IN THE SUPREME COURT OF NEW ZEALAND SC 74/2008

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

Hearing:	29 April 2009
Court:	Elias CJ Blanchard J Tipping J McGrath J Anderson J
Appearances:	E Orlov with R Zhao for the First and Third Appellants F Deliu for the Second Appellant I C Carter with MRL Silverwood for the Respondents

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CIVIL APPEAL

MR ORLOV:

May the Court please, myself and my assistant Mr Zhao for the first and the third appellants.

ELIAS CJ:

Thank you Mr Orlov, Mr Zhao.

MR CARTER:

May it please the Court, Carter for the first respondent, appearing with me is Ms Silverwood.

ELIAS CJ:

Thank you Mr Carter, Ms Silverwood.

MR DELIU:

May it please the Court, Your Honours, Mr Deliu appearing for the second appellant.

ELIAS CJ:

Yes Mr Deliu, and Mr Carter and Ms Silverwood for the respondents in that appeal also, thank you. Yes, Mr Orlov.

MR ORLOV:

Sorry Your Honour, my learned friend has asked to mention that there was some documents omitted from the bundle and they're now before the Court and so they are pages 117 and –

ELIAS CJ:

Was it page 236A and 316A, is that where they're to be inserted?

MR ORLOV:

Yes Ma'am.

ELIAS CJ:

Right. Is the first one part of the humanitarian interview is it?

MR ORLOV:

Yes Ma'am, I believe it's the humanitarian interview for the second appellant.

ELIAS CJ:

Thank you. Mr Orlov, we've read all the submissions in this case and of course, we do so with the benefit of having heard argument on the similar cases we heard last week. We think we would be particularly assisted if you would not dwell on the submissions about general review and so on which we're very familiar with those cases and we've read your submissions on. We think it would help us if you would concentrate on the facts of the case.

MR ORLOV:

Yes Ma'am, thank you. The facts of the case are set down in the background section beginning at paragraph 53.

ELIAS CJ:

Yes.

MR ORLOV:

Before I begin with basically setting out all the facts of the case, I do want to submit that even on the position of my learned friend in using the *Wednesbury* test on the facts, the decision was unreasonable. My learned friend, in his submission, has referred at paragraph 153 to 199 on an Australian case where a black child, as it were, would be considered a refugee. Now, the Court in that case, as I understand it, was prepared to consider a child who would be returned to China or in China as falling under the Convention on Refugees. Now the basic tenet of my argument is that, on the facts, this child, if not to be considered a refugee, because as a New Zealander in China, removed of all the rights that a Chinese child would have and discriminated against possibly as a black child, what should have been done as an enquiry, as a best interests of the child, is to see what exactly harm would fall to this child in China. Now, on the facts, that enquiry was simply not made. Although the Immigration Officer was fully advised of the following issues, and

now I go through the facts, and that's why I want to focus this Court's attention on the best interests of the child issues.

Also Your Honour, I want to say that the issue of the interests of the child is as very ably set out by Dr Harrison in the Care of Children Act, a very important factor. I don't want to distinguish between primary and paramount because, in my submission, the distinction is linguistically untenable in any case, but one thing that my learned – Dr Harrison hadn't mentioned and I want to actually add to, is that under the Children, Young Persons and Their Families Act, which is legislation empowering the executive, in fact, obligating them to protect children. Under section 14 of that Act, a child in need of care and protection can be taken away from parents whether or not they're in fault. The question is, whether the child is in danger. In my submission, the removal of a child to China by the parents would entitle and should entitle the executive to remove him, hence the conundrum. I've even prepared a case, a case I was involved in, for the Court which I would like to give as a supplementary in reply where a mother who was from the Ukraine, her child was born here, a New Zealand citizen, the child was removed by the father who was a paedophile, which is relevant to – she wanted to take the child back to the Ukraine, the Family Court prevented it and CYFS declared the child in need of care and protection.

These are the issues which are so fundamental to the practical realities of the immigration context. For example, one matter my learned friend hasn't addressed is what happens in a family context where the father is a New Zealand citizen or vice versa, and the mother is not. It creates a discriminatory possibility for application of the law and the misuse of the law in terms of that the mother or father can be thrown out and the other one can keep the child via the Family Court hence separating the family.

BLANCHARD J:

Mr Orlov, we're not called on here to write a textbook. We're called upon to address the particular case and the Chief Justice has already asked you to go to the facts.

MR ORLOV:

Yes Your Honour, I just wanted to contextualise.

ELIAS CJ:

Mr Orlov, we do appreciate the background of the interests of the children and it's against that background we'd like to look at the facts of the particular case. Can you confirm, is the humanitarian interview in relation to your clients, is that at page 220 of the case or is that –

MR ORLOV:

I'm just looking at – the humanitarian interview's actually, my learned friend had put together the bundle.

ELIAS CJ:

It's 233 perhaps.

MR ORLOV:

Tab 23, on the case on appeal.

ELIAS CJ:

Yes.

MR ORLOV:

At 124. Sorry, tab 24 Your Honour.

TIPPING J:

What interval was there between the appeal to the RRA and the humanitarian interview? Interval of time.

ANDERSON J:

He said it's in the annexure to the Crown's submissions.

MR ORLOV:

The interval was quite a long period of time. Two years, Your Honours, approximately. But if I can go through the facts then, as the Court has indicated, the background is set out at paragraph 53, if I can begin with the background. I've only set out what I have submit I think are the most essential facts.

ELIAS CJ:

Again, we've read this. It's really the facts that you are relying on in development of your argument that we are most interested in. That's really why I invited you to take us to the humanitarian interview that you are challenging.

MR ORLOV:

Yes, Your Honour. I'll go through the humanitarian interview at length but the facts that I want to point out that are most relevant in terms of the considerations not taken into account is that firstly, the first appellant was forcefully terminated, two pregnancies and the third one would have most likely been terminated, i.e. Jarvis the citizen, had she returned to China which is why the Removal Review Authority actually ordered her to stay until the child was born. Therefore implicitly, the danger to the child was recognised at that stage. In other words, it was recognised by a Court or Tribunal of this country that China was prepared to forcefully destroy a child's life. Now that's relevant in terms of the other matters that the appellants place before the interviewing officer.

ELIAS CJ:

What permit was granted to the mother to stay in the country for Jarvis' birth? What was that permit issued under, what provision?

MR ORLOV:

I believe, Your Honour, that it was a temporary purpose permit which is usually the type of permit given for a temporary purpose for, that permit in fact usually – but my learned friend can correct me but that permit usually creates no further rights and it's issued as a way of stopping any other processes.

BLANCHARD J:

Is that a limited purpose permit?

MR ORLOV:

Yes, yes, limited purpose permit.

ELIAS CJ:

Where do we find that decision in the materials? Is it in the materials, is there a decision?

MR ORLOV:

There are so many decisions in relation – in terms of the RRA decision, tab 19 of the bundle. There are actually two Removal Review Authority decisions. This is the first –

ANDERSON J:

It's volume 1, tab 19, is the one you're concerned with.

TIPPING J:

That was a direction to give a visitor's permit, current until the 28th of February 2001.

MR ORLOV:

Yes, I actually thought that we weren't actually revisiting these decisions. I haven't addressed them in detail –

BLANCHARD J:

But they are part of the background.

MR ORLOV:

Yes, yes.

TIPPING J:

Is your case essentially unreasonableness, or do you rely on any other head of review? Can you just state that in the simplest, shortest possible way. Is it just unreasonableness, or are there other errors that you assert?

MR ORLOV:

There are other errors that I assert.

TIPPING J:

What are they, in summary?

MR ORLOV:

In summary, using the standard *Wednesbury* tests, breach of legitimate –

BLANCHARD J:

That's unreasonableness.

MR ORLOV:

Not only, breach of legitimate expectation. I have mentioned the breach of legitimate expectation cases, one of them strangely enough being called *Huang*, where a policy that was created outside –

TIPPING J:

All right, don't elaborate at the moment. Unreasonableness, including legitimate expectation?

MR ORLOV:

And natural justice Sir.

TIPPING J:

Anything else?

MR ORLOV:

Unfairness.

TIPPING J:

Oh, come on now.

MR ORLOV:

Unfairness Sir and also breach of – I've asked this Court to look at a higher test, breach of rights, using the hard look approach which is an approach used in America. I've also asked to –

BLANCHARD J:

But do you need that, if you can identify other errors? Have you no other errors to identify?

MR ORLOV:

A total absence of an application of a discretion. In other words, the officer did not do what he was supposed to do. He didn't look at the facts and he didn't apply them to the tests. He didn't balance or weigh, he just made a decision which was completely arbitrary.

TIPPING J:

Well that's unreasonable decision then, it's all within – I want to know whether there's anything outside the rubric of unreasonableness. Whatever manifestation of unreasonableness you are seeking to put it on?

MR ORLOV:

He acted contrary, if that's – it's more than unreasonableness, he acted contrary to his own policy guidelines by splitting the family, that's another factor. His guidelines were that he should, his own cross-examine –

TIPPING J:

Do you say he made any error of law and if so, what?

MR ORLOV:

Yes.

TIPPING J:

What?

MR ORLOV:

He didn't apply the policy to the facts. He failed to apply the policy at all.

BLANCHARD J:

But you don't have any specifics.

MR ORLOV:

Yes, I do.

BLANCHARD J:

Well, what are they?

MR ORLOV:

Sir, I guess to use the concept the devil is in the detail, I'd have to go through the facts that he didn't apply and that's why I was attempting to answer –

BLANCHARD J:

That's what we are asking you to do.

MR ORLOV:

Yes, yes and that's what I'm –

McGRATH J:

We are suggesting that you go to the questionnaire first, so we can see actually what the humanitarian interview produced.

MR ORLOV:

If we turn to the bundle. First of all, at bundle 24.

ELIAS CJ:

Perhaps, I will just mention that one of these pages, 236A, needs to be inserted here, that we've just been handed up.

MR ORLOV:

I will go through this now but I wanted to contextualise it, that he had a very, very rich background as to what was, or what could happen to both the child and the parents, in terms of all the previous decisions which he failed to also apply in relation to the child –

ELIAS CJ:

Sorry, have you identified those previous decisions? That was the question that I had asked earlier.

MR ORLOV:

Yes, I was actually going to go through them Your Honour, in the background –

ELIAS CJ:

Okay, no, carry on.

BLANCHARD J:

We don't need him to go through them.

ELIAS CJ:

No, you don't need to go through them. I was just trying to find them in the bundle.

MR ORLOV:

Yes, I've mentioned them in the background, in very detailed submissions of what was said but if I could make that background because that will contextualise the questionnaire. He knew –

ELIAS CJ:

We don't need that. I was just trying to locate the physical documents and I've done that now, so you can just start with the questionnaire which as you say, he had some background before completing this.

BLANCHARD J:

It's really a question of what did he ask and what didn't he ask.

