it? In my respectful view it's as simple as that. That is the allegation against you.

MR CARTER:

That the children are –

TIPPING J:

The black children issue is relevant. You couldn't possibly suggest I take it that it's irrelevant?

MR CARTER:

Well I'm about to I'm afraid Your Honour because –

TIPPING J:

All right, well that I think is what you have to say because frankly your people, as you've acknowledged, didn't make any reference to it and didn't appear to weigh it in the equation.

MR CARTER:

But that was because there is nothing coming from, there's nothing coming from either Ms Ding or Mr Qiu that states that their children are going to be directly affected by the black children –

TIPPING J:

Well I have to tell you that I find that a most unpersuasive argument. You're in effect shooting yourself in the foot here because you're saying that because nothing came from them, they didn't take any notice of it, therefore you have to say that it was an irrelevant consideration.

BLANCHARD J:

Were it something as well known as this policy I think it's got to be factored in. I share the view that Justice Tipping is taking on this. I found it quite extraordinary that there was no reference to the policy.

TIPPING J:

When you're looking at it through the lens of the children, the whole focus of these things seems to me to be through the wrong lens or at least not to include the right lens. Now that's the point you've got to make and this is just a manifestation of it.

MR CARTER:

Well I think another, I was going to mention also that the other region of, region mentioned here in this –

TIPPING J:

Look if you want to take up valuable time in trying to persuade us or me that because there's regional variations and because they didn't mention it, it doesn't have to be taken into account, you're wasting your time.

MR CARTER:

But if the actual factual position, which may be known to Ms Ding and may be known to Mr Qiu that –

TIPPING J:

They didn't even ask her.

MR CARTER:

That if –

TIPPING J:

They didn't even ask her.

MR CARTER:

But wouldn't it be reasonable for Mr Qiu and Ms Ding, when they're interviewed and prompted –

TIPPING J:

Is hugely depressed. She's hauled off to the police station. She's in a hostile environment. Your people know or should know all about the national policy of China and they simply sit on their hands and say because she didn't raise it, we're going to ignore it.

MR CARTER:

There was a previous interview, humanitarian interview of Ms Ding.

BLANCHARD J:

Was it mentioned there?

MR CARTER:

Not the black child –

BLANCHARD J:

So they've done it again.

TIPPING J:

I really think you must have a better point than this.

MR CARTER:

It seems officials are damned if they do or damned if they don't.

TIPPING J:

No they're not.

ELIAS CJ:

They don't.

TIPPING J:

They've got to do it, if we're going to do it at all, they've got to do it properly.

ANDERSON J:

They're damned if they do when they shouldn't and they're damned if they don't when they should but that's as –

BLANCHARD J:

If they had put it to her or asked her whether she understood there was likely to be any specific effects of this policy in her province and she had come up with something that was effectively just airy statements, they might well be entitled to say well the information that we've got, imperfect as it may be, suggests the contrary, and then they can factor that into their decision. Nobody is going to be requiring them to go off to the particular province and make their own enquiries there but simply to pay no attention to it when the interests of children is a primary consideration, under a convention that New Zealand signed up to, seems to me to be strange.

MR CARTER:

Well of course as part of the context in Ms Ding's case there was an earlier Refugee Status Appeals Authority decision which raised the one child policy as part of the mix.

BLANCHARD J:

What was actually said in that decision?

MR CARTER:

Well, it actually didn't – the decision was entirely based on credibility, on adverse credibility findings so the –

BLANCHARD J:

So it didn't really address this question?

MR CARTER:

No it didn't, but that was because the story of Ms Ding for one reason or another was not found to be credible.

BLANCHARD J:

But wasn't that on a completely different basis? Wasn't she complaining that she was going to be personally persecuted because there was some family or other dispute with a local official that she was either implicated in or got caught up in?

MR CARTER:

No that's actually Mrs Qiu.

BLANCHARD J:

Is it? All right.

MR CARTER:

Yes.

ANDERSON J:

Could you give us the reference to the Refugee Authority decision again? You gave it before I think but I missed it.

ELIAS CJ:

And just before you take us to that, because I'd like to see that, in respect of the Ye children, the questionnaire does talk about not knowing how she could afford to school them and hospitalise them and things like that. That must be an indication of concern about disadvantage.

MR CARTER:

Well yes it certainly is, I accept that without hesitation, but it's got nothing to do with the black children.

ELIAS CJ:

Well don't all children, all single children in China have access to education and –

MR CARTER:

Citizens.

ELIAS CJ:

Yes.

MR CARTER:

Citizens.

ELIAS CJ:

Oh it's a citizen disadvantage.

ANDERSON J:

The National Policy of Free Education for Citizen Children.

MR CARTER:

Volume 4, page 57 is the – tab 57, page 728 is the Refugee Status Appeals Authority decision. Volume 4, page 728.

ELIAS CJ:

Sorry, what page?

MR CARTER:

728. Yes, it's attached to the first affidavit of the Immigration Officer in that case.

TIPPING J:

Right at the very end of the decision, 735 paragraph 28, there's a passing reference to the number of children, "And it may be that on their return, they would face penalties such as fines and the likes, and/or be required to undergo sterilisation. Any such State sanctions will be imposed in accordance, et cetera, general applicable, not as a discriminatory measure for a Convention reason", well that's all very splendid in that context, but it's not quite so splendid in the present context.

MR CARTER:

Well yes, the word “may” is used Sir.

TIPPING J:

Well no, they’re just saying well it’s not for a Convention reason, but here –

MR CARTER:

Yes, but we’ve also got, the rest of the decision Sir is about –

TIPPING J:

I know it’s all about credibility, I’m just trying to identify the only bit where they refer specifically to the situation in China.

MR CARTER:

In those circumstances, the emphasis is rightly put on the word “may.”

TIPPING J:

I’m not saying – I’m just saying, it doesn’t help much, it doesn’t give one much comfort when you’re told that they’re going to face sterilisation.

MR CARTER:

Just before leaving that –

BLANCHARD J:

Not the children.

TIPPING J:

Not the children, no, no.

MR CARTER:

There was one other matter I wanted to – on the subject of black children, if I could just have a moment Your Honours, I’ll just find a document that I seem to have mislaid on my table here. I’m handing up a copy of a Removal

Review Authority decision concerning the *Huang* couple, which is the case that Your Honours are hearing next week, and the reason I'm doing that in the current context is there is a discussion of the *Chen Shi Hai*, High Court of Australia decision, which begins at paragraph 26 and the –

TIPPING J:

I'm sorry, I missed the reference.

MR CARTER:

Paragraph 26, page 7 of the Removal Review Authority decision.

McGRATH J:

Can you just tell us who the member or members who sat were?

MR CARTER:

This was Mr Turkington, his signature is on the last page, and one member only. Now, that discusses the *Chen Shi Hai* decision which my learned friends have highlighted and the member points out, paragraph 27, at the top of page 8, that *Hai* proceeded on the basis of unchallenged findings of fact that the child would be the subject of persecution and the question at issue was whether that fell within Convention reasons because of its membership of a particular social group. The High Court found that it did, but the factual analysis under which it relied is challenged here. He mentions that the refugee status branch in this particular case referred to the latest Home Office report which was October 2001 and here's the variability in practice that I was getting at before. Any problems with officials over non-registered status that would logically be the case are in practice, rarely meaningfully enforced with the situation being particularly unclear in rural areas. The question of lack of registration limiting access to services such as health and education is misleading. Health services in rural areas have never been free of charge, likewise, education is increasingly fee paying at all levels. Such services are accessible upon payment. The PRC State Council has stated that unregistered children will be registered unconditionally as part of the fifth national census in January 2001.

So again, there's nothing conclusive about it, but it's another factor in the mix, in my submission, that in my submission suggests that invoking the black child policy, which was not expressly invoked in either of the two matters that are the subject of these appeals is necessarily going to be the clincher.

TIPPING J:

Is your submission here essentially that failure to take this into account is excused by the applicant's failure to mention it?

MR CARTER:

If there is nothing raised by the interviewee that would prompt the decision maker to take into account, then that is – there is no error of law.

TIPPING J:

All right, thank you.

MR CARTER:

There is one reference that may assist in that submission, which is a New Zealand case, removal case, *Butler v Removal Review Authority*, which is volume 1, tab 37 of the volume of authorities.

BLANCHARD J:

I didn't know they had a one child policy in Ireland.

MR CARTER:

It's not about the one child policy Sir, it's an attempt to at least impart –

ELIAS CJ:

Sorry what tab?

MR CARTER:

Actually, I think I may have got myself muddled, Your Honour, I don't think it's *Butler* that I'm after, it's –

BLANCHARD J:

To be sure.

TIPPING J:

I'm glad you – because it doesn't look very promising from your point of view, this judgment.

MR CARTER:

Yes I hope the reference I'm thinking of is actually in the case I'm about to refer Your Honours to, it's *Jiao* which is volume 2, tab 59.

TIPPING J:

An authority of some force, I see.

MR CARTER:

Very much so, yes. In the main. It's not – there's a cross-reference to *Butler* which is why I thought of *Butler*. At paragraph 33 of the judgment, at the end of that paragraph, "As this Court said in *Butler v the Attorney-General* at page 215, it cannot be an error of law for a Tribunal considering a matter which is properly before it to fail to rule on some particular aspect of the matter if that matter is not raised with it by the interested party."

BLANCHARD J:

And if it does not stand out as requiring decision.