MR ORLOV:

Sir, with the greatest respect, it's not simply what he asked but whether he actually evaluated the answers to those questions properly. This is my whole submission –

BLANCHARD J:

Even before you get to evaluation, there's a question of what information he's got for himself. We are speaking Mr Orlov, with the benefit of three days' of argument last week.

MR ORLOV:

Yes Sir, I understand.

McGRATH J:

We're at page 233, are we?

MR ORLOV:

Yes. Moving on, let us begin then at the first question he asked which raises the issue in relation to the child, if we go to question 15. "What are your financial circumstances?" The mother says, "I have about less than a thousand dollars." Now, that shows that the mother is in poverty and to remove the mother with a child who will be in China without any support or networks or any finances is, in effect, creating a life of poverty for that child who is a New Zealand citizen.

I'll move on to number 17. The question in 17 is, "What effect will it have on you if you return to your home country?", the answer is, "We have been here

for almost 10 years, we will have unimaginable difficulties in our household, registrations may have been cancelled." It asks, "Where will you live?", the answer is, "We will look for places to live by ourselves, we will have to support ourselves. If we can't find a job, we will have problems to make a living."

At paragraph 19 of course, she refers to the fact that the husband is in prison. It's something Mr Deliu will address on, but the father was removed and is still in China, so therefore, they split the family then and there without any consideration of what effect that would have to the child.

BLANCHARD J:

Can you just clarify, the prison that's being referred to there, is that a New Zealand prison?

MR ORLOV:

Yes, pending removal. And of course, they ask at paragraph 20, "Do you have any children born in New Zealand?", and obviously the answer is yes, this is the particular child. Now, at paragraph 21, it's also relevant, the consideration that, "Do you have anything else to tell me?", and she says, "Yes, I hope my husband is released immediately, he is our household support", which shows that her income comes from her husband here, splitting the husband, sending him away, again, relegates the child to a life of poverty.

Now, this is, I guess, relevant also to the moral, if not the legal, context at paragraph 26, she advises the husband is earning an income here as a painter by contract, so we're not actually, in terms of the balancing exercise, looking at someone who is a criminal or unemployed or not contributing to his family. So that also shows the source of income for the child, who needs his parents to support him by that income.

Now at paragraph 31, it asks, "How does your partner support himself or herself financially?", the answer is, "He supports himself and his family." In

other words, again she's answering that her major, or sole income is from the husband.

At paragraph 33, it's asked, "What effect will it have on your partner if you are removed from New Zealand?", and the answer is, again this is very relevant to the interests of the child, "My husband comes from Shen Yang, North China, we come from different places, we won't know where to go to settle down. My husband has nobody in China."

ELIAS CJ:

Well I've read through this questionnaire and I don't think it's necessary for you to read it to us, we can do that. What submissions do you want to make arising out of it? What facts came out that you say should have been taken into account? The fact that there are no means of support in China? The concern about treatment for asthma for Jarvis? And what do you say wasn't addressed in the questionnaire that was relevant to Jarvis' circumstances? What criticisms do you have of this document?

MR ORLOV:

Of the document or the general document?

ELIAS CJ:

The way it was answered.

MR ORLOV:

If I can say what should be in questionnaires of this type, I preamble this by saying that, in my submission, that is something that is within the discretion of the executive as to what they want to put in the questionnaire. However, the questionnaire should be directly addressed to the interest of the child, this being, what effect would it have on the child in relation to all this? One thing that wasn't addressed in the questionnaire is the child's link to New Zealand, his current association with other children, his linguistic identity, his ethnic identity as a New Zealander, his wishes or at least an implication of what his

wishes could be, in other words, an analysis of the child's whole world. It's just not in there.

BLANCHARD J:

How old was the child at the time?

MR ORLOV:

He wasn't old enough to really give wishes, I think he was around four or five.

TIPPING J:

Four and a half, five?

MR ORLOV:

Four and a half, five, yes. He's only four and speaks – yes, he's only four. Or 4.5, four and a half. Now, I'm not saying that anything's so – none of my arguments are anything so black and white as the child has a right to express views, that's a question of discretion, especially as to the age of the child, but the issue is, what effect will it have on the child's world if he is moved? That's not really considered, not properly. Not by a standard of a reasonable observer.

The Court has mentioned the factors, I just will summarise them, a) the asthma, now, the asthma is relevant, not only Your Honours in that he won't get access to free treatment because asthma is a life threatening disease. There's no question that asthma is treated in China like it is in the rest of the world, but it's also treated in all poor countries, but if you're too poor to afford the treatment, you die. It's as simple as that. Now, he had a major asthma illness, this is known, this has been known all along, and China is, as a matter of common knowledge, has a very, very polluted environment, especially in some parts of China. It's a consideration, especially as a New Zealand citizen child. So that's a factor which, in his cross-examination, and I'll turn the Court to, Mr Fennell simply said "Well, I've spoken to people in my office and they say asthma treatment is available in China." Well that's not the issue, of course it's available in China, the question is, would this child get it? It's

available to the street kids of Bangladesh but they don't get it either, and that's the point.

The other issue is, as this Court has identified, the economic, I won't so far say rights, but the economic position of Jarvis. In New Zealand, he would be supported by the network of social welfare payments, whether or not he was in the care of his parents. Here, clearly, he would not be. Furthermore, there's an issue – so he wouldn't have access, not only as a black child, but there's another issue of nationality. In the index, I think it's index 1 to the judgment of Justice Baragwanath, he sets out, I think, the nationality law of China. Now what the parents are saying is that the child would not be a Chinese national, at least until he gave up his New Zealand passport and that's unclear. So he'd be treated as a foreigner. That's double discrimination because as a foreigner, he would be unlikely, or will not, as on the balance of probabilities test, get access to free education, get access to free medical services, get access to free social services, so he, in fact, would be – but his parents are Chinese and therefore, they wouldn't get any funding for him either, so he's in a dilemma.

TIPPING J:

Mr Orlov, would you just pause for a moment. When it comes to the decision, this person, the interviewer, the officer, has actually identified a number of points that he's brought to bear, three, potentially four, of which are expressly directed to the interests of the child. Now, one may debate whether he's given them enough weight, but he has clearly come to this in his decision making process, recognising that the position of the child is important, because he's expressly referred to the child separately from the mother.

MR ORLOV:

Sir, this is where we have a philosophical conundrum in the *Wednesbury* test. In my submission, it's not simply enough to put in a form that I've considered, because otherwise, you see Sir, you can consider the interests but give them no weight, which is unreasonable, because it would mean that Immigration Officer –

TIPPING J:

How can you say that he gave them no weight? What do you rely on for that rather bold proposition?

MR ORLOV:

At the beginning of my submissions, I've talked of a decision of Justice Cooper which was then confirmed by the High Court in *H v Minister of Immigration*, at 6.1, about lip service being paid to these considerations –

TIPPING J:

Are you staying that this was all a façade, this decision making exercise?

MR ORLOV:

Sir, it's not a question –

TIPPING J:

You realise you have got ethical obligations in making these sort of allegations, don't you?

MR ORLOV:

No, no, Sir. *Tavita* – I'm not saying a façade in terms of fraud or deceit, no Sir.

TIPPING J:

Well, you're saying in effect, that he's written these things down as matters that he's brought to bear but he hasn't really taken them into account.

MR ORLOV:

Well Sir, what really means – this is where I'm talking about, this is where my argument in terms of *Wednesbury*, really means properly balancing them. You see Sir, on the face of this document, he didn't really take them into

account, it's obvious because if he had, the decision would have been to allow it to stay, the decision is eminently unreasonable –

TIPPING J:

Well, that's a most ridiculous submission. That just completely begs the whole question.

MR ORLOV:

It was a submission that was accepted by the High Court in the Justice Cooper judgment which allowed not only the stay and paying lip –

TIPPING J:

Well, I'm not bound by Justice Cooper.

MR ORLOV:

No Sir but, you see, let me give a prime example Sir, if I may, if I may go to a reductio ad absurdum –

TIPPING J:

No, I want you to tell me how you justify the proposition that he has in effect written all this down but not taken it into account, never mind the weight he gave to it?

MR ORLOV:

Well Sir, if he gave it no weight, that means he didn't take it into account.

TIPPING J:

Right. Forget it, carry on.

MR ORLOV:

But I will answer –

TIPPING J:

Forget it Mr Orlov, we are on a completely different wavelength. Carry on with your submissions.

MR ORLOV:

I just want to answer because it is very important for me to answer Sir, to be given that opportunity. In the decision, he states at page 244, "I've carefully weighed the competing matters set out above and in the circumstances of this case, I consider..." and this is where – he's saying, "The client has been in New Zealand for four years but lawfully for 4.5 years. Client has been working in New Zealand. Client's child has not started school." Now, where is it that he looks at the fact, or weighs, that this child may not even be able to start school in China. That's the first point, nowhere in the decision. He says, "The client has not started school." The fact that he has access to education in China is irrelevant because he doesn't have free access to education and there's no finding of that, so he's actually not properly looked at the issues he should be looking at.

Now, he also says, "The client has exhausted all avenues to stay in New Zealand. Someone has declined to intervene in this case." Then he goes on, "Medical and educational available in China" and that goes to my point, so what Sir. They are available but they are not free and, "New Zealand born child will adjust to being in China and can come back to New Zealand at any time." Sir, how will he adjust, in what way will he adjust, that's just a bland statement without any foundation whatsoever, no factual foundation, no investigation, no rebuttal of the claims that he's a black child, that's he a New Zealand child, no investigation – and he can come back to New Zealand at any time. Well, that's the same that he can get education in China. Of course he can but who's going to buy his ticket? If he can't afford to even feed himself, how can he come back to New Zealand. So what we're doing is we are removing a New Zealand child to an uncertain future, I would have loved to have put it stronger but I'm ethically bound not to, although in my submission, there's clear evidence that it would be stronger, that he's in a life of discrimination and poverty but I won't say that. In fact, there has been –

there's nowhere really also, a consideration of the asthma. So, where are the best interests of the child here as a primary consideration?

BLANCHARD J:

Are you arguing that there's been a failure to take account of the fact that the child is a black child, to whom other considerations about the availability of say, educational facilities, would not apply?

MR ORLOV:

Absolutely Sir and also, a child is a foreign New Zealand child, who also, apart from being a black child, would not have automatic right to educational facilities –

TIPPING J:

That's what I was trying to get at a long time ago.

BLANCHARD J:

That's the guts of your case, isn't it?

TIPPING J:

Yes. I was giving you every opportunity about 10 minutes ago to identify and you didn't come anywhere near it. Anyway, it's uncovered now.

MR ORLOV:

Sir, sometimes I take a while to understand, I apologise Sir. Really, that's the essence Sir, that using the *Wednesbury* test and I did want to make –

BLANCHARD J:

You don't get to a *Wednesbury* test if these are failures to consider a relevant matter.

MR ORLOV:

Absolutely sir but –

BLANCHARD J:

That's what we've been trying to say to you for the last half hour.

MR ORLOV:

Yes. He's failed to take into account relevant considerations.

TIPPING J:

Ah.

MR ORLOV:

That was pleaded Sir.

TIPPING J:

I know but, the really crucial one, is the black child point?

MR ORLOV:

And the citizenship point.

TIPPING J:

All right.

MR ORLOV:

In other words, it's a foreign child.

TIPPING J:

Well, the two relate.

MR ORLOV:

Yes, yes, those are the two critical points and I would –

BLANCHARD J:

Is there any mention anywhere in the questionnaire, or the other materials concerning decisions made, about the child's black child status and the effects of that?

MR ORLOV:

Yes Sir, there are. I made detailed submissions to that, they are contradictory, there are some decisions I think in the RRA which says that in certain provinces there is a problem and in others there's not, it's not clear but I want to say, in all the other decisions and this is the point of my case, they never really considered the child because the child wasn't even a party, they considered whether the applicants would be discriminated against.

McGRATH J:

Isn't it the case, that the decision of the Removal Review Authority addressed the black child aspect?

ELIAS CJ:

What page is –

McGRATH J:

I'm just looking at page 170.

MR ORLOV:

This is what my submission to the Court of Appeal was and again, I repeat it in these documents, they addressed the black child issue only in relation to the first appellant but not in relation to the child. In other words, they didn't look at the child's interests, they looked at whether he would be discriminated against, or a refugee or whatever, in relation to the child but they didn't do a proper investigation of the child because (a), the child wasn't a party and –

McGRATH J:

Well, the child wasn't born at the time of the removal authority decision.

MR ORLOV:

Yes but the child also never is a party to these sort of decisions.

ANDERSON J:

You wouldn't have to be a party to have its interests considered.

MR ORLOV:

Not according to the argument of my learned friend, who considers that it can be done through the parents and that's something I wanted to raise as a procedural objection to my learned friends raising this at this stage, that the child cannot be a party to this procedure. Now, that wasn't raised in the Court of Appeal by my learned friend, nor was it –

BLANCHARD J:

That's a side issue.

MR ORLOV:

Yes Sir. So, they didn't look – and also if one looks at – these decisions about the black child, conflicting as they are, in terms of – because one thing, the Removal Review Authority, then the RSAA and another I think decision, they all talk about the black child aspect, I might say, in different ways.

McGRATH J:

The next decision is the one at page 209, isn't it which is after the child is – though it says perhaps still four because it's more than four and a half years ago?

BLANCHARD J:

Not from the date of the decision.

McGRATH J:

That's right but if you look at page 209, we have a decision in June 2003, of the Removal Review Authority?

MR ORLOV:

Yes, before I – just, I wanted to address this decision. Now, at paragraph 22, which is of the first one, the Removal Review Authority, which starts at page 170 of the bundle.

McGRATH J:

Yes.

MR ORLOV:

This is the error again of the failure to take into account relevant considerations. For example, they say that – they talk about the rights of education of the child, there's conflicting evidence whether the child would be able to receive an education. Now it says, "Without registration, the child would not –

BLANCHARD J:

Where are you reading from?

MR ORLOV:

This is at paragraph 22 of the RRA decision.

McGRATH J:

Page 176.

ELIAS CJ:

It's quite clear from paragraph 24 that the RRA is not considering the interests of the child who has not been born and that this decision is made on the circumstances that then apply.

MR ORLOV:

Yes Ma'am, and in fact, no decision ever considered the child in any reality and that's the point of my whole case. That the real, only time to consider properly all the issues relating to the child is at the point of removal through the humanitarian interview, and that is why the intensity review must be strong, because children, their lives change daily and at the point of removal, it's the child we're focusing on. What would happen to the family, I accept that in a – these issues are res judiciata in relation to the mother, but in relation to

the child, no one's really looked at what effect all of this will have on the child. And in fact –

ELIAS CJ:

This reads, in fact, like a temporary determination, doesn't it, because the authority recites the arguments about discrimination that the family is likely to face with a second child but says, well the child hasn't yet been born.

MR ORLOV:

Yes Ma'am. But it goes further than that Ma'am, you see, this is the mistake that Mr Fennell, in my submission, made. He drew from paragraph 22 of that decision that the child would have a right to receive an education. Not a right, but would have the right to go to school, in other words, he wouldn't be prevented from going to school. But there's nowhere in that decision that he would have free education, and that was what he had to turn his mind to, how would he get that education? I mean, even in the most totalitarian of countries, if you pay for education you can get it, the question –

ELIAS CJ:

I'm not sure about this argument Mr Orlov, because there may be many countries in the world where education is not free. Are you saying that a child would never, or a family would never be able to be sent back if those circumstances apply, if there isn't free education?

MR ORLOV:

Absolutely not Your Honour, because, for example, if a rich family went to Switzerland and they could pay for –

ELIAS CJ:

Well you're saying that it's the fact that it's a poor family?

MR ORLOV:

No, it's even more than that, what I'm saying is, it's a combination of factors. First of all that it's a poor family who have said they won't be able to survive,

b) that it's a New Zealand citizen child, I think citizenship is important because New Zealand doesn't have an obligation to protect the world, but it does have an obligation to protect it's own citizens as I've mentioned in the CYFS Act, because a child who's sent to a poor country who can't –

ELIAS CJ:

I understand the argument. I'm just grasping for how ambitious it is.

McGRATH J:

Mr Orlov, I think that really, if we're to focus on the key passages of what the Removal Review Authority considered in relation to the black children and education issue, we're at the decision that starts at page 209 and it's really, perhaps, about paragraph 34 that you should be looking at, is it not? This is a decision that is actually looking at the educational needs of this child.

MR ORLOV:

Quite correctly Sir, yes, and I did address them in detail in my submissions but I'll just speak to them very briefly. Paragraph 34, they admit or imply that yes, it may be correct that they may not be freely accessible, but they are accessible, but that, again, begs the question of whether this child could access them.

McGRATH J:

So it is a question of accessibility including cost for a poor family?

MR ORLOV:

Yes Sir.

McGRATH J:

That's what you're inviting us to focus on?

MR ORLOV:

Yes Sir, the accessibility of these services. And with the combination Sir of course of poverty, the fact that he's a non-citizen child, non-Chinese citizen

child, and a black child. All of these would make these, in fact, de facto, impossible to access. De jure, he might be able to in law access them, but de facto –

McGRATH J:
I understand.

BLANCHARD J:
Was there any consideration of that conjunction between being a – within the black child area and not being a Chinese citizen? Was that considered in either of these decisions?

MR ORLOV:
Sir in cross-examination he does answer that in a way that, in my submission –

BLANCHARD J:
No I was asking whether it was considered in the two decisions that we have before us.

MR ORLOV:
Not that I can see, no Sir.

BLANCHARD J:
Yes, thank you.

TIPPING J:
What I find particularly puzzling is if the Review Authority two years earlier has said what it says here in the passages that have been drawn attention to, 34, 35 in particular, how can the Immigration Officer go behind that if nothing new is raised?

MR ORLOV:

Sir, what's said in those decisions, with respect, supports my argument. The Immigration Officer just didn't properly take it into account. What it says is, he won't be able to freely access these services.

TIPPING J:

But the Review Authority decided on the same basic legal test, 47(3) to the opposite effect.

MR ORLOV:

But you see Sir, that's the point of my whole submission, the Removal Review Authority wasn't considering the child, it was considering the parents.

TIPPING J:

This decision is not under review, and surely you can't expect the Immigration Officer, himself, to review the decision of the authority. Doesn't he have to take this decision in these circumstances as a starting point and see whether anything fresh has come into the picture significantly to alter?

MR ORLOV:

I agree with you Sir, but to answer, this decision is actually only related to the first appellant and the third. It doesn't talk about what will happen to the child.

TIPPING J:

It talks about the children, the child specifically in 34 and 35 doesn't it? 35, "If all elect to travel to China, there is no reason that the child…", that's Jarvis, I understand, "…could not enjoy a normal family life in that country consistent with expectations and conditions of others in that country." You may disagree with that, but what's the unfortunate Immigration Officer to do faced with that as a very important finding, if you like, in the background to his determination?

MR ORLOV:

Because Sir, if you look at paragraph 35 of that decision, the test used is whether the child will suffer exceptional deprivation, exceptional deprivation, and that is not the test in the UNCROC –

ELIAS CJ:

But the point that's being put to you is that this decision is not being challenged. There were not judicial review proceedings in respect of this decision.

MR ORLOV:

Yes.

TIPPING J:

I don't understand how you can – the scheme of the Act suggests that the Immigration Officer post a decision of this kind, right or wrong, as it may be, is supposed to go behind it and relitigate, if you like, the issues that have been determined in this decision.

MR ORLOV:

Sir, this is my point, it's not a relitigation. The test applied was exceptional circumstances test, whether it's unduly harsh to remove the parents, but the exceptional circumstances test, the statutory test applies to the parents, not the child. The best interests tests applies to the child, the totally different test. They said, would it be exceptionally harsh to remove the family? They were looking at the parents. They said, no it wouldn't be exceptionally harsh. That's not under review. But the question is now, when the child is removed, a focus of the best interests of the child would look at, would the child get an adequate standard of education in the circumstances? The answer would be no. The Removal Review Authority might think that's not exceptional, but in terms of the best interests of the child, it's a factor which would void the decision.

TIPPING J:

You may have an argument that the Review Authority didn't correctly direct himself, but that is not before us.

MR ORLOV:

But Sir, the child was not a party to the review, he's not estopped from raising arguments in relation to the child, that's why I included the child as a party, that is the very purpose of this – the child was not a party before the –

ELIAS CJ:

That might be so, but the question is whether the Immigration Officer has acted reasonably and surely, it is reasonable for him to act on this determination and indeed it would undermine, one would have thought, the Removal Review Authority for him to second guess its determination on the point, unless there is some new circumstance which needs to be taken into account by the immigration official.

MR ORLOV:

Ma'am, I go back to my argument which is focused that the child did not have an opportunity to be heard and therefore, the child, the only opportunity –

ELIAS CJ:

I accept that the child is not estopped from being heard in your challenge to the immigration official's decision which is what's before the Court but the child still needs to convince us that the decision was unreasonable.

MR ORLOV:

And why Ma'am, I say the decision was unreasonable is, if the Immigration Officer turned his mind to the exceptionally circumstances test, in other words, would it be exceptionally harsh to remove this child which was the test in this, he used the wrong test because the test in relation to the child is not would it be exceptionally harsh for the child to go with his parents, or would it be exceptionally harsh for the child to be expected to either stay here without his parents or to be expected to go to China where his life standard would be almost impossible. Would it be in his best interest, that is the test. Therefore, the Immigration Officer took into account irrelevant consideration, the wrong test.