MR CARTER:

Yes, I was going to read that out as well Sir, but obviously, well, we may differ on whether the black children matter is a matter standing out for –

TIPPING J:

But note the words "rule on", the expression "rule on." This isn't a failure to take into account relevant considerations authority, you can't fail to take into

account a relevant consideration just because someone doesn't raise it. This is an adjudicative, that's why the expression "rule on" is used.

MR CARTER:

Well it depends –

TIPPING J:

If you don't put a point in issue, you can't expect to have it ruled on unless it is put.

MR CARTER:

Well if the interviewees here don't, or haven't raised anything other than general statements about possible limits on access to health and education, in my submission, it's not something that stands out and not something –

TIPPING J:

All right, I hear what you say.

MR CARTER:

Thank you Sir. Now the other matter I wanted to address was, at this stage was the significance of New Zealand citizenship. I've covered that in paragraphs 80 to 91 of the first respondent's submissions and I've noted that the citizenship issue was not the subject of pleading in the High Court, there is a reference in the Ye children's statement of claim to the possible loss of citizenship but not to the idea that the status of citizenship requires some higher or gives some superior right for the parents to remain in New Zealand.

TIPPING J:

This is a factor peculiar to these cases because going forward, it's no longer an issue, is it, the citizenship point because in 2006 wasn't it changed? You don't become a citizen?

MR CARTER:

Yes, that's correct, so citizens –

TIPPING J:

I mean it's obviously relevant to this case but it doesn't have continuing relevance.

MR CARTER:

Well it does for a period of time measured in years.

TIPPING J:

I'm not saying it shouldn't be addressed, I just wanted to see the weight of it in the overall scheme of things.

MR CARTER:

Well I would suggest considerable weight because potentially, as I've said in the first respondent's submissions, we're talking about potentially thousands of children of unlawfully present persons who are – who may be able to invoke New Zealand citizenship as part of –

TIPPING J:

Is anyone saying that it's more than just a factor to bear in mind? No one's suggesting it's a trump card are they? Mr Harrison may have got quite close to that in one of his more enthusiastic moments, but –

MR CARTER:

Well I thought he did, yes. I stand to be corrected, but that's certainly my interpretation of both the oral and the written submissions and I'll take you back, if I may, to the *Winata* decision again, volume 7 at tab 178. And at paragraph 7.3 –

ELIAS CJ:

Sorry, which volume? One, is it?

MR CARTER:

No, it's 7.

ELIAS CJ:

And tab?

MR CARTER:

178, paragraph 7.3. That was, well we've already been over the facts, but 7.3, the committee says, "It's certainly unobjectionable under the Covenant that a State Party may require, under its laws, the departure of persons who remain in its territory beyond limited duration permits, nor is the fact that a child is born or that by operation of law such a child receives citizenship either at birth or a later time sufficient of itself to make a proposed deportation of one or both parents arbitrary. Accordingly, there is significant scope for the States Parties to enforce their immigration policy and to require departure of unlawfully present persons. That discretion is, however, not unlimited and may come to be exercised arbitrarily in certain circumstances." That's the starting point as recognised by the committee that operates under ICCPR.

Now, there is another case that I wanted to highlight which is returning to Ireland, the Irish Supreme Court decision which is at tab 183 of the same volume. We've referred to it in our submissions and index as *Lobe* when we had an unreported version but see that there is a, there's been suppression orders of some sort and it's reported as under the letters AO. That case didn't concern the European Convention or the ICCPR, but did turn on provisions of the Irish Constitution which have some similarities to the articles that we're concerned with here. I've set out parts of the constitution at paragraph 87 of the first respondent's submissions and in particular Article 41 concerning the family, the State recognises the family as the natural primary and fundamental unit group of society, which is very similar to Article 23 of ICCPR. The facts of AO briefly set out in the judgment of Chief Justice Keane at page 11 of the report, all the applicants were nationals of the Czech Republic. They arrived in Ireland and almost immediately made a claim for refugee status, so there's a similarity with the present appeals. While the refugee status claim was being determined, over a period of a year or two, several children were born and at the time of the relevant decisions the children were young, like one or

two years old. At page 16, Chief Justice Keane said, “The issue which arose for determination in the High Court and this Court was, as to what extent the fact for the children is entitled to Irish citizenship necessarily confers an automatic right of residence in the State on the parents and siblings of that child.” At paragraph 18, His Honour noted, “Every citizen, including the minor applicants in the present case, enjoys in general terms the right not to be expelled from the State. It would seem however that like so many other rights acknowledged by or conferred by the constitution, this is not an absolute right.” Next page, a little down the first paragraph, “At the time the claim was made in this proceedings, they were entitled as a matter of legal right, to reside in Ireland by virtue of their citizenship, they had only just been born. Infants of that age are incapable of making still less articulating any decisions as to where they will reside. The decision as to where they will reside will inevitably be taken by those in whose care they are at the relevant time, normally as in this case, their parents.” In the next paragraph, in the last third, His Honour states, “The position of children of the age of the minor applicants is significantly weaker than that of adult citizens who are in prison or otherwise constrained from exercising a choice of residence since the children have never been capable in law of exercising the right and in practical terms as distinct from legal theory. It may reasonably be regarded as a right which does not vest in them until they reach an age at which they are capable of exercising it and it may be of asserting a choice of residence different from that which their parents would desire. The constitutional right which the minor applicants in this case undoubtedly enjoy, is the right to be in the caring company of the other members of their families including their parents and siblings and that right is not contested in these proceedings.” Further on, “If there were no authority to the contrary, I would have little difficulty in reaching a conclusion the children in the position of the minor applicants in this case, have no automatic constitutional entitlement to the care and company of their parents in the State for an indefinite period into the future, simply by virtue of their having been born in the State.” Over the page, in the middle of the first paragraph, “Presupposes that the minor applicants are in law entitled to choose where they reside. They are both factually and in law incapable of making such a choice and if their parents were lawfully entitled to choose to

reside in Ireland rather than in Nigeria or the Czech Republic which they are not, the right of the minor citizens to reside with them in Ireland would derive not from the fact that they are Irish citizens but their constitutional right to be in the care and custody of their parents."

Now, there are similar – it's a majority judgment of five to two. There a similar comments in the other members of the Court, who are in the majority which, in my submission, are helpful in understanding that citizenship is simply a factor but it is not to be confused or elevated into providing some sort of superior lever to enable the parents who are unlawfully present to remain. In the conclusion section of Chief Justice Keane, at page 36, His Honour seems to describe the case before him in terms of the way some of the submissions have been advanced by the appellants, "In effect, the case made on behalf of the applicants is that where a married couple arrive in Ireland in circumstances which render them illegal immigrants and the wife gives birth to a child, the entire family are entitled to remain in Ireland, at least until such time as the child reaches his or her majority. That this right derives from the Irish citizenship of the newly born child and the constitutional rights of such a child to the society and care of its parents and that it arises irrespective of the length of time which elapses between their arrival in the State and the birth of their child." That argument was rejected by the majority. There is a lot of discussion of distinguishing of a previous case *Fajujonu*, which I've probably pronounced wrongly, *Fajujonu* which is cited at page, one of the places it's cited is at page 62. That was an earlier case involving families in similar circumstances but where the citizen children were slightly older. I don't recall the exact ages but they were older and the opposite conclusion in the earlier case was reached, whereby the Irish Supreme Court did find in favour of the applicants and a lot of this AO decision is about distinguishing that earlier case of the same Court. One of the factors which appear to have influenced the Irish Supreme Court in reaching a different conclusion in the second case, apart from the age of the children, is the knock on effect to the integrity of the asylum system, the refugee system and a theme that you get running through the judgments is that if we allow the parents to, in a sense, leverage off the citizenship of their minor children and give them an ability to remain, given

that they only entered Ireland through making a claim for refugee status, that a long term effect may be to diminish the integrity of the asylum system.

ELIAS CJ:

We don't have to worry about the long term effects because they've been addressed by the change in status of children born here.

MR CARTER:

Well yes, up to a point but as I submitted to His Honour Justice Tipping earlier, there's still some residual significance in that there is an unknown cohort, to use Mr Harrison's expression I think, an unknown group which could be in the thousands, that is, you know, can't be dismissed. That's all I wanted to draw Your Honours' attention to in relation to citizenship.

ELIAS CJ:

I can accept that citizenship is not the decisive factor but it must be relevant, as you've acknowledged and it also does give rise to some wider public interest issues, some wider New Zealand public interest issues. If children who are settled here are dislocated, have problems of adjustment in China and ultimately have the right to come back into New Zealand, we are going to have a cohort of potentially quite disruptive citizens, ones who haven't been adequately educated to fulfil their citizenship responsibilities.

MR CARTER:

You already have a no doubt significant cohort of precisely the same category of citizen children being New Zealand citizen children of parents who have voluntarily decided to go off somewhere overseas, take their children with them and the children are not – they have had to experience a disruption, a temporary deferment of the enjoyment of what they get from citizenship.

ELIAS CJ:

Yes but it is not being imposed on them. It is not in circumstances of such risk. Anyway, I'm not disagreeing with the main thrust of your submission

which, as I understand it, is that it's not a decisive factor although it's a relevant factor.