TIPPING J:

But there's a finding, right or wrong, that the child could – there is no reason why the child could not enjoy a normal family life in that country, et cetera. Now, that's a finding, right or wrong but I don't understand how you can say that the Immigration Officer has got to go and revisit that.

MR ORLOV:

Sir, I'll explain in the subtlety of what's been found here, they are not saying that the child – if that decision had said the child can get free education in China, or will be able to access, that's different, they didn't say that. They said there's nothing to prevent the child from paying for an education, that's the implication of this. That's an irrelevant consideration because it doesn't matter. The question is, will this child have an adequate standard in his best interests.

TIPPING J:

Do you regard this as the key point because unless you can get behind this, you can't show anything new, can you?

MR ORLOV:

I can show something new Sir. The child, since that decision, the child has grown up in New Zealand, the child has made ties, the child has a New Zealand language –

TIPPING J:

Two years have gone by.

MR ORLOV:

2003, it's now –

TIPPING J:

Two and a bit years have gone by.

MR ORLOV:

It's now 2009 –

ELIAS CJ:

The Immigration Officer does deal with that by saying and again, rightly or wrongly, that the child is four and a half years old and not at school, speaks Chinese. So that's, at least looking at whether the child, there are special circumstances attaching to the child which in the interval, would make the decision of the Removal Review Authority inapplicable and its conclusions.

MR ORLOV:

Ma'am, not really because he's saying that as a ground for removing the child, that the child speaks Chinese and that he hasn't gone to school here but what he hasn't considered is the child's right to go to school here, the child will be given an education here and it won't be given an education in China. To address that point again, at paragraph 39 –

ELIAS CJ:

Sorry. I'm not precluding you developing that as a new circumstance which was relevant and which should have been taken into account. All I'm saying is that as far as the disadvantage from the status of this child is concerned, the Removal Review Authority has addressed that and come to a conclusion that that should not preclude the family being resettled in China.

MR ORLOV:

Well, in my submission Ma'am and if I can have just a few minutes to address that because I think that, in my submission, there is a big conflict between the exceptional circumstances test and the Removal Review Authority that is apply and the best interests of the child test and that's the conundrum here. If I can turn Your Honour to paragraph 39 of the Removal Review Authority's decision, it's very clear that the decision is related to only to whether it would be unduly harsh to remove the parents. There is not a serious advocacy for the child's best interest, there's no one to advocate or put the position of the child. The question is, would the parents and to a very lesser extent, the family unit, suffer in terms of exceptional circumstances but the child is not

really addressed fully or property. Even on the decision, this decision, when you take the humanitarian interview in terms of UNCROC, et cetera and you look at the best interests of the child, again, that decision doesn't go into the questions because possibly they were never put to Removal Review Authority of what really would happen to the child in terms of access, it was never considered –

McGRATH J:

In deciding whether or not the parent goes, the Removal Appeal Authority has considered whether the parents will be unable to provide basic necessities of life for the child in China. That's been an important factor for the authority on which it's made a determination in the course of reaching a decision which I agree, relates and binds only the parent.

MR ORLOV:

Yes Sir but to address basic necessity of life, the best interest of the child is much more than a basic necessities. Basic necessities I take, is giving rice and water but what are the basic necessities that a New Zealand child, that New Zealand has an obligation to protect. In my submission, if a child was in New Zealand under the circumstances that the parents say they would be in China, CYFS would remove it automatically because the parents wouldn't be providing what New Zealand considers the standard. So, in China –

McGRATH J:

Mr Orlov, you keep coming back to this. I think you may want to, at some stage before you sit down, get to the issue of what the legal standard is. Whether the legal standard is a direct application of the convention, or whether the legal standard is section 47(3) brought in to apply to section 54 and the temporary permit sections. Just at the moment, I think what the problem that we are having with your argument, is that we are talking to you about factual conclusions and findings that were reached by the authority and then picked up on by the Immigration Officer and you are really talking about the legal standard that should be applied which is a different issue. I mean, in the end, as far as the authority went, can you take issue with what it decided

on his line of reasoning and on whether the Immigration Officer was entitled to pick up that and to make his decision on the basis of it?

MR ORLOV:

Well, I've posed the question in a different way Sir but in order to answer your question, the matter that wasn't decided or even considered here, asthma, it's not in there, it's not in the decision. The matter of access is not in there, the matter of the child's nationality is not in there, the matter of discrimination against black child in terms of their perspective not their parents is not in there. In other words, nothing relating to the best interests of the child, or even the consideration properly of all the factors are not in there.

McGRATH J:

So, your submission is, that the Immigration Officer's conclusion was too superficial for the task he was required to undertake?

MR ORLOV:

Absolutely Sir.

McGRATH J:

I think that that probably rounds off the factual position, unless there's – what we understand your submission to be and I understand what you've done. If I may say so, you've summarised the headings in the last minute very succinctly. Does that mean we can move on from the facts and perhaps go to that legal standard that you want to argue about?

MR ORLOV:

I think we can Sir, if I may. I want to, I guess we use T.S. Eliot's phrase, start again from the beginning, of what it is that I see that we are looking at here, or what the issues are here, in terms of the tests –

ANDERSON J:

I'd keep away from T S Elliot, there are too many other things he said that could be sided against you.

MR ORLOV:

Beginning, I guess, with what is traditionally viewed as the *Wednesbury* test. In my submission and I've quoted extensively the Chief Justice –

McGRATH J:

Can I just say Mr Orlov, what I thought you were about to come to was not so much *Wednesbury* because we've had a discussion about that, but really what the statute requires. The Immigration Officer works from the statute. International obligations inform what the content of the statute is, but I think the main issue you've got to address is, whether the Immigration Officer simply has to address the standard in section 47(3), harshness and injustice in that context, or whether you can somehow bring the International Convention obligations to be applied in domestic law. I think that that's probably the main if not the only point you need to address before you sit down.

MR ORLOV:

Okay, I'll try to do that without addressing *Wednesbury* because in a sense, that involves –

McGRATH J:

It is an important point, I realise.

ELIAS CJ:

We're all very familiar with that, though and we have read your submissions on it so you don't need to address us orally on that topic.

MR ORLOV:

I want to be radical Sir in the sense of radical – the root of the case. The High Court Justice Asher has said, following a submission in a sense, I made, that there is no statutory source of power for the *Tavita* interview, it just simply doesn't exist. As I've quoted, it's like looking for a black cat in a dark room which just isn't there. And that is why in this case, the Court of Appeal

reversed it's eight month decision that it had made that had taken eight months to look at in the Ding case, in other words, the reason is, statute does not and has not considered this. Now, where then do we find the jurisidictional power to strike or to consider or to look at? Now this comes to the point we find them in the following, in my submission, the *Tavita* principles or the principles of International Treaties are actually incorporated in domestic legislation, the Care of Children Act and the Care of Young Children and Their Families Act.

McGRATH J:

But haven't they been included in section 47(3) to the extent that Parliament wanted them to be addressed in the immigration context?

MR ORLOV:

No Sir, in my submission, no because the Immigration Officer's evidence is that post-*Tavita*, the Immigration created a policy as the Minister can, at any time, create, based on international considerations which Parliament hadn't specifically addressed.

ELIAS CJ:

But the policy is about how the Immigration Department addresses its statutory responsibilities and what you're being asked is, what is the statutory obligation of the Immigration Officer? And it's being suggested to you that section 47 provides the test that the Immigration Officer has to apply.

MR ORLOV:

I would submit that it doesn't Ma'am, and I would explain why I submit that. The Immigration Act has numerous sections which confirm limitless discretion on the Minister to look outside policy or to create new policy to consider things. One of those issues which has been specifically now created by the Minister is the *Tavita* policy. *Tavita* has said that we must follow international obligations, the Minister has accepted that and created policies, because he has limitless discretion to allow anyone to stay, but that discretion must be guided by –

ELIAS CJ:

Well it's not limitless, no discretion is limitless. That's basic administrative law. So any discretion is conferred and has to be exercised to achieve the policies of the legislation.

MR ORLOV:

Yes. And the policies of the legislation and using *Tavita* principles again, must be read or be read into the policies that are part of international law, Care of Children Act and CYFS Act. In other words, the legislation's policy, one of the primary policies of the Immigration Act, in my submission, is to bear it in accordance with New Zealand's obligations to protect children.

McGRATH J:

But only so far, would you agree, as is consistent with the legislation and its statutory scheme?

MR ORLOV:

That's provided that anyone understands the legislation or the statutory scheme which is from the legislation, it's so wide and so open that it's – the statutory scheme is absolutely part of the statutory scheme –

McGRATH J:

Section 47(3) is a precise formulation of a humanitarian test and that's why I'm suggesting to you that if we accept that the statute is the governing and we look to conventions to, so far as is consistent with the statute to clarify its meaning, it's very hard to go beyond section 47 which does address humanitarian questions including children, family considerations.

MR ORLOV:

Well in my submission, if the Court wishes to take that approach, I wouldn't object to it, but in my submission, it's factually erroneous to do so because the Immigration Department has given evidence and the High Court has accepted

and no one has challenged that there is no source of power for the *Tavita* interview, it was never contemplated.

ELIAS CJ:

Well that's not a factual matter, that may be their opinion but it's not a matter of – it's a matter of law, what's the standard of the legislation, what's the purpose of the legislation? These are the matters we have to look at.

MR ORLOV:

Because we're in the context of immigration which has multiple standards and purposes and constantly changing policies, doctrines and documents, the legislation is, in my submission, purposely so wide as to allow a large amount of discretion, I appreciate I may have been wrong in using the word limitless, a large amount of discretion to the Minister to create policies which must be interpreted in accordance to international law. Now, when I submit the powers of the Minister, in other words, the Minister has a discretion to allow, under various sections, Jarvis' parents to stay in New Zealand. He can go outside policy to do so.

TIPPING J:

We are attacking here the decision of the officer. How can it be argued that the officer should guide himself or herself by a different test from that which binds the RRA?

MR ORLOV:

Because the test is set out in the very humanitarian questionnaire itself and in the evidence of the officer, that he was guided not by the RRA test, he was guided by the –

TIPPING J:

I'm talking about as a matter of law, not what people may have thought or done, I'm talking, as I think my brother McGrath was, as a matter of law. How can you argue that the different tests applies to the officer as against the RRA when they are considering the identical issue?

MR ORLOV:

In my submission, the RRA considers whether it would be unduly harsh or exceptional to remove illegal overstayers, the humanitarian interview looks at whether it's in the best interests of the child to go with their parents or to allow their parents to stay and waive that against the immigration policy, two different tests.

TIPPING J:

That is not addressing my question.

MR ORLOV:

It's a different test, Sir. Totally different test.

TIPPING J:

I asked you how it can be argued that there should be or is in law a different test. I know you want a different test.