MR CARTER:

That's correct, Your Honour, thank you. Perhaps now is a convenient time –

McGRATH J:

In between sections of your argument Mr Carter, there was something I meant to raise with you earlier. Could you just tell me which statutory provisions actually deal with the children going with a parent who is being removed from New Zealand? Not confined to questions of whether they are citizens or not, or others but there was at least one statutory provision that addressed that factor, wasn't there? What I'm really trying to do is to find what statutory context there is that will help guide us in this matter.

MR CARTER:

I think the one you might be referring to is 141B to D which is the responsible adult. Is that the one that perhaps...?

McGRATH J:

Yes, that does sound familiar. Is that the only such provision and what is the context of which it deals?

ELIAS CJ:

Isn't it 54(3)?

MR CARTER:

54(3), that's dealing with the situation of dependant children who are also unlawfully present.

ELIAS CJ:

Yes.

MR CARTER:

There won't be a provision dealing with the removal of citizen children.

McGRATH J:

Of course but section 54(3) is and section 141B to D are the only provisions I need be concerned with in that respect?

MR CARTER:

I believe so Sir, I'll check that during the lunch adjournment but I think that's all there is. Perhaps now, before leaving citizenship completely, if I could deal with the evidence that was before the High Court in relation to citizenship and also the new evidence proposed to be adduced in these appeals, being the evidence of Mr Delamere. Could I invite Your Honours to take volume 1 of the case on appeal and the second judgment in that volume is the judgment of Justice Baragwanath. If I could ask you to open the copy of the judgment at page 266 which is the appendix that His Honour has added the judgment with a copy of the nationality law of the People's Republic of China. If you keep that open but also find volume 3 of the case on appeal and take you to the affidavit of Ms Ye which is tab 49 of volume 3.

TIPPING J:

Volume 3 at page? I'm sorry.

MR CARTER:

Page 545. That's the evidence on – remembering that the Ye children statement of claim contains a paragraph alleging the likely loss of citizenship in China. This affidavit is one of the affidavitsto which objection has been taken because it is largely post-decision evidence that is brought in in the application for judicial review, it wasn't before the decision maker but at paragraph 5 –

ELIAS CJ:

Why is it not permissible?

MR CARTER:

It wasn't before the decision maker. There's also a question as to the, in this particular case –

ELIAS CJ:

In judicial review material is often admitted that is not before the decision maker.

MR CARTER:

Generally and I acknowledge there are exceptions, generally, directly relevant evidence to impugning a decision in judicial review is the material that was before the decision maker at the time they made their decision. Now, there are obviously exceptions and I've covered some of those in –

ELIAS CJ:

Anyway, carry on.

MR CARTER:

In relation to this particular affidavit, Ms Ye is not qualified in Chinese law but she's qualified as a New Zealand lawyer but –

MR HARRISON QC:

Read paragraph 4 please, if you are going to criticise her qualifications.

MR CARTER:

Mr Harrison has just pointed out paragraph 4, where she says, "I'm not qualified to practice as a lawyer in China but from my experience of growing up there, living there and visiting on many occasions, I am familiar with the legal and political system of China, including matters relating to citizenship, immigration, education, health care and family planning." Now, in relation to citizenship, the next paragraph, paragraph 5, states that, "China does not recognise dual nationality. Article 5 of China's nationality law states that foreign born children of Chinese citizens who have acquired foreign nationality at birth shall not have Chinese citizenship."

BLANCHARD J:

That's actually not correct. If you look at Article 5, on page 266, it doesn't say that.

MR CARTER:

Yes, you took the words right out of my mouth Sir.

ELIAS CJ:

Why are we doing it in this very roundabout way? Why can't you just, where's it, why can't you just tell us what the – what is the submission you're, I mean, this isn't a detective exercise, we can accept submissions from you. I'm lost, in terms of what you are trying to tell us here.

MR CARTER:

Just that the material here may not be reliable because what is deposed in paragraph 5 –

BLANCHARD J:

Isn't the simple point this, Article 5 of the nationality law of the PRC says in part that, "A person whose parents are both Chinese nationals and have both settled abroad and who has acquired foreign nationality at birth, shall not have Chinese nationality." Now the critical point, I would have thought, is whether the Chinese authorities would regard these people as having settled abroad, when for the whole time they have been in New Zealand, well for most of the time, they have been here unlawfully. We don't know the answer to that, do we?

MR CARTER:

No, we don't –

MR HARRISON QC:

It's in Mr Delamere's affidavit.

MR CARTER:

My learned friend says the answer is in Mr Delamere's affidavit but again, that information isn't coming from an expert Chinese lawyer and doesn't refer to relevant statutory provisions.

TIPPING J:

I would have thought, for myself, that if one is going to engage in this issue which is peripheral at best, one would need evidence from a person versed in and is an expert witness in the laws of China, in this respect. Since neither of these deponents are, I wouldn't be inclined to take much notice of them. By neither, I mean Ms Ye, no disrespect to her or Mr Delamere. I mean, otherwise we are just punching around.

BLANCHARD J:

Ms Ye doesn't actually address the point.

TIPPING J:

No, she doesn't and frankly I think we're – you don't need to chase every rabbit that's been set loose in this case.

ELIAS CJ:

But you are very welcome to pull some out of hats.

TIPPING J:

I'm longing to get to the point that's troubling me, it is the legal mindset of the decision makers and I don't really care very much about whether, you know, there's enough problems that they are going to face in China, it's whether or not they get out of China and come back to New Zealand. We are never going to pin all this down exactly.

MR CARTER:

Well, the appellant –

ELIAS CJ:

It doesn't lie terrifically well, I wouldn't have thought, in the first respondent's mouth to say that people in this position must put evidence before the Immigration Officers and then to be enormously critical of the evidence they manage to cobble together in very difficult circumstances. So, I would have thought for some purposes, departing from my earlier statement, for some purposes this may well be material that would have been relevant to the decision maker and it does not abate concern about disadvantage.

MR CARTER:

The Ye appellant children are advancing the submission as I understand it, that there is a risk that they are going to lose New Zealand citizenship. In fact, in the proposed new evidence sought to be adduced on appeal, it's put in more emphatic terms, that what it all adds up to is that these children are going to be stripped of their New Zealand citizenship.

TIPPING J:

But they can't lose New Zealand citizenship vis-à-vis New Zealand, can they? The attitude the Chinese people take about it is relevant but it can't strip them of their New Zealand citizenship.

MR CARTER:

Which actually goes – and that's correct Sir because under –

TIPPING J:

Why are we spending so much time –

ANDERSON J:

There's two possibilities. The Chinese authorities will recognise the children are of Chinese nationality and give them the benefits of that while they are there, or it will not recognise them as having Chinese nationality and they will suffer the disadvantages of that while they are there.

TIPPING J:

But nothing will change their position vis-à-vis New Zealand.

MR CARTER:

The appellants are advancing the opposite proposition –

TIPPING J:

I know but it's –

ELIAS CJ:

I think you can move on from this Mr Carter.

MR CARTER:

Thank you for that indication.

BLANCHARD J:

He sighed.

MR CARTER:

Perhaps if I take Your Honours to the Canadian authorities that the first respondent relies on.

BLANCHARD J:

They are dealt with in your written submissions, aren't they?

MR CARTER:

Yes, they are.

BLANCHARD J:

Are you going to be taking us to anything in there that is not highlighted in the written submissions? I'm just trying to avoid having to get out another volume of material.

MR CARTER:

The key points – I'd prefer to get out another volume as well Sir, if I possibly can. The key points are that – and I've got this at paragraph 118, that at the final stage of the immigration process, a more limited enquiry is justified. Going on, "While a full fledged analysis is required in the context of a humanitarian and compassionate grounds application, a less thorough examination of children's best interests is sufficient at the end point in the process where a decision to remove is made. Here the obligation is to consider the short term interests of the child, for example, to determine whether to defer removal until the end of the school year if the child is going to accompany the parent, or to ensure that the provisions have been made for the care of the child if the parent is to be removed and the child is to stay." That's the key point, to draw the distinction between the different approach that the Canadians take at the end stage of the process.

ELIAS CJ:

Can everyone, as a practical matter, get to the appeal stage in the Canadian immigration set up because that's the problem here, that this is a first and last stop. If it's a long stop under the Canadian legislation, the position is very different.

MR CARTER:

They seem to have a – they have the humanitarian and compassionate exception procedure which seems to be broadly equivalent to our Removal Review Authority jurisdiction.

McGRATH J:

But do you get locked out of it?

ELIAS CJ:

That's the real problem in this case.

MR CARTER:

I will check this over the lunch hour but I think the answer is that you don't get locked out of it. You can be removed and some of the cases that I've cited that deal with the later stage of the process, seem to indicate to me that you can be removed before your compassionate and humanitarian exception application is considered and determined but the fact that you've got one pending for determination doesn't prevent your being removed. So, it's still fairly tough.

McGRATH J:

Yes, is that the *Munar* case, is it?

MR CARTER:

Munar, Simoes and *Harry*, three of them.

McGRATH J:

What volume are they in?

MR CARTER:

They are all in volume 6. *Legault* which is the leading Canadian decision, just a note that that's concerned with the earlier stage, the stage equivalent to the Removal Review Authority jurisdiction, humanitarian and compassionate exception. The other Canadian case that I've highlighted in the submissions is *De Guzman*, referred to in paragraph 122 which I've cited as authority for the proposition that if you have a best interests of the child enquiry at some other part of the statutory process, you don't have to repeat it at other parts. That's not a removal case, it's concerned with a different part of the Canadian immigration legislation.

ELIAS CJ:

Is it convenient to take the adjournment now?

MR CARTER:

Very convenient Your Honour.

ELIAS CJ:

Are you going to take us to these cases?

MR CARTER:

No, I think I've covered what I need to say in the written submissions. I just wanted to highlight that I was relying on the particular cases dealing with the final removal stage as distinct from the earlier stage.

ELIAS CJ:

Right. This is more alert, alive and sensitive.

MR CARTER:

I'm not suggest, I should have said, that I'm not suggesting that that test be incorporated into New Zealand because we already have a test, in my submission, the exceptional circumstances test.

BLANCHARD J:

We are naturally alert.

TIPPING J:

Not necessarily alive.

ELIAS CJ:

I'm glad you are, yes, definitely not. I suppose the opposite being, inert, dead and?

TIPPING J:

Insensitive.

ELIAS CJ:

Yes. All right, we will take the adjournment now, thank you.

COURT ADJOURNS: 1.01 PM

COURT RESUMES: 2.18 PM

ELIAS CJ:

Mr Carter.

MR CARTER:

Thank you Your Honour. Just a few things to tidy up from dialogue prior to the lunch adjournment. In relation to a couple of questions from Your Honour Justice McGrath. There was another provision dealing with children in a removal situation which is section 59, subsection 5 and subsection 6.

McGRATH J:

Okay.

MR CARTER:

Your Honour was also correct this morning when discussing the procedure after there is a removal appeal to the RRA and liability for the making of the removal order and an unsuccessful appeal arises seven days after delivery of the RRA decision and that's section 53(1)(b).

McGRATH J:

Fifty three, one?

MR CARTER:

B.

McGRATH J:

B, thank you.

TIPPING J:

The microphone is either not on, or the sound is very low.

MR CARTER:

Is that better Sir?

ELIAS CJ:

It's on.

MR CARTER:

There was one – other couple of things I wanted to say about the Canadian cases, or one of them in particular, *Owusu*. You don't need to find but it's in volume 6, tab 156 and that's just relied on for a couple of propositions at paragraph 5 of the decision, that the applicant has the burden of proving any claim, as in New Zealand. A statement is made in paragraph 5, "If he fails to provide evidence to support the claim, the officer may conclude it is baseless." Further on in the same decision, at paragraph 9, the Court said that, "The information that was before the Immigration Officer, that he would be unable to support his family in Ghana, was too oblique, cursory and obscure to impose upon an officer a positive obligation of further enquiry as to the children's best interests."

Just a couple of other things arising from the Canadian decisions. In *Baker*, the proposition was rejected that natural justice for children demands a separate notice or right to be heard to the children. *Baker* is at volume 6, tab 143. In *Francis v Canada* which is volume 6, tab 148, the Court, referring to passages in *Baker*, said that, this is the Federal Court of Appeal, the Court said that, "In most cases involving young children, the position of young children would be put by their parents." That's at paragraph 17 of the decision. Then, a last Canadian reference which is *Wynter v Canada* which isn't in the authorities but it's (2000) 24 ADMIN LR 99 and referring to *Baker* and *Francis*, it expressly rejected the submission that there is a duty to provide notice to or to consult Canadian born children. That's at paragraph 29.

ELIAS CJ:

What level is that?

MR CARTER:

Federal Court.

ELIAS CJ:

Yes, thank you.

McGRATH J:

What paragraph was the reference you gave us in *Baker*?

MR CARTER:

Two paragraphs, 30 and 34.

McGRATH J:

Thank you.

MR CARTER:

On the duty to enquire which I've covered in the written submissions but a recent Australian case which I'd like to hand up copies of, shed some light on the duty to enquire which relates to the discussion this morning about how far the Immigration Officer needs to go in further eliciting information when there's not much supplied by the interviewee and that's *MZXRS v Minister of Immigration and Citizenship*, a 2009 case, Federal Court of Australia. I'm referring to paragraphs 24, 25 and 26 of the decision. Two of the cases referred to in those paragraphs are *Prasad* and *Luu* which were both referred to by Her Honour Justice Glazebrook in her judgment concerning the duty to enquire, or for the Immigration Officer to go further. The summary, in paragraph 26, is a review of several cases including those two, *Prasad* and *Luu*, about the circumstances when it's necessary, where readily available to the decision maker, whether important information on a critical issue of which the decision maker knew or ought reasonably to have known, whether further enquiry should be made. If you look at the examples, at the summary in paragraph 26, they are quite routine situations, quite limited situations. For example, the last one, where there's a missing five pages referred to in a fax header sheet, the remaining pages were not received and the decision maker

took no step to get the rest. So, it's fairly minimal sort of stuff. There's also a decision referred to in Her Honour's judgment, *Del Cid*, an Australian case referred to in – oh, Canadian case sorry, *Del Cid*, it's volume 6, paragraph 147, referred to by Mr Mahon in his submissions. As far as we are able to ascertain, that decision hasn't been followed in any other case concerning the decision maker going to investigate and find other information.

Just turning to the – still under processes, process of hearing or enquiry. Turning briefly to the appellants' argument that there was a notice or hearing requirement at the making of the removal order stage, at section 54. I've set out the submissions in paragraph 148, all the reasons why. There's no notice requirement implied in section 54 in the circumstances of this case –

BLANCHARD J:

Do you need to go through these arguments which haven't really been, as I recall, advanced orally?

MR CARTER:

Well, they haven't been advanced –

BLANCHARD J:

I mean, we have got your submissions and we are getting very short of time.

MR CARTER:

Yes, well I'm content not to Sir, as long as it's understood, as Mr Harrison submitted, that just because the written is not referred to in any way, that it's still relied on and advanced, or not to be inferred that something that's not referred to is regarded as weak –

BLANCHARD J:

We're not going to rely on Mr Harrison's written submission and ignore your written reply, are we?

MR CARTER:

No, well in that case Sir, there isn't a need, I think, for me to go in any depth into the rest, including the cross-appeal submissions. I accept that, in relation to joinder of parties and appointment of counsel for the children that, in a sense, it's all rather late to do anything about it and the only concern would be that it doesn't become – if the first respondent's submissions are accepted, that it doesn't become a routine practice in other cases which is the concern for the first respondent.

McGRATH J:

Can I ask, what are you asking us to do about that, what relief do you want us to give you?

MR CARTER:

Well, relief is a little late and I'm not actually – I'm not seeking any kind of retrospective, any order with retrospective effect which I understood Mr Harrison to suggest was what I was seeking in the submissions. I guess all I would ask for is if Your Honours happen to agree with any of the submissions in the cross-appeal, that there should be some reference to it in the judgment. Not so much for the purposes of this case –

McGRATH J:

Yes but what reference, just in four or five sentences tell us what references you'd like us to make in the judgment if we are moved by what you say in your cross-appeal submissions.

MR CARTER:

Generally that children will not be joined as parties in immigration cases. There may be rare cases where it may be appropriate. I would have said that this wasn't an appropriate case but the Court may not necessarily agree.

ANDERSON J:

What about the case where the process is Judicial Review at the suit of the children? Or appropriately at the suit of the children.

MR CARTER:

Well if appropriately at the suit of the children and that's a big assumption of course because that's all tied up with the substantive issues.

ANDERSON J:

But your concern is if the Judicial Review at the suit of the person to be removed?

MR CARTER:

Yes, and they happen to have children so you throw in the children and then you have separate representation of children by separate counsel.

TIPPING J:

Do you really want us to, putting it colloquially, dump on those two theses, that you've got to have separate representation and/or they've got to be joined?

MR CARTER:

Yes, and I'm not putting it so high that –

TIPPING J:

No, but as a general proposition.

MR CARTER:

As a general proposition.

TIPPING J:

There may be exceptional circumstances where it would be justified, is that the essence of it?

MR CARTER:

That is the essence of it, Sir. And in relation to costs and discretion as to relief, all of that is going to very much depend on how Your Honours approach

the case as a whole and I am just content to leave it in your hands because it's a discretionary –

McGRATH J:

You ask for costs if you win, is that right?

MR CARTER:

In relation – I ask for costs for the first respondent against the second respondent only, in Ding, and if –

McGRATH J:

That's Ms Ding is it?

MR CARTER:

Yes I'm not seeking costs against any of the appellants.

McGRATH J:

What do you say to the argument that in fact, she was the only proper party in the proceedings?

MR CARTER:

Well she hasn't appealed. She's a –

BLANCHARD J:

That's a pretty good reason for not awarding costs against her, isn't it?

MR CARTER:

Well except for the substance of it is that really, she has and what this is all about is Mrs Ding.

ANDERSON J:

But if the appeal is resolved in favour of the Minister, she won't be around to get costs out of.

MR CARTER:

Well that's true but if there's –

ELIAS CJ:

I don't think we need to entertain this.

BLANCHARD J:

Otherwise we'd get into the complexities of Bullock orders and Sanderson orders.

ELIAS CJ:

They don't have those in immigration.

MR CARTER:

If Your Honours are generous either in the sense of whatever the outcome you award as suggested by Justice Anderson, whatever the outcome you award costs to Ms Ding and if the first respondent is successful, you don't award costs to the first respondent, it might be interpreted by counsel in lower Courts as indicating that there's not much exposure to costs should they bring Judicial Review proceedings in immigration cases.

TIPPING J:

Well we'll have to think about all the complicated interrelationships in the costs area, but that won't be what will be troubling me most.