MR ORLOV:

I'll answer your question Sir in relation to the legitimate expectation doctrine that I've addressed in the English case, one of them being that's at page 30.

TIPPING J:

That's nonsense. Move on.

MR ORLOV:

But it's case law Sir. It's exactly the same facts. *Schmidt v Home Secretary*, a Privy Council decision, *Attorney-General of Hong Kong v Ng Yuen Shiu*, a Privy Council decision, *R v Home Secretary ex parte Khan,* policies created by immigration almost identical to these and in my submission –

TIPPING J:

It's not addressing the issue that I'm putting to you.

MR ORLOV:

Had no statutory basis.

TIPPING J:

All right.

MR ORLOV:

They had no statutory – but Sir, this raises the following issue, let us assume for a moment, and I know the Court may not accept that, let us assume that Jarvis' citizenship rights create certain rights under the Bill of Rights Act. For example, rights to have his citizenship taken into account of by, for example, CYFS and other government organs. By allowing his removal to China, it could be argued in 20 years time that New Zealand has abrogated its responsibilities to him by not preventing his removal and he would have a Bill of Rights claim.

ANDERSON J:

It depends on the authority if you argue something like that, I mean, there's no question whatsoever that if they're citizens, the State cannot remove them.

MR ORLOV:

No, but the State has an obligation not only not to remove them, the State has an obligation perhaps to prevent their removal and I have a case here where the State did exactly that.

ANDERSON J:

All the jurisprudence in this immigration area is against you on that.

MR ORLOV:

I have a case opposite that.

ANDERSON J:

Well, much of it then. Much of the authoritative jurisprudence.

MR ORLOV:

In other words, I gave the example and this is an example of a case where the mother wanted to take the child back to the Ukraine and the father obtained an order preventing removal and CYFS now has got custody of the child. Now CYFS has obligations towards children to prevent harm. If the child is taken to China and he does suffer irreparable or serious harm, would it be possible, theoretically, for that child to have a Bill of Rights claim?

ELIAS CJ:

Well we're not going to be looking at theoretical questions, we've really got quite a difficult enough issue here in considering whether the Immigration Officer's decision was one reached in accordance with law and I suggest that you concentrate on that.

MR ORLOV:

And Ma'am, that's why I was, I was moving on to that. If within the citizenship, the various, the body of rights, there's created a certain set of rights or expectations, then that is what he didn't turn his mind to and that creates another relevant consideration in terms of not only *Wednesbury* but beyond that.

ELIAS CJ:

We have that on board, your submission that he hasn't addressed the status of the child as a New Zealand citizen, he hasn't addressed access to education, he hasn't addressed the child's health concerns, so that's the factual background that you've put quite forcibly to us. We're now looking at how the legislation, whether he applied the legislation properly.

MR ORLOV:

Well Ma'am, I guess the Court has been much informed with Dr Harrison's very comprehensive submissions, I can't add to those, I can't add anything more to those and he has far more dealt with that, I don't want to repeat his arguments, suffice it to say that my submission is totally different but I incorporate his arguments in mine.

ELIAS CJ:

So you adopt his submissions on the legislative interpretation of the Immigration Act, you make further submissions about the standard or review but you adopt his submissions on the interpretation of the Immigration Act, is that the way you want to put it?

MR ORLOV:

Yes Ma'am, I do have an alternative one that I have asked the Court but if the Court doesn't accept that, I fall back on his submissions, so I gave two possible –

McGRATH J:

But I think you've elaborated that, you've made it plain that you are, I think you accept, making a rather radical submission, I think you don't shy away from that classification, but in relation to international law principles applying to New Zealand law, there's a lot in your written submissions and this morning you have elaborated quite fully on that aspect too, and we will have to address that aspect as well. So I think that you've – but if necessary, you, and this is perhaps a winding up concept, if necessary, you will rely on Dr Harrison's submissions as to how the Act should be interpreted.

MR ORLOV:

Yes Sir absolutely.

McGRATH J:

That's very helpful, thank you.

MR ORLOV:

If one other, in terms of Dr Harrison's submissions, I would say that even if we used the statutory test Your Honour has said, exceptional circumstances test for removal, even here there are absolutely exceptional circumstances in relation to Jarvis, and therefore, he didn't apply –

BLANCHARD J:

Which you've outlined to us.

MR ORLOV:

Which I've outlined, yes.

ELIAS CJ:

We understand that submission. So does that really cover the matters that you wanted to develop orally in addition to your written submissions Mr Orlov?

MR ORLOV:

I would like to perhaps turn just some of the things I wanted to say, or emphasise to the Court, paragraph 153 of my learned friend's submission, what –

BLANCHARD J:

We have, of course, been through this argument last week. We've heard all of Dr Harrison's criticisms.

MR ORLOV:

Yes Sir, I just –

BLANCHARD J:

You haven't had the benefit of the transcript unfortunately, it's only just arrived. We have spent a lot of time on this.

MR ORLOV:

So I will keep it very short, one line. If one takes 153 and 199 of my learned friend's submissions and applies them to the exceptional circumstances test, no more need be said because if there is a possibility or even a strong one on the balance of probabilities that this child could be deemed in international law, a refugee, there's no way he can be asked or expected to go back to China with his parents, nor can his parents be expected to go back to China without him.

BLANCHARD J:

Understood.

MR ORLOV:

Ipso facto, and that's all I really need to say, because in a sense, the Crown, in my submission, accepts my argument. Now, the further, just to address, the Crown has accepted at paragraph 171 the very test I'm asking this Court to adopt, at 171 of their submissions, that the presumption in terms of the best interests of the child test is the test I understand that the officer is applying, the best interests of the child test, the presumption is a), it's better for the child to be with its family unit, 17.1.1, 17.1.2, living in New Zealand can offer many opportunities, and 17.1.3, in most compulsory removal cases, the child's best interests factor will play in favour of the non-removal. And it's not a trump card, I agree, but on that test alone, the child should, in my submission, be allowed to stay.

Now just dealing with the question posed by the Court, if I may, and I'd ask the Court if this ground has been covered to stop me, how, or in what manner, should the Immigration Officer consider the best interests of the child test or exceptional test, or whatever, in my submission, Justice Glazebrook has covered that very well, a balancing exercise, and in my submission, that is the test adopted in most of the world, including actually in Ireland the very case that my learned friend cites actually, I wanted to go through that case to show that Ireland adopts the same test.

McGRATH J:

We went through that case, Dr Harrison took us through it, yes. The one that, yes, which is interesting, but yes. I don't think you need to go further than that.

MR ORLOV:

So and on a rational basis, the focus which is never a focus of any other proceeding before the humanitarian interview, and this is the key here, the

focus is purely or largely on the child and his ability to function in the family unit and how he'll function when he goes away, that's the focus and that should always be the focus of – in a proper way, to say that "well, I've talked to my staff in immigration and China's a good place", is not enough. He doesn't have an obligation to investigate everything obviously, that would be absurd, but he has an obligation like a reasonable officer to look at the issues. If the issues that are put to him have substance, he has to at least rebut them on the balance of probabilities. If the parents are saying they won't be able to survive, he has to point to factors where they would. If they're saying he won't get access to free asthma treatment, he has to point to at least something that says he will. He can't just say, "I reject that", because to reject those things, is not to apply the test at all, otherwise, what would happen is that every time that anyone created a form, he could tick the boxes and that would be the end of the enquiry of the Court. That would undermine, in my submission, the concept of the rule of law, because executives could do want they want, as long as they had a form to tick, and that –

ANDERSON J:

Is the Immigration Officer bound to accept as true anything that the subject says?

MR ORLOV:

No Sir, but if the subject says and has compelling, obviously on common knowledge, China has a one child policy, everyone knows that, there are black children, everyone knows that there's huge poverty in China –

ANDERSON J:

Well, there are great regional differences.

MR ORLOV:

Of course Sir. He can't just say "well, I don't accept your argument, go back".

ANDERSON J:

He might say, “Well, I know there are regional differences so, you may be right, where you’re going to.”

MR ORLOV:

Sir, the problem is and this is the context, the very practical problem, these matters were put to him, he says I need more evidence. If there’s no legal aid, where is the money to give this evidence? How can the appellants who have no money –

ANDERSON J:

There may possibly be an argument that the Immigration Officer should take some step to facilitate the provision of information by the subject.

MR ORLOV:

Absolutely Sir and that’s an argument actually accepted by various law on refugees, where refugees raise issues which seem prima facie correct. There’s almost – sometimes there’s been findings that there’s almost a duty to investigate if you are going to say that you don’t accept those findings.

ANDERSON J:

Would you argue that if it can’t verified but it may be so, then the possibility is probably sufficient?

MR ORLOV:

I would say, for example, again this is a case by cases analysis because the Court – I would say that if there is a prima facie arguable case, or a balance of probabilities argument, knowing what we do know in the papers, on the internet, it’s easily – if he’s saying look, in this province I won’t be able to get my child into school, this and this and this will happen, if there’s nothing to refute his argument, then the argument should be accepted, or at least there should be a weighing of that. One can’t simply reject an argument, otherwise there is no test, there is no consideration, otherwise he could off the top of his head say, I don’t accept anything and that would depend whether he’s in a good mood on the day. That’s, of course, not *Wednesbury*, even not

Wednesbury. This is where it comes to the concept and I wanted to make clear what I meant by lip service. I don't mean a fraudulent thing, I mean paying lip service to the very –

ELIAS CJ:

You're talking about tick the box?

MR ORLOV:

Yes.

ELIAS CJ:

Yes.

MR ORLOV:

Yes, I meant lip service by ticking boxes and this is what appears to be happening in the immigration context and I've seen that in the coal face. Furthermore, if I ask the Court and my learned colleague Mr Deliu will address them, in cross-examination I asked the officer why he removed the father when that would be automatically splitting the family. Now, the Court of Appeal couldn't answer that issue because it was a breach of the child's rights directly, without any reason. So, he didn't address his mind at all to the child's rights when he removed the father.

McGRATH J:

Mr Deliu is going to deal with that, is that what you are saying?

MR ORLOV:

Yes.

McGRATH J:

Just getting a bit concerned about time.

MR ORLOV:

Can I turn you to some of the things he didn't consider in terms of the cross-examination. I took the unusual –

BLANCHARD J:

Are these different from the ones that you have identified?

MR ORLOV:

Sir, they embellish them.

BLANCHARD J:

Well, we don't want to hear that.

ELIAS CJ:

We are looking at the matter as one of principle Mr Orlov. It's the topics that you say haven't been addressed and that's plain, one would have thought, on the face of the document.

MR ORLOV:

Yes Ma'am, thank you but in the cross-examination, I'll leave it to the Court to read – I embellish to what extent he didn't turn his mind to that and I think I demonstrate a lack of –

ANDERSON J:

Just give us the documentary reference to that cross-examination.

MR ORLOV:

Case on appeal, volume 2, tabs 35 and 36, cross-examination as to medical facilities but I actually summarise that evidence at paragraph 83, it's easier for the Court to look at, in my submissions.

ANDERSON J:

I recall that. Tabs, what was it again?

MR ORLOV:

Actually, if I can turn to the paragraph of my submissions, that would make it easier –

ANDERSON J:

I recall reading that, I just want to make a note of the tabs for my notes.

MR ORLOV:

Okay, the tabs, tabs 35 and 36 of case on appeal, volume 2.

ANDERSON J:

Thank you, 35 and 36.

MR ORLOV:

Also, at paragraph 86 of my submissions, talking about the rights of free education, et cetera, that's in case on appeal volume 2 also, tabs 35 and 36. I set out the relevant cross-examination. I also talk about the fact that he didn't take into account even this Court's – sorry, the High Court's finding in the *Ding* case of Justice Baragwanath appendix 1, as to the Chinese nationality laws, where he says well, he will be a Chinese national. He had no evidence for that at all, he was told precisely the opposite and that's at 88 of my submissions. So, if the Court could guide me how much more time I have, or whether –

ELIAS CJ:

It's really a question of – you seemed to have covered everything you need to say to us Mr Orlov, so you don't need to fill in any more time, unless there's anything additional you want to say to us.

MR ORLOV:

Would the Court permit me to address the Court on say, the conceptual framework of the *Wednesbury* and the hard look –

ELIAS CJ:

No, we've read your submissions on that. We are very familiar with that debate, with the literature, as well as with the case law.

MR ORLOV:

As Your Honour pleases. In that case, I end my submissions.

ELIAS CJ:

Thank you Mr Orlov. We will take the morning adjournment now Mr Deliu and hear you afterwards.

COURT ADJOURNS: 11.26 AM

COURT RESUMES: 11.47

ELIAS CJ:

Thank you. Yes, Mr Deliu.

MR DELIU:

Your Honours, if I may start with the grounds, because that appeared to be what the Court wanted this morning, essentially I submit that there are three review grounds that I'd like to address. The first two are the most important and then arguably, a couple of others but that hadn't been pled before.

The first one is relevant considerations, now that being essentially dealing with the family unity and the rights of the child. Now, of course I'm going to have to come to the edges of the rights of the child, but not directly addressing it in terms of the father's position, but what I mean by that is for example, the separation of the father as it affects obviously the father and the child, so the family, and also, one of the key points is the lack of support that would be, that would not be provided to the child on the basis of the father's removal, whether the support's financial, emotional, in that sense.

The second ground is indeed unreasonableness, dealing with the separation of the family as a result, that lip service was paid, I would adopt that as well

for the decision relating to the second appellant in the sense that the best interests were not really considered. In fact, I'd make the additional argument that if this Court were to adopt a different standard of review, that due weight has to be given to the considerations.

The third point that was also plead in the High Court deals with the failure to afford natural justice being a fair hearing and dealing with the opportunity to provide submissions and evidence, including as a collateral point, the Immigration Officer's obligation in certain circumstances to gather evidence, and key to this point that I'll discuss briefly later is the conditions in which these interviews were taking place. This one, in particular, took place in a prison, so in other words, for the detainee, it's basically impossible for the detainee to actually gather any evidence or make any tenable submissions or support, so not only are there the financial considerations which my learned friend Mr Orlov raised, but there's just simply the practical impossibility of lack of access to resources, and I would argue that the Court should consider that as well as part of the onus on the Immigration Officer to gather.

ELIAS CJ:

Are those the three grounds? Because I want to ask you if you'll take us to the statement of claim in this matter. Are those the three or is there further?

MR DELIU:

Yes. Those are the three, however, as I said, there's also two more arguably dealing with either errors of fact or no evidence for a conclusion to be drawn, but I do, of course, concede that those weren't specifically plead.

ELIAS CJ:

Where do we find the statement of claim?

MR DELIU:

The first statement of claim is on page 357 of volume 3.

ELIAS CJ:

Is this the final statement of claim?

MR DELIU:

No, Your Honour, there was an amended –

ELIAS CJ:

Well there's no point in taking us to the first one, is there? If you just take us to the last one.

TIPPING J:

There's an amended at page 81 is there, of volume 1? High Court, amended statement of claim?

MR DELIU:

Yes, yes thank you, Your Honour.

TIPPING J:

On page 81?

MR DELIU:

Yes Sir, so at tab 12 of volume 1.

ELIAS CJ:

Thank you. It's a combined statement of – a joint statement of claim?

MR DELIU:

Yes, so in terms of the, what was then the second plaintiff, relevant considerations are at page 85, unreasonableness and breach of natural justice –

TIPPING J:

Wait a moment, page 83 – you said 85, that's where you get to the second plaintiff is it? Sorry, I beg your pardon.

MR DELIU:

Yes, Your Honour.

TIPPING J:

Unreasonableness and then breach of natural justice. So those were the three heads?

MR DELIU:

Yes. And again, if I may, because I'd like to get into the decision itself, and I'll start in the decision on what I would argue are two additional heads of claim, the first one being the error of fact, now that deals with the availability of education.

ELIAS CJ:

But as you've said, it's not pleaded?

TIPPING J:

You've got no findings on it, have you, if it wasn't pleaded?

MR DELIU:

No, what I'd argue Your Honour is then, therefore, it's not taking into account a relevant consideration, in any event. In other words, the officer essentially said in his conclusion that education is available in China, but that contradicts entirely what the second appellant actually told him in the interview, so the second appellant actually said at question number 22 on page 223, the question is, "Please describe the educational and medical services available in your country", and the answer is, "Yes, there are schools and hospitals, you have to pay for this."

TIPPING J:

Sorry, what page are you on?

MR DELIU:

223 of volume 1.

TIPPING J:

Thank you.

MR DELIU:

So in other words, the appellant clearly said that you have to pay for these facilities and then absent any evidence to the contrary, the officer actually made a conclusion that the education and health facilities are available.

ELIAS CJ:

So you're saying that it was a failure to consider the relevant consideration of whether education was free?

MR DELIU:

Exactly, Your Honour.

ELIAS CJ:

And therefore practicably available?

MR DELIU:

Exactly, available doesn't just mean theoretically available, especially in this context. Another related point dealing with the failure to take into account the relevant consideration was the conclusion that also said that the child will adjust to being in China. Again, that's in the conclusion. There was no evidence, in my submission, to sustain such a conclusion. So in other words, in the decision itself, there's arguably only really two passages that even refer to the child in particular. The first passage is that the client has a New Zealand-born child, he is four and a half years old and not at school, and then the second passage is, the one that I'm referring to, "New Zealand born child will adjust to being in China and can come back to New Zealand at…" I read that to mean "again."

ELIAS CJ:

Sorry, what page, is this 232?

MR DELIU:

231 and 232 actually repeat though Your Honour so in fact either. So the point is, the child is only mentioned on these two occasions, really, Your Honours. However, if you look at the decision carefully, the fact that the second appellant was an overstayer and was here illegally in New Zealand is a common theme throughout the questions and in fact, in the conclusion. Examples that I would give is, even on page 230, the preceding page, there's a question that asks, "Any other compelling reasons?", now, by compelling reasons, this is asked under personal factors. The officer actually says, "The client has been in New Zealand since 2001 unlawfully and has not attempted to stay lawful but he has failed policy. Client has not approached Immigration since 2002 and he has not lodged any other appeal since then." Well firstly, Your Honours, in my submission, that's not a compelling reason as it relates to personal factors, it's under the rubric of personal factors. The next part of the document is public interest factors. That's clearly where the person's immigration status and lack of equities should be raised.

ELIAS CJ:

If you don't want a "tick the box" mentality, then it can't also matter what box this information is put into.

MR DELIU:

No, of course. What I mean though, Your Honour, the reason I'm raising that is that was predominantly in the officer's mind, that's what I'm saying, that this is a common theme throughout the questionnaire, it reverts back to the appellant's unlawful status, instead of focusing on the child, and that's what's basically being argued here, is the rights of the child as balanced against the rights of the government to control its borders. Now, if this Court adopts that the rights of the child are paramount, primary or whatever label is used, Your Honour, then in this decision, the officer must have applied that. I'm arguing he did not. He was instead simply repeatedly looking at the overstayer status of the appellant and then simply discussing the child because he felt he had

an obligation to discuss the child but basically nothing more, and I may, I can take Your Honours to the obligation.

ELIAS CJ:

What obligation?

MR DELIU:

That the officer had where he felt that he basically just had to pro forma consider the child, but essentially, I'm arguing that nothing more did he do. If I may take you to –

ELIAS CJ:

What do you mean you want to take us to the obligation? I'm not sure what you're meaning.

MR DELIU:

I think it will become clear if Your Honour indulges me at volume 2, tab 36, page 4.

ELIAS CJ:

What line?

MR DELIU:

Line 20. 21, I'm sorry. The question that the officer is asked is, "So you actually consider the public factors in relation to Mr Cui and those words were a result of your consideration?" "Those words are put in there to show that I have considered the circumstances… because if I didn't put that in there, obviously judicial reviews happen."

ANDERSON J:

Sorry, what page are we at?

MR DELIU:

Page 346 of volume –

ANDERSON J:

Yes, I've got that.

MR DELIU:

And line 21 to 25. So in other words, that's one example where the officer is saying that the words are just put in there –

ELIAS CJ:

I don't know what we're meant to take from this. Obviously, it's good practice to record it because there may be a review.

TIPPING J:

You're damned if you do and you're damned if you don't.

ELIAS CJ:

That's why lawyers are told to take notes of their conversations.

MR DELIU:

I agree Your Honour, but what I'm saying is, it's not enough just to put the words in there.

ELIAS CJ:

Well we accept that, it's not enough to tick the box.

MR DELIU:

Exactly and then in the decision, that's essentially what the officer has done and getting back to my original –

ELIAS CJ:

Well, I don't think it was necessary to take us to that.

MR DELIU:

The point is, in the decision, the officer only mentions the child two times.

ELIAS CJ:

Yes.

MR DELIU:

Again, whereas – in fact, even if we look at the decision itself, it mentions unlawfulness in the first sentence, it mentions unlawfulness in the second sentence, it mentions unlawfulness in the sense of exhausted all avenues to stay in New Zealand, that's in the one, two, three, four, five, six, seven, eighth sentence. It mentions unlawfulness or lack of permit, in the ninth sentence, declined to intervene. It mentions the Immigration Act in the tenth sentence. So, essentially, the appellant's immigration status is mentioned basically five times in the actual decision –

ELIAS CJ:

The first time it's mentioned, it is favourably to him, "He's been here for four and a half years lawfully." He's just really reciting the history, isn't he. A lot of these factors, do bear upon the child dimension, the New Zealand born child dimension because the wider family circumstances are also relevant to questions of the interest of the child.

MR DELIU:

Well, if I may Your Honour, that gets me the next point that I wanted to make actually. In my submission, the humanitarian questionnaire itself is fundamentally defective.