MR CARTER:

No Sir. Unless there's anything else, those are my submissions.

ELIAS CJ:

Thank you Mr Carter. Mr Bassett, I hadn't thought that we would call on you in reply unless there was anything in particular you needed to get off your chest very briefly?

MR BASSETT:

No, I just wish to check that everything that – just to check that the Court does have my submissions, I didn't refer to my submissions in my oral presentation.

ELIAS CJ:

Yes.

TIPPING J:

Yes, we do.

MR BASSETT:

There is one typographical error in relation to a reference which perhaps I could just refer the Court to?

ELIAS CJ:

Yes, thank you.

MR BASSETT:

Page 12, paragraph 43, subparagraph A. In the second to last line of that paragraph there's a reference to SC, that's the case, volume 3, that should read 653, and then volume 4/779, is the correct reference.

TIPPING J:

I think you ought to be congratulated for addressing us without reference to your written submissions.

MR BASSETT:

I was a bit concerned that you didn't have them.

TIPPING J:

No, no, we got them all right. I wish more people…

MR CARTER:

Your Honour, since Mr Bassett has just corrected a typo, I wondered if I could correct an error in the written submissions that I had omitted before I sat down, and that is to paragraph 171 and this is a correction that I'm not simply making because His Honour Justice Blanchard mentioned it, he put a question mark against the paragraph but because I have discovered after the submissions were filed that it was an error based on a misunderstanding of what a Canadian case said, in fact, it didn't say it at all.

BLANCHARD J:

No, I'm pleased to hear that because it didn't seem right.

TIPPING J:

That's a relief.

ELIAS CJ:

Which para?

MR CARTER:

The first line, most of the first line is correct, "The best interests of the children are to be considered as at the date", but after that, strike out the rest and replace with "…of the interview conducted by the Immigration Officer but circumstances concerning the parents since the date of becoming unlawfully present may also be taken into account including evasion, fraud, concealment of relevant information." That's all, thank you.

ELIAS CJ:

I missed the paragraph number.

MR CARTER:

171, sorry.

ELIAS CJ:

Thank you. Mr Mahon, are you going next?

MR MAHON:

From the discussion with Mr Harrison, I'll be very brief Your Honour, I was – if it was suitable to the Court, I would prefer that Mr Harrison went first.

ELIAS CJ:

All right, that's fine.

MR HARRISON QC:

I'll just have a moment. In the spirit of –

ELIAS CJ:

Yes, thank you.

MR HARRISON QC:

Yes Your Honours, in the spirit of minor corrections and quickly moving on, my learned friend Mr Carter did submit that the paramountcy principle argument, which I call the first and paramount standard argument, which had been advanced was abandoned and not the subject of the grounds of leave, that is only true in relation to the statutory limb which relied directly on the Care of Children Act as I hope my submissions have made very clear.

Now, I want to revisit section 47(3) which, of course, has become fairly central in two respects. The first respect relates to its interrelationship with other discretions in the Immigration Act. Now we had some exchanges before where I was arguing that it couldn't simply be imported into either the section 54 or 58 discretions. I may have misunderstood Mr Carter this morning when – in the way he referred to section 35A, he seemed to characterise that as a regularising discretion used, in other words, in conjunction with decisions favourable to the overstayer under either 54 or 58 and he seemed to be implying that it too needed to be – section 35A needed to be also exercised subject to the 47(3) standard, but then he sought to distinguish between that and the special direction discretion under section 130. I'm just inviting a little more consideration of the implications because, in my submission, as soon as

you open that particular door and you say wherever there's a discretion to be exercised in relation to the fate of someone who's not here lawfully, under provisions of the Act be it 35A, 54 or 58, section 47(3) is imported, you have some significant implications and fetters on the discretion in question and it's no answer to say, well, as I seem – I think that Mr Carter said, it's no answer to say, well, that's all right, there's always the Minister under section 130.

BLANCHARD J:

Well it's the Minister under section 35A.

MR HARRISON QC:

That's right, it is as well. But if we look at section, and this is in volume 1, tab 12 where the Immigration Act provisions are, what section 130(1) special directions by the Minister says is that he or she can give special direction in respect of person, permit, in relation to any matter for which such a direction is contemplated by any of the provisions of this Act or regulations made under the Act. So if you're looking at section 47(3) as the lodestar, it's equally logical to say that anything that is done by way of humanitarian consideration or amelioration of a situation according to the Crown, it can't have a more favourable standard applied to it in section 47(3), and with respect, I submit that that is wrong, it's not importing a relevant consideration by a process of implication from the statute, it's actually fettering the discretions in question which is why I am still urging my other two-pronged approach which doesn't rely on section 47(3). That's really what I wanted to say about that.

There's an offshoot of that when my learned friend started, and it's another topic, my learned friend started telling us how it's also an unwritten, I'm not sure whether he said it was a practice, it was the first I'd heard of it, an unwritten route, if you like, to giving a more prolonged consideration to humanitarian issues to issue a temporary permit, as I understood him, just of short duration to allow a more leisurely look at these things and that, if that is the case, and I don't doubt what he's saying, but I've never seen it done and there's no material to support it, one might just, in terms of cross-checking that against how well informed about that option our decision maker, Mr Zhou,

was, refer to the final three paragraphs of his second affidavit. Sorry to be doing this so late in the piece, but it's volume 4, not been referred to before, volume 4, tab 58 at page 785 of the case. What Mr Zhou says, paras 91 to 93 is, finally I reiterate "The first plaintiffs have failed refugee status claimants, she has remained unlawfully in New Zealand since 1 September 2000, consequently section 45, which we know about and 129(u) of the Immigration Act have application. Under 45, she has had an obligation to leave New Zealand by virtue of 129(u), first plaintiff is prevented from applying for any further permits or from requesting a special direction." All of which is true, if we look at 129(u), then he says, "It follows that the first plaintiff simply cannot lawfully remain in New Zealand." So he seems to have no idea of the possibility of having issued her a temporary permit for the purpose of making further enquiries. There is this distinction between being prevented from applying for a permit and receiving a permit and it's only been prevented from applying that section 129(u) addresses, but it's another indication that really, with respect, the departmental procedures do not go far enough in dealing with the kind of case that the Court's concerned with.

Now, moving on, my final and I hope perhaps more broad ranging and helpful submission, it's intended that way, if the Court's still enamoured of section 47(3), concerns the wording, both as it might be interpreted and as it was applied in this *Huang* decision of the RRA which was handed up. Now if Your Honours will go back to tab 12 and 47(3), it has two limbs and Your Honour the Chief Justice has made some suggestions about how the first limb and indeed the second limb might be interpreted, which set me thinking and if we look at the second limb which says, "And it would not, in all the circumstances, be contrary to the public interest to allow the person to remain in New Zealand" and dwell on what permissible facets of public interest would be able to be considered under this provision properly interpreted, I submit that you end up with looking at three, there may be more, three alternatives to that second limb, and if I can just outline them before suggesting where to go.

The first one would be to consider that only factors, public interest factors, personal to the individual, including his or her immigration history and

defaults, could give rise to that public interest assessment. I'll go through the list of three and come back. The second possibility is that only factors personal to the individual but excluding the immigration history could be used with the public interest assessment, and the third is that as well as one or the other of those personal factors, you can import consideration of what I could call "big picture immigration policy factors", such as those mentioned in the long titles, the 1999 amendment, ensuring better compliance, making sure those who don't play by the rules aren't advantaged, et cetera.

So if we just look at that in a blank sheet sort of way, and apply the ordinary rules of interpretation, purposive and so on, and there may be other combinations, what does the wording and purpose tell us? First of all, although this is not invariably the sequence, under subsection (3), you'd have expected the first limb to have been overcome by the time you got to the public interest second limb. That's to say, ordinarily you'd have someone who's made out the humanitarian case to that standard so that all of the humanitarian factors, it might be –

TIPPING J:

Well if you don't jump the first hurdle, the second is irrelevant.

MR HARRISON QC:

Quite, and equally, by the time you get to the second hurdle, you ought to have cleared the first and therefore you are a deserved humanitarian candidate for remaining because you will have shown there are exceptional circumstances of a humanitarian nature making it unjust or unduly harsh for you to be removed. So what then does the second limb mean in relation to such a person? And in my submission, it would be quite appropriate to read that down so it did not include what I call the big picture immigration policy factors. That's to say, we're looking at this person and we're looking at, does he or she have convictions in country of origin? Is he or she a sufferer from a kidney disease such that they'll be a very expensive hospital candidate now or later? Those are factors personal to the individual. So that's one way to read it excluding the big picture. Another way to read it is again, just focus on the

personal and exclude the immigration history because that is simply the reason why this enquiry has been reached, you're here unlawfully, you don't get to appeal unless you are unlawfully in New Zealand and required to leave, that's past history so it's just the narrow personal approach, or alternatively, if you prefer, it's the narrow personal approach but you shouldn't ignore the shenanigans that preceded it and they are part of the public interest.

ELIAS CJ:

I don't understand the difference between the two, I thought you said that two was excluding immigration factors. The big picture immigration factors but not the personal immigration factors, is that it?

MR HARRISON QC:

Yes, yes, well what I'm saying, whichever order I got them in, there's one personal factors only enquiry which is all personal factors including immigration history, or it can be narrowed more to exclude it. What I'm submitting is that, if you determine that section 47(3) is it, then these are some of the interpretation choices and what I would –

BLANCHARD J:

Mr Harrison, this seems to go directly against the words "in all the circumstances."

MR HARRISON QC:

In my submission, in fact, it doesn't, if the enquiry is to the public interest that is operating in the circumstances, it would be appropriate to look, I concede –

BLANCHARD J:

At everything?

MR HARRISON QC:

At everything personal to the appellant, but not the big picture policy considerations.

BLANCHARD J:

But that comes into the public interests.

MR HARRISON QC:

Well I'm arguing that it doesn't.

BLANCHARD J:

This is crazy stuff.

MR HARRISON QC:

Well with respect Sir, it should not be dismissed that lightly.

BLANCHARD J:

Well it seems completely contrary to what the words are saying.

MR HARRISON QC:

Well if we look at the wording of the section, subsection (3) of 47 says that, sorry subsection (4) says, the mere fact that the circumstances are that you meet applicable government residence policy, that suggests that we are not concerned with issues other than those arising in the particular case and so that there isn't a weighing of the personal circumstances which have already been found to be worthy of a humanitarian outcome.

BLANCHARD J:

Some poor Immigration Officer's got to interpret this.

MR HARRISON QC:

Well may be he's better off Sir not having to weigh chalk and cheese or compare apples with oranges, because that's what happens under the humanitarian questionnaire.

TIPPING J:

Mr Harrison, I agree with my brother Blanchard, you are in effect writing out the whole point of this second limb. Why circumscribe the public interest in

this manner? Your client seems determined at every turn to take the highest possible ground irrespective of its logic.

BLANCHARD J:

But don't let that deter you.

MR HARRISON QC:

I simply reiterate that the public interest issue ought to be determined in relation to the individual's circumstances and not by weighing against that, the kind of points which are in the humanitarian interview which is the interest and –

TIPPING J:

I understand what your argument is, I have very great difficulty seeing that it's within the purpose of this provision.

ELIAS CJ:

Is your argument perhaps, because it isn't very attractive to invite us to read broad words down as narrowly as you are, but is your point perhaps better put or equally put by saying that the purpose of the legislation is contained in the whole legislation, and that really that it – to resile from the bipolar analysis that, for example, Claudia Geiringer has adopted, that this is always balancing between this two polar chalk and cheese, as you put it, extremes, and that really, it's a much more holistic assessment within the scheme of the Act that is required.

MR HARRISON QC:

Well it's a lifeline Your Honour.

ELIAS CJ:

We don't know what they do with lifelines behind the scenes.

MR HARRISON QC:

Yes, yes, I'm sure. Well I suppose, I mean, it is because –

ELIAS CJ:

Well I am bothered by this chalk and cheese dilemma and I don't think it's a – I don't think the legislature sees human rights as contrary to the policies it's seeking to achieve through the Immigration Act, that's why they're there, but it is, in all the circumstances, assessment that has to be made in the end, Mr Harrison, so I can't see that the integrity of the process and matters such as that don't come into account. Now you might be right that they come into account principally where people have bucked the system, so that they loom larger in that connection. But I can't see that they're not relevant, I just don't see them as starkly, as two different narratives in these cases.

MR HARRISON QC:

Yes, I mean it's, I am trying to gloss section 47(3) because of the concerns which were expressed in the written submissions about the approach, say, in the humanitarian questionnaire, volume 2, page 293, where you've got some poor unfortunate person who has, let's say, has demonstrated that, or can be taken to have shown that the children are vitally affected by this decision and then you've got this list of four public interest factors which you just can't actually weigh them or compare them, they are, as I argued, chalk and cheese. How do you take the one set of concerns and considerations, which are personal and potentially tragic and take the others which are purely administrative concerns of the entire system and balance them? It seems to me –

ELIAS CJ:

But incommensurability goes with human rights, that's what happens, really.

TIPPING J:

What it seems to me to be saying is that once you've found that the person is across the first hurdle, the fact it's put in the negative I think is significant, not contrary. So you've got to say, in order to overcome or outweigh the fact you've jumped the first hurdle, it's got to, sort of, fundamentally undermine the whole purpose of the Act.

MR HARRISON QC:

There's much more than giving with one hand and taking away with the other.

BLANCHARD J:

Yes, because the fact that you've jumped the first hurdle, as my brother puts it, is one of the circumstances. So you're actually getting a double up.

MR HARRISON QC:

Yes, all right. Well I won't pursue that further, except that can I just point out what I submit is the wrong kind, the opposing kind of double up, quite the wrong kind I would submit and one that needs correction in this *Huang* case where the RRA said, on the one hand at para 17, "When the authority comes to consider the public interest aspect of the relevant criteria, there is some countervailing considerations. The authority should consider the public interest, ensuring the integrity of New Zealand's immigration laws –

TIPPING J:

I'd have some difficulty finding –

ELIAS CJ:

I won't be able to find it, I can tell you –

TIPPING J:

Could you just tell, I've got it now –

MR HARRISON QC:

This was the single decision –

TIPPING J:

Yes, I've got it but what paragraph was it?

MR HARRISON QC:

Para 17.

TIPPING J:

Seventeen.

MR HARRISON QC:

I'll give the Chief Justice a moment or two more.

ELIAS CJ:

Well, don't worry, I think it's gone, I've lost it, don't worry. I think I might have inserted it into one of the volumes I had open. Just say it.

MR HARRISON QC:

All right, I'll start again. "When the authority comes to consider the public interest aspect of the relevant criteria..." and here talking about 47(3), "there are some countervailing considerations the authorities need to consider. The authorities should consider the public interest, ensuring the integrity of New Zealand's immigration laws and policies and the need to ensure that those with children or immediate family resident in New Zealand do not automatically become entitled to remain in New Zealand, thus creating an incentive for visitors, those unlawfully in New Zealand, to have children while in New Zealand in anticipation of themselves being able to remain." So that's what they said about the second limb but at para 20, they say, "The integrity of New Zealand's immigration laws, on the one hand, needs to be balanced against family considerations including the interests of the child, on the other hand, in determining whether exceptional circumstances of a humanitarian nature exist in any given case". That's the first limb, so there the integrity of laws –

TIPPING J:

That's clearly wrong.

MR HARRISON QC:

Yes, well that's – for the sake of whoever is appearing as counsel next week, that's the decision which was delivered in respect of Jarvis Cui, and if we read that decision –

BLANCHARD J:

Inaudible

MR HARRISON QC:

I cannot possibly comment.

BLANCHARD J:

Aside from Mr Carter of course.

MR HARRISON QC:

All right. So, it certainly appears from that decision, that the public interest limb under 47(3) is being applied by the RRA quite vigorously. The other thing, again, a little bit of repetition here but just in response to Mr Carter when he talks about the short timeframe when you've made a removal order and how it's a very tight timeframe and it's not practical to make any real enquiries, was the burden of his submission. My immediate rejoinder is that this supports having the enquiry at the section 54 stage wherever possible because those time constraints are not –

TIPPING J:

They can't get hold of them normally until they've issued the removal order and arrest them

MR HARRISON QC:

It may or may not be the case. I don't want to chore back through the evidence but it's accepted that Ms Ding was moving around but in the last few days she was asked to come in for interviews and did. Whether the right judgment call was made there, for that reason –

TIPPING J:

You can understand them doing it this way, can't you because – are you saying we should say that they should try and do it the other way if they can, voluntarily as it were, before they issue the order?

MR HARRISON QC:

My submission is that using section 27(1) and doing the classic analysis on the nature of the section 54 decision, you end up in the position that the enquiries and the interview need to be before the order is made.

ANDERSON J:

If possible.

MR HARRISON QC:

If possible, yes. That is my position, in terms of statutory –

ELIAS CJ:

I suppose section 58 could be used to take you back into section 54?

MR HARRISON QC:

You could do it, it's a bit convoluted. I would put it this way rather, that section 54 is the first port of call for the natural justice and thus the interview but then you have a threshold which should be practical and tolerant of the job the Immigration Officer has to do and which he or she can make the assessment to defer it but there should not be any lack – there should be no difference between the extent of the enquiry because it's being done later. You can't have a more cursory look because you end up doing it after you've made the order under 54 and provided you were to agree with me on that point, then it matters little I suppose but that's the point.

I did want to also refer, I'm afraid, back again to section 141C(c) and just remind Your Honours that it says, "To the extent practicable given the level and maturity and understanding of the minor, the responsible adult must attempt to elicit the views of the minor and make them known on behalf of the

minor where appropriate". Now if we apply that to a scenario like the Ding case but assume that the Ye children were themselves overstayers, Ms Ding's in the police station, she's wearing the responsible adult hat, there actually does have to be a timeout, the statute says. As long as your children have a level of maturity, assuming they have for the sake of argument, the responsible adult has to be given the opportunity to elicit the views of the minor and make then known. So, it's actually in-built into the statute that there could be a timeout during the interview process, even where you've got an overstayer children –

BLANCHARD J:

Timeout with children usually means something a bit different from that.

ANDERSON J:

If the person is in custody pursuant to a section 54 order, presumably they couldn't get police bail?

MR HARRISON QC:

That's right, I would think.

ANDERSON J:

Although they might get Court bail, under the Zaoui principle.

MR HARRISON QC:

Well, they can – yes, yes.

TIPPING J:

That's all getting rather awkward administratively. Your point essentially is if you have to have timeout, whether that be an appropriate expression or not, for these unlawful minors, the more so should you do it for the lawful minors?