ELIAS CJ:

Where is your pleading on that and why should we reopen that point here? Surely you need to just identify for us, you don't need to be confined to the humanitarian questionnaire. What topics do you say the Immigration Officer hasn't addressed which are relevant in the scheme of the legislation?

MR DELIU:

Firstly Your Honour, as an example, the breaking up of the family, or the potential breaking up of the family. In the decision, that's actually not placed as a factor, even though it was obvious that that would be a potential consequence of the decision and in fact, is what has actually happened, the family has –

ELIAS CJ:

Was this decision, sorry, just tell me again, the dates, are these decisions taken at about the same time?

MR DELIU:

No, not at the same time, the –

ELIAS CJ:

Well, there's only a month between there, isn't there, less than a month between them, a couple of weeks?

MR DELIU:

Yes, the first decision is September, the second decision is October but what I'm saying Your Honour, is the practical effect that was actually understood to the officer, would be the contemplation of the break up of the family and that's what he also discusses in –

BLANCHARD J:

Why was that because, as the Chief Justice points out, there's only about three or three and a half weeks between this questionnaire and the interview with the wife and there was no removal until after the interview with the wife and a decision being made that the removal decision should not be revoked in her case?

ELIAS CJ:

Both of these parties were contemplating that they would accompany each other back to China, at least that's in the wife's questionnaire – oh, the children, the child would go back.

MR DELIU:

Well, actually Your Honour, if I can take you to question 32, on page 224, this is the top question, the question is, "Will your partner accompany you back to your home country?" Answer, "I don't know." That's one example. The next one is question 40, on the following page, "Will they accompany you back to your home country?" "I don't know." So, in fact quite the opposite I would submit. It was clear, at least in terms of the second appellant, that if he were to be removed, either the wife and/or the child would in fact not, or possibly not, accompany him back to China and the officer absolutely did not take that into account at all.

ELIAS CJ:

There's a sense of unreality about this because the wife is saying that they are all going to go back as a unit.

MR DELIU:

Your Honour, the decision was made in respect of the second appellant, on the 14th of September 2005.

ELIAS CJ:

I understand that.

MR DELIU:

The interview with the wife was October 2005.

ELIAS CJ:

Well, we've been through that.

MR DELIU:

Well exactly, so then, in other words, the officer had already made a decision as to the second appellant but had not made a decision –

ELIAS CJ:

I understand that, that formally that that's right. What I'm suggesting to you is, looking at the matter realistically, it looked as though the family was contemplating a return together. Anyway, I understand the point but, in its own terms, the officer didn't see from the questionnaire to have information which would support his view that the family would not be broken up.

MR DELIU:

Exactly Your Honour, so in other words, the officer should contemplate both possibilities. In other words, what will the effect be if the father goes with the mother and what will the effect be if only the father goes and he failed to do that. So that and my submission is, a mandatory consideration that simply does not exist in his decision at all.

TIPPING J:

If you look at stage 3 of this process, the first, this is on page 229, the first thing that's asked at the assessment stage is, "Has anything changed since any decision made by the appeal authority?" and it's there recorded, "Nothing has changed." Then, relevant to the point that's just been debated, the question about the partner and the children and the decision will be made after the other process is complete it says But what I'm particularly interested in is, can you reasonably say that anything significant had changed? This is where it's recorded, "Nothing has changed." Can that be – you don't seem to be putting your focus on that but can that be reasonably challenged?

MR DELIU:

The only strong point I can make in relation to that is the child has become more ingrained and more a part of society.

TIPPING J:

Is that a significant change, him attaining the age of four and a half, as opposed to what, two and a half or so, for a child of that age, that's the one point you would ask us to take into account on that issue?

BLANCHARD J:

The child didn't speak English, is that correct?

ELIAS CJ:

No, the child is described as speaking Chinese.

BLANCHARD J:

But did the child speak English?

MR DELIU:

As far as I know, yes.

ELIAS CJ:

Do we have evidence of that, we really can't take that from the bar, is there evidence of that?

BLANCHARD J:

There was one, I may be confusing the situation but there was one I think, in which a child didn't speak English.

ELIAS CJ:

One of the other cases, yes.

MR DELIU:

The point I would make on that anyway though, is the age of development. Obviously, such a sensitive age is an important age of development and in fact, four and a half years is basically on the cusp of actually beginning school. So, whether the child did or didn't speak English, that would be the time that the child would certainly be learning English. So, the point on that is that's another consideration is, if the child were to leave and I argue it's a de facto removal, the State cannot simply have it both ways and say no, we are removing the parents but we're not removing the child, that's simply not true and in fact, one Court has actually called that, I'll use the exact language, "disingenuous", is that argument. The point is, that the child then, let's assume arguendo that the child does leave, whether he's de facto removed or

not, it's the parent's quote unquote choice. If the child leaves and doesn't return to New Zealand until the age of approximately 18, at the age of majority, assuming the child even has the financial resources and the incentive to return to New Zealand and if the child didn't have English by the age of four and a half when he left, then it's fair to assume that he would have basically no English skills upon return to New Zealand. How can a New Zealand citizen, an adult New Zealand citizen, not know any English? That would be a consequential result potentially, of the removal of the child, among the other matters raised, education, health, et cetera. It's basic notions of culture that the child wouldn't have. In fact, what I would argue is, the child would serve as a black New Zealand child. Just as they're second rate children in China, this child would be a second rate New Zealander, essentially. The officer didn't consider that either. The officer basically said the only consideration that he did give was that he will adjust to being in China and that he can come back to New Zealand, but is that really the only question? Children can perhaps adjust to many things, but is that in their best interests? The officer simply didn't consider that. The officer basically assumed a), that the family would go together and b), that the family could provide for the child.

If Your Honours are minded to look at page 352 of volume 2.

ELIAS CJ:

Why? Just tell us why you're taking us there first.

MR DELIU:

Because of the assumption. I'm submitting that the officer assumed that things would go for the child on that basis, a), the parents go together, and b), they can provide for the child. Even though that contradicts what the father said in the humanitarian interview, on a few occasions, he says that he has no family in China, that he's in a region of unemployment, that he does not know how he will support, that he must pay for services, that he has no work in China, that the separation will cause the child's support to be reduced. The father brings this up repeatedly in the humanitarian interview. Then the

officer, in cross-examination on page 10, line 5, “Did you actually turn your mind to how they would earn a living to support Jarvis when they told you they couldn't explore how Jarvis would be fed, clothed, et cetera?” “They both had been working here in New Zealand, living in a house in New Zealand, earning an income to pay for things, they would do exactly the same thing in China, get a job like anyone else to earn a living.” And then later on line 15, “They provided for Jarvis very well in New Zealand –

ELIAS CJ:

What are you referring to? Are you referring to volume 2, as you said?

MR DELIU:

Yes, this is the cross-examination.

ELIAS CJ:

Well where is it? Because I think you said page 10, it’s not at page 10, we don’t have a page 10.

ANDERSON J:

Page 352, it’s page 10 of the original notes of evidence.

ELIAS CJ:

I see, 352.

MR DELIU:

Yes, thank you, Your Honour. So again, the father, by my count, at least seven times in the interview, makes clear that the economic situation might be in peril for the child, providing basic needs.

ANDERSON J:

He hadn’t been there for years, he hadn’t been there for 12 years. I mean, what the Immigration Officer is really saying, in effect, is that he has no physical or educational impediments to keeping himself in China. And that wouldn't be an unreasonable assumption. How does your client know what

the conditions were like in the province that he might go to which he'd left 12 years previously or whatever?

MR DELIU:

Well, but, Your Honour, on the other hand, it is common knowledge that China is, a vast majority of the population lives in poverty. Not all, granted, there's one percent perhaps that live extravagantly.

ANDERSON J:

Well who knows? It's a vast country with over a billion people, can one generalise like that?

MR DELIU:

No, but the point then is this Your Honour, if we're not to generalise, the father has raised it again, by my count, seven times in the interview.

ANDERSON J:

Without any suggestion that he is informed on that subject. It's speculation on his part.

MR DELIU:

Well he – there's nothing that the officer has drawn out to show an ability for the contrary, that he has skills to get any job or a job in the area. In other words, if the father is raising this repeatedly, the officer can't simply ignore the father's contentions and then make a conclusion to the opposite. In other words, any conclusion the officer makes must be reasonable.

ANDERSON J:

But he's not bound to accept them at face value without question and without context.

MR DELIU:

No, of course not, Your Honour, but then that gets us back to the original point, how is the father going to provide evidence? He's in a custodial setting –

ANDERSON J:
That's a different point.

MR DELIU:
Well it gets me back to the point that the officer should, in my submission, in some circumstances, and there's Canadian case law to support that, enquire further.

ANDERSON J:
Mr Orlov subscribed to that view too but that's a different point, that's whether fairness requirements, if any, were met in circumstances where there were barriers to providing information. What you seem to be arguing at present is that he has made a factual determination without a proper evidential basis for it.

MR DELIU:
Yes and failed to take into account the considerations of the father.

ANDERSON J:
Which is a different point.

MR DELIU:
So in other words, the officer then – then what's the point of the interview, with respect, Your Honour, if the officer can simply listen to whatever the person to be removed is saying, and then if the officer can absolutely ignore everything and come to the exact opposite conclusion, then the interview is lip service.

ANDERSON J:
It's a rhetorical question, but I don't think it helps me as a submission, with respect.

MR DELIU:

The conclusion also, the decision also doesn't take into account the support of the child, so this is separate as the family unity point is simply the support of the child in either country. It doesn't discuss how, if the father is removed to China, how will the child – let's assume the child remains here, which is in fact what happened, obviously.

ELIAS CJ:

Just hold on a moment, you are representing separately the interests of the father in this matter, and while it can be accepted that the family unit considerations are ones that are properly advanced on the part of the father in his own right, it is unnecessary for you to repeat submissions that we've heard relating to some of these topics because we've heard them. You can simply adopt them, unless you've got something additional to tell us. Because these are what Mr Orlov has been urging on us also. You're quite right to take us to the particular interview with the father and the decision that's made in relation to him because that's slightly different from that in respect of the wife, but as for the topics, you can just really identify the absence of consideration of some of these topics.

MR DELIU:

Yes, yes. Well if I may then extrapolate briefly on the separation point because Mr Orlov had actually raised that with the Court and said that I would be addressing it which I can. This is also in the cross-examination of the officer, so volume –

ELIAS CJ:

Tell us what the point is first.

MR DELIU:

The point is the officer a), conceded that family unity is very important and in fact, stated by analogy to another case as well, that they would not remove the mother and the father and leave the child here, firstly, and then secondly,

that family unity is important. He actually says both of these things and then he gives the example of how, in another case, because it appeared that the family would be broken up into different countries, he ultimately exercised the decision not to remove.