MR HARRISON QC:

Correct.

TIPPING J:

It's as simple as that isn't it, at this point?

MR HARRISON QC:

Yes.

TIPPING J:

Yes.

MR HARRISON QC:

In the statute, it's a counter indication to my learned friend Mr Carter's argument that by its very statutory nature, it's a tight timeframe. It's not a tight timeframe to the extent that this has to be complied with.

That's just about it I think. Oh, yes, it was also said on the section 47(3) front that the section 47(3) appeal as such and all by itself satisfies our obligations under UNCROC and ICCPR. I would reject that submission as such by arguing that 47(3) is not a remedy capable of being invoked by or on behalf of the minor child, or indeed a family member who is not an overstayer. The proposition, in that absolute form, cannot be right, that 47(3) satisfies UNCROC and the ICCPR. My submission is, when we look at human rights and domestic remedies for them, the remedies must deliver compliance with the human rights standard in practice, they can't simply be there on paper but so hedged about with restrictions that they do not ensure compliance to a reasonable standard and the interpretation is an injunction of course is to interpret the statute to achieve the compliance with the international obligation as far as possible, so far as the wording permits. I agree that perhaps, to some extent, that the heart of some of these difficulties is the limits with which the current right of appeal is hedged about.

TIPPING J:

Mr Harrison, just before you leave that point, an overstayer child could invoke 47(3) couldn't they?

MR HARRISON QC:

Yes, yes, the right –

TIPPING J:

So you've got another anomaly in a sense, if the lawful child is worse off than the overstayer child, in that respect.

MR HARRISON QC:

Yes, that's correct Sir, I would agree with that. The section again, back to section 141C, it makes plain that under (a), the responsible adult may appeal, so the overstayer child plainly has, through the responsible adult, the right of appeal under 47.

TIPPING J:

So it would be peculiar in the extreme if the lawful child was any worse off, if you like, from the point of view of the –

MR HARRISON QC:

That's part of my argument, yes Sir. Can I just, I'm sure it hasn't been overlooked, but I just remind Your Honours because there was a query from the Chief Justice about the legislative history of section 47(3) that I do deal with this in my submissions from paragraph 61 on and in appendix I, I go right back to the first precursor to section 47(3) and note when the added words, the second limb was brought in and so on, and the submission that we make is, and I can acknowledge Ms McNab for this, we went right through the legislative history to see whether anyone said, "We are doing this because of either the ICCPR or UNCROC", we did not find a single Parliamentary statement or other history document that indicated it was. So just mentioning that.

Yes, it's almost the final point, my learned friend referred you to the Refugee Status Appeal Authority decision in respect of the parents – I'm looking in the wrong volume, I think it's at page 728 it starts.

TIPPING J:

Volume 4, 735, is the note I have.

MR HARRISON QC:

I should know my way around by now shouldn't I? Yes the final page of the decision, 736, I think it was Your Honour Justice Tipping who pointed to it and the conclusion in their case about the State sanctions not being a discriminatory measure for a convention reason, cites a major appeal which was decided in October 1992 and was a reason, if not the main reason, why there was such a delay in determining this. All I want to do is just remind Your Honours that, at least in my submission, the law moved on with the cases dealt with in my submissions at page 37, footnote 40, I referred Your Honours on the first day to the English Court of Appeal case in footnote 40, *Chun Lan Liu*, you remember, the woman who had been sterilised, and the English Court of Appeal changed the law, at least of England, by saying that they are a social group, and the High Court of Australia –

TIPPING J:

Even if the law hadn't been changed, Mr Harrison, there's no great analogy between the refugee jurisdiction and this one.

MR HARRISON QC:

Quite, but I'm making the point that at the end of the day, if the law had been declared as declared by the High Court of Australia and the English Court of Appeal, they might have succeeded on their refugee status application then and there. The citizenship issue, my learned friend says it was not an issue in the High Court, I disagree, but I say, so what if it wasn't? But Justice Baragwanath devotes a number of pages –

TIPPING J:

I think what he meant was that the parties didn't raise it as an issue.

MR HARRISON QC:

Well I don't accept that.

TIPPING J:

Well even, look, I don't think it matters.

MR HARRISON QC:

It's a major plank of my argument and the Crown, if we just go to paragraph 227 –

TIPPING J:

But does it matter?

MR HARRISON QC:

No, no I just take umbrage. Basically, it was a major plank of my argument throughout.

BLANCHARD J:

Take it somewhere else.

TIPPING J:

Make sure it's recognised in a footnote. Your umbrage, I mean.

MR HARRISON QC:

I'm going to take it back to Auckland with me right now, because unless I can assist further, those are my submissions.

BLANCHARD J:

Will you have to check it in?

MR HARRISON QC:

There's so much excess baggage, I hope not.

ELIAS CJ:

Thank you Mr Harrison.

MR MAHON:

I can assure Your Honours the number of volumes don't represent a very long reply submission, is it just a very few brief matters that I would seek to address you on. The first one is just briefly the issue of representation which was raised by my learned friend Mr Carter. It is being acknowledged now that there will be the rare cases when children will be represented and that of course was the position for both appellants that that was appropriate. One of the issues is what the status of that representation will be, will it be litigation guardian role, amicus, or would it be as counsel? In my submission, if there was that representation, it's appropriate it is as counsel. There is a role of that counsel, first of all, the screening process will be the High Court Judge who will make the appointment and that Judge will then have to determine a threshold's been met, or if the children were appellants, that in some way, they met a status or sufficient ground to be in that role. Secondly, the people who will be appointed in that role should appropriately be specialist counsel who are experienced in representing children, and that role in Family Court jurisdictions deals with Article 12 issues of rights of children and their voice, but also the overriding best interests enquiry issue, and so the dual role and that difficult balance which the Courts have to deal with is a matter that counsel representing children have to deal with. The ultimate, overriding issue, of course, is the best outcome for the best interests enquiry. So just briefly on that, it is my submission that that would be the appropriate terminology or role would be as counsel.

I just wish to very briefly clarify a couple of matters in terms of the Crown's submissions today, when they refer to the Canadian authorities. Your Honour the Chief Justice did ask me yesterday what was the relevance of going to overseas authorities, of course, because there is New Zealand authority, the New Zealand authority is, of course, are known to the Court and in the submissions –

ELIAS CJ:

I think that was simply on some of the well-known principles of general administrative law, I wasn't suggesting you shouldn't go to other authorities.

MR MAHON:

And I accept that Your Honour and I think that, of course, we're dealing with interpretation, International Conventions and comity, and all those issues. I just wanted to raise what would appear to me from an interpretation point of view and that is in paragraph 118 of the Crown's substantive submissions, they refer to the *Simoes* and *Munar* cases which Mr Carter took you to, and that's footnote 134 on page 34 of the submissions. And what I understand to have been the submission from Mr Carter is that it's a very light enquiry at this final stage and he is suggesting that that Canadian authority is authority for that point. It's my submission that it's not and there were two matters that come out of that.

The first is the danger of comparing statutory format in one jurisdiction with another, if one reads closely the cases, and I leave this with you because I think it would occupy too much time to go through it in detail, in my submission, what those cases are dealing with is what is our section 60 stage, what flight does the child go on? Is it, let's make sure that it's within the 72 hours? Now, the section 60 definition is that it's a departure as soon – if it's not practicable, that's the way in which the enquiry is made, is it practicable? At this stage, everything's finished, it's just a timing matter. That is in fact the same stage that those two cases in the Canadian cases are, they're under section 48 of their statute, and I admit there is a slight difference, but there is no broad discretion in that section 48, like there is in our sections 54 and 58, and I have copies of that section if that would be of assistance.

ELIAS CJ:

Yes please.

MR MAHON:

In Canada, at the stage of this section 48 which I'm submitting is effectively our section 60 stage, the person who is acting in the capacity is a removal officer, not an Immigration Officer. We don't have that difference in our stage. The second point is that 48(1) talks about that it's enforceable unless it's

stayed, the removal order, and in subsection (2), "If a removal order is enforceable, the foreign national against whom it was made must leave Canada immediately and it must be enforced as soon as is reasonable practicable." I accept, under that definition, the enquiry is a very, once-over lightly enquiry, which flight number should the person be on? I acknowledge, however, that their humanitarian criteria of enquiry is slightly different to ours as to when it comes in and I just invite Your Honours to look closely at the interrelationship between their section 48, our section 60 and their humanitarian enquiry and ours.

McGRATH J:

Is the Canadian case we should be focusing on *Baker*, really?

MR MAHON:

Exactly Your Honour, *Baker* is the case to focus on. I just want to briefly also raise an issue in terms of what I suggest, there really is no difference about this duty to inquire and the level of enquiry required. The last three days there's been a lot of discussion about contextualising the situation. A lot of these issues are fact-specific and if one goes to paragraph 109 of the Crown's submissions and Mr Carter referred to this case today, that's on page 31 of the submissions. Mr Carter talked, that he did talk about it but he didn't do it on that page, it's footnote, the previous page, sorry, the footnote is 109 Your Honours and it's a footnote from paragraph 106, the top of page 30. His submission is that in Canada, the obligation to consider the best interests of children only arises when it's sufficiently clear from the material submitted that an application relies on this factor, at least in part, and what was *Owusu* about? It was quite remarkable. In Canada, they were so concerned about the interests of these Canadian citizens who were living in Ghana, not in Canada, what the applicant appellant was saying was, "If you deport me from Canada back to Ghana where the Canadian citizen children live, I will not be able to continue to remit money back to them from the First World country Canada is, to support them in Ghana. You send me back to Ghana and I'll be poor with them. If you allow me to stay in Canada, I can keep sending money to these Canadian citizens in Ghana." My submission is, that's quite

remarkable for the children, that the Canadian government, the Canadian Courts, I'm sorry, were prepared to go to the stage of considering citizens outside their country in those circumstances, they were already outside the country, but what's also reasonable is of course you can't expect a level of enquiry more than is provided by that father, because it would be impossible to make it in terms of the Canadian authorities because the children were not even in Canada.

So it's a matter of degree and it's fact-specific and my expression for the level of enquiry, of course one would nearly always expect the parents to provide the information, of course it's the opportunity and how that's done, it's the education of the parents as to what is relevant for the children, and it's a question of evaluation.

I wish to also finally in terms of the issue of the submissions for the Crown, Your Honours were involved in a discussion with my learned friend Mr Harrison on the issue of human rights and the difficulty that one has in definitions and words and I think that we have to be conscious that when interpreting international conventions and treaties, that we do often look at the academic articles for assistance, and on paragraph 101, sorry, starting at paragraph 100 onwards in the Crown's submissions, it's on pages 27 and 28, and I'll leave Your Honours to read this without going into it in detail. There is as suggestion in one of the footnotes which is footnote 101 to paragraph 101, so the footnote of the paragraph fits together which is convenient, on page 28, that Philip Alston, and this is the last paragraph there, agrees that paramountcy, sorry, I'll read the sentence for context, "In essence, the applicants argue that because paramountcy principles are given increasing recognition in domestic family law, this should affect the interpretation of the Convention on the Rights of the Child. Such an approach has been expressly rejected by Philip Alston." Now, it's first accepted that Philip Alston is a leading writer, however, that's an inaccurate reference to what he says. The reference there in the footnote 101 at page 17 of the article, and I don't feel it's necessary to take you to the actual phrase, what Philip Alston is doing there is saying there's one argument, and on the other hand there's another

argument. He's doing a literature review, effectively, and this is where I stand. Page 17 is that argument, page 18 is the other argument and I think it's page 19 is his view that there can be a domestic best interests enquiry informed by domestic law because best interest is a process that's in our law and we understand it in our societies as to what our shared values are, et cetera. It's just to be sure that one is accurate when referring to these writers because they are significant in what they say.

Just finally on that point, there is, in that footnote 100, reference to two articles which, in my submission, are helpful to the Court, and –

BLANCHARD J:
Footnote 100?

ELIAS CJ:
I don't remember the submissions we heard today going through these footnotes, I'm not sure what this is replying to.

MR MAHON:
It was the, I guess the amorphous word "rights" Your Honour and how that was being referred to in terms of the rights and obligations that flow to it from the Crown in terms of what they must do with children, but I won't labour the point, I just wished to encourage Your Honours to read the articles in 101, which are cited by the Crown because I would submit that those two articles, which are the second and third are relevant and helpful to the Court.

I'll now move on to the last three brief areas I wish to mention to Your Honours. It seems accepted by the Crown that the approximate number of 1500 overstayers and approximately just over 2,000 Republic of Chinese overstayers include both the pre- and post-2006 overstayers and of the 15,000, the balance after the 2,000 odd from China, of course, will be from a range of countries in terms of their opportunities for children and that balancing exercise. As you have noted, there are limited issues arising now

for the citizen children, it is still a significant issue for you to address and I acknowledge the Crown's point there.

I just have two final points I wish to address. The Crown's position in reply in their submissions today was the citizenship issue can be overstated in terms of the best interests enquiry and I quite accept, there are no trumping factors in these enquiries, there's a process. However, it seems to me that citizenship was enough of a concern to the New Zealand government to change the law and I would encourage Your Honours to – just if I could briefly refer to the one volume that I'll be asking you to look at and that's volume 9 of the authorities, and it's under tab 230, and this is the Parliamentary debates and I'm just going to refer you to two comments in these debates, aware of the dangers of drawing this Court to what Parliamentarians say about how one should interpret statutes.

I'd first refer you to page 20,089 which is the second page under tab 230, the last paragraph on the right hand side, The Honourable George Hawkins, the Minister of Internal Affairs who was responsible for that bill, the last paragraph, "Proposals to amend the citizenship by birth provisions have been incorporated into the bill at the Select Committee. From 2000, a person born in New Zealand will be a citizen only if at least one of the person's parents is a New Zealand citizen or permanent resident", and this is the relevant part, "Restricting citizenship by birth will ensure that citizenship and its benefits are limited to people who have a genuine and ongoing link with New Zealand…" and over the page, and he goes on to say that that will not breach the International Conventions. It was significant enough, in my submission, to the government of the day that those rights meant something which we should not allow children in the category of these children to automatically have.

The only other matter I will refer you to in terms of comment, it's by Matt Robson, who was, of course, then in coalition with the government and it's page 20,110 and it's the second paragraph which starts with the word, "The second amendment concerns citizenship…" and it's those two paragraphs that follow at the foot of his comments before Keith Locke from

the Greens was speaking. There are other references but in my submission, those two references are helpful to you.

I just have one final matter I wish to respond to. The Crown has made significant submissions in the nature of enquiry which should be the obligation of an Immigration Officer to respect the entitlements that children have. What the Crown has not attempted to do is to in any way define that enquiry with any detail and in my submission, of course, that is the difficult role that this Court will have if the appellant's case succeeds. In my submission, there were three main points that would apply to that enquiry. It will be independent, it will be ongoing, and it will be significant. What is important to understand in terms of the interface of Article 12 rights of children's views and their entitlement to be respected and consulted appropriately in these processes, is that just as in the Family Court, we must understand that the overall enquiry is a best interests enquiry. One must respect children and their views will, for older children, be one of the factors, there will be many other factors, it is the best interests enquiry that is necessary to look at and it's a completely different enquiry to what one would have obviously in Family Court jurisdictions because of the nature of the interface between the border control requirements that we all want Immigration to achieve and these rights. Therein lies the difficulty, for the enquiry to be independent, the difficulty for Immigration is, they effectively have a conflict of interest in terms of these children. The mandate for the Immigration Officer is to ensure that New Zealand border control is respected. It is extremely difficult within that process as is my submission, you will have seen from the humanitarian questionnaire and the great difficulty the Immigration Officers have in dealing with the issues to do with children, to run both enquiries in the same form, therefore it must be separate. And in my view, and this is probably not a matter Your Honours see as necessary to address specifically, there are cheap and inefficient ways, and I'm just trying to give one example of how that could be done, under section 132 of the Care of Children Act, a Family Court Judge in a case which has nothing to do with care and protection or CYFS can direct a social worker's report, usually a very defined area, the state of the home or schooling arrangements, it's specific evidence. That is actually

undertaken by contract report writers to the Court who have the CYFS qualifications, and the report is to the Family Court Judge. It may in fact be that to undertake these obligations to children, there will be these kind of people with expertise with children and understanding what a best interests enquiry is, and they'd be guided, I would submit, by what is a necessary rewriting of the immigration manuals in this area, and they would provide a short focused report, they would rely to a significant degree on the parent information. It's only going to be in rare cases where further information is required that one would have to go a lot further. They would, however, of course, have to respect the Article 12 rights as part of that process. So there are options and ways forward.

I would finally, in my submissions, refer back to the case of *D v S*, not because it's actually the principles that you will directly apply but I would just leave you, it's under, I don't see it as necessary for Your Honours to turn to it, it's in the authorities bundle, paragraph 2, tab 45, and at the foot of page 341, the Court of Appeal set out the principles in terms of a child enquiry in what was then custody cases, although it was a relocation case, they were principles that were applied every week.

TIPPING J:

What was this case, I'm sorry Mr Mahon?

MR MAHON:

This was *D v S*, it was the relocation case in Christchurch. Now, I'm aware that His Honour Justice Blanchard dissented in that case, but he did not dissent on the issue of what the principles were, he said, that they had been properly applied by the Family Court Judge, so when I was aware of the dissent, I made sure that it wasn't in relation to the principles and I think Your Honour agreed with the principles set out in the Court of Appeal.

TIPPING J:

Is that the case of the people going backwards and forwards to Ireland?

MR MAHON:

From Ireland, and ironically, the mother –

BLANCHARD J:

I'm a specialist in Irish cases.

MR MAHON:

Yes, and ironically the mother and three children returned back from Ireland two years ago and they live in Christchurch.

ANDERSON J:

What Crown submission is this in reply to?

MR MAHON:

This is to do with the nature of the enquiry that's necessary, and in my submission, there are simple principles which –

ANDERSON J:

There might be but I'm just intrigued to know what Crown point you're replying to.

MR MAHON:

I'm replying there Your Honour to the issue of how you weigh the balance, you actually weigh the balance in terms of the child enquiry and those principles and that will guide you on that path. Unless you require anything further, those are my reply submissions, thank you.

ELIAS CJ:

No, thank you Mr Mahon. We'll reserve our decision in this matter and as you know, we have another case to be heard next week which has some parallels and we will doubtless want to consider those two cases in tandem to some extent, so thank you very much counsel for your assistance.

COURT ADJOURNS: 3.38 PM