ELIAS CJ:

But why does that help us in this case? Who would doubt that the family unit is an important consideration? The question is, is it going to be so adversely affected that the removal order shouldn't be made here?

MR DELIU:

That then takes us to the philosophical point that I raised earlier.

ELIAS CJ:

I don't think we will be assisted by going to the cross-examination on this point if he's simply acknowledging that it's a relevant consideration that explains further why he didn't think it prevailed in this case. We should really just stick with the decision for that.

MR DELIU:

Well except for one caveat Your Honour, he doesn't actually, in my submission, anywhere that I've seen in the cross-examination explain why this case is different than even the case that he gave as the example. So if in one case he said that family unity is so important that I simply, I being the case officer, would not separate the family and I would exercise my discretion to let them stay, and then yet in this case, that's exactly what –

ELIAS CJ:

We don't know the circumstances of the other case, and really, if one looks at this particular case, he has given rudimentary reasons, he has said that there is other family in China, that these are resourceful people who have shown that they support themselves, that there's no reason to believe that educational and medical facilities won't be available to the child, so he has addressed the topics.

MR DELIU:

Except that I would argue Your Honour additionally that he's addressed the topics in a very cursory manner.

ELIAS CJ:

Well that's a different submission and you're entitled to make that, but it's not a – that it's only an acknowledgement of issues that need to be considered. That's the lip service point which you've already said you support Mr Orlov's submission on.

MR DELIU:

If I may very briefly, at question 41 is an example of where I submit that he should have tried to extract further information. Again, this is the question dealing with the potential family separation. In other words, "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…", the question deals with the effect, "I have no idea", so literally, the father is saying that he has no idea what the effect will be on the family and the officer simply doesn't even ask him to elaborate further, and in fact, the question actually asks in both scenarios. The officer doesn't even consider that. In other words, did the appellant have no idea as to the first scenario, the second scenario? It simply is not explored. So therefore, the officer's decision to actually remove has the effect of splitting the family, which again he didn't consider.

In fact, one of the reasons that he actually, that the officer actually gives in the cross-examination for the removal if the Court will indulge me at 345 of volume 2.

ELIAS CJ:

Sorry, what's the submission that you're making now?

MR DELIU:

This goes to the decision, one of the grounds for making the decision and taking into account the family separation.

ELIAS CJ:

Volume 2?

MR DELIU:

Volume 2, page 345.

ELIAS CJ:

Yes, what line?

MR DELIU:

33, or in fact, even 30. "I put it to you despite saying that you hadn't made a decision in relation to whether the child had gone back, you had already pre-determined that the child would go back", "No, because the child under New Zealand laws and the conventions we look at, the child's interests have to be taken into consideration, obviously. Mr Cui was in custody so I must make a decision rather quickly, because there's no point in keeping him in custody if we're going to allow him to stay in the country because the child was in the care of the mother at the time." And this is repeated in another place in the cross-examination, I can't –

ELIAS CJ:

He says, "Because the child was in the care of the mother at the time, we looked at the circumstances for the whole family."

MR DELIU:

Yes, but he says he had to make the decision rather quickly, which had the ultimate effect of separating the family but was there a need to make the decision rather quickly?

ELIAS CJ:

Well you could make this submission without taking us to this cross-examination.

MR DELIU:

Well in my submission, it's wrong for the officer to make a decision rather quickly based on that, that's an irrelevant consideration if the father's custodial status is actually an irrelevant consideration. The decision should be made in a proper –

ELIAS CJ:

Doesn't the Immigration Act indicate the need for some speed? And if he's in custody, isn't it right that the Immigration Officer should make the decision quickly? Because as he says, otherwise he'd be kept in custody unnecessarily if the decision is taken to grant them a permit to stay here.

MR DELIU:

A few points on that Your Honour. Firstly, the Immigration Act says 90 days, that somebody can be detained 90 days without it become unreasonable, that's both the Act and case law interpreting the Act, in any event. Secondly, in fact in practice, people are held even in excess of 90 days, there are even cases where people are held years if they refuse to co-operate in getting a travel document, for example.

ELIAS CJ:

So what?

MR DELIU:

So, but secondly, is the question of the period of time in this case was approximately a month between the interviews so there's nothing to say that keeping somebody for one month at the peril of not splitting up a family when they shouldn't be split, shouldn't be something that the officer takes into account. In other words, they routinely detain people.

ELIAS CJ:

So you're complaining that he made the decision too quickly? He should have taken more care, is that the submission that you're making?

MR DELIU:

Yes, and took into account an irrelevant factor, being the father's detention status.

ELIAS CJ:

Well it's not really a, that's not a factor in the decision he comes to. It's a reason why he says that "I need to make a decision quickly."

MR DELIU:

Yes Your Honour, it all comes back then to the evidence that was or wasn't provided and the conclusions that the officer did or didn't come to, so I do agree. Another factor that the officer didn't take into account would be the effect of the removal order and in fact that's what the Crown has actually pointed out to the Court of the five year mandatory ban on re-entry back into New Zealand. The officer also didn't consider that. In other words, since he was making the decision to remove, if he hadn't yet made a final decision as to Ms Huang, then the possibility would have been that had he, for some reason, allowed Ms Huang to stay, but yet at the same time removed the second appellant, the effect would be that the family would be broken up for at least five years. In other words, it's a mandatory ban on removal.

BLANCHARD J:

Yes but it's plain enough, if we look at the realities, that he was making the decision in relation to the father, which he felt he had to make relatively urgently, but he was looking forward to the fact that there would be an interview with the mother. He plainly was anticipating that the decision in relation to the mother would be the same but crucially, I think, they didn't actually remove the father until the decision had been made in relation to the mother. So it appears to me that he was anticipating that if contrary to his expectation, the mother wasn't removed, it would be possible to re-look at the

situation of the father. It's very artificial to divide this up. I frankly don't think, so far, you've added one iota to the argument we heard from Mr Orlov.

MR DELIU:

Well except Sir, in my submission, it's not artificial because it's in fact what happened.

BLANCHARD J:

Well you can pursue the argument if you like, but to my mind, it is a totally artificial approach to what happened.

ELIAS CJ:

Effectively, are you arguing that you cannot have serial determinations for members of a family? You have to consider them altogether and at the same time?

MR DELIU:

Yes, exactly Your Honour.

ELIAS CJ:

All right, well then what's being put to you is that in substance, that is what happened because they didn't deport the father until after the decision had been made about the mother.

MR DELIU:

Well the point that I would make on that is also then there were, the judicial review proceedings were in place for both of them at the time, so then in that case, again the net effect is actually that the separation actually did occur, we can't simply ignore that as a reality. So in other words, the officer had no – there's nothing in the policy or guidelines that the officer can point to as to the need to make such a quick and pressing decision to the father, and not make one uniform decision relating to both of them. In other words, they're both overstayers, it's undisputed, why should there be two decisions? It's actually incongruous, if anything, and leads to, well, different results.

ANDERSON J:

From what view point? I mean, if one were considering the welfare of the child, it's better that the child have one parent with him in New Zealand than none, obviously, so that's an indication for a different approach. I was wondering if your submission, I may have got the wrong end of the argument here, but I wonder if your submission was that he should have taken into account that the five year ban following a removal order would operate as a barrier to family reunification within those five years whether one or both were removed and the child remained?

MR DELIU:

Yes, Your Honour and in fact, even further to that, it would act as a barrier for the child coming back because the officer says that the child can come back to New Zealand at any time, that's actually what the wording is in the decision –

ANDERSON J:

Well, I understood that but then do you think that an Immigration Officer would be completely oblivious to a five year ban consequence on a removal order? It would always be an assumption that the officer would be making because it's so obvious.

MR DELIU:

Except that in practice what's actually happened then therefore is that the five year ban is in place and now, relief has to be sought of this Court whether a), whether the Court decides to grant it and b), whether the Court can grant it, as to the second appellant's position. So, in other words, taking this step, I submit prematurely, has actually resulted in possibly disallowing any relief to be granted.

TIPPING J:

Actually, what relief does your client, the father, actually seek now that he's gone?

MR DELIU:

Essentially Your Honour, the means to return to New Zealand, either by virtue of the cancellation or direction that the removal order, or that he be allowed to submit a new application –

TIPPING J:

Can you cancel an executed removal order? Sounds a bit odd to me.

ELIAS CJ:

It's been executed.

McGRATH J:

You are wanting to attack the ban, aren't you, the five year ban?

MR DELIU:

Yes, the ban on removal is what I mean. So, therefore –

TIPPING J:

The ban on what?

MR DELIU:

The ban on re-entry.

TIPPING J:

Oh, re-entry.

ANDERSON J:

But that's a statutory consequence, isn't it?

ELIAS CJ:

Well, that is why presumably formally, you are seeking the setting aside of the removal order?

MR DELIU:

Exactly, so again –

ELIAS CJ:

So the consequence goes.

TIPPING J:

But can you do that? I would have thought the best you can do is a declaration that it was unlawfully made.

ANDERSON J:

It is the sort of relief you sought in your statement of claim.

TIPPING J:

I cannot conceptually understand how you can set aside a order that's been executed, by that, I meant performed.

ELIAS CJ:

I don't think you could in fact because it would mean that people had acted unlawfully.

BLANCHARD J:

But the declaration would be sufficient, wouldn't it?

ELIAS CJ:

Yes.

MR DELIU:

The declaration, or even mandamus –

TIPPING J:

Well, you see, this is an example of not –

BLANCHARD J:

To stop it having a continuing effect, that's what you want to do, isn't it and the declaration would do that.

MR DELIU:

Yes, if the declaration would do that, yes, of course.

TIPPING J:

What would that mean, that your client could come back to New Zealand and seek some form of a permit, without the five year ban applying to him?

MR DELIU:

Exactly, in fact the ban would have to be lifted for him to apply for a visa to come back to New Zealand and upon –

ANDERSON J:

How do you lift that, can you take us to the Act and show us where there's authority to get around the five year statutory consequence?

MR DELIU:

Yes Sir, I –

BLANCHARD J:

The Minister could presumably waive it.

ELIAS CJ:

Yes.

ANDERSON J:

It's a Ministerial discretion.

BLANCHARD J:

And would really be obliged to do so in the face of the declaration, that it resulted from an unlawful act.

ANDERSON J:

If it's a Ministerial discretion, then a declaration would be a sufficient remedy.

TIPPING J:

All right. So it's a declaration that the order was unlawfully made.

ANDERSON J:

Well, would it be a declaration that the decisions in relation to sections 54 and 55 were unlawfully made? You would need a composite, sort of decision idea, wouldn't you?

MR DELIU:

Yes, yes, if under those sections.

ELIAS CJ:

Is there anything more you want to take us to in support of your appeal Mr Deliu?

MR DELIU:

Yes, very briefly in terms of the breach of natural justice. The decision to remove him while there was judicial review proceedings afoot. That was pled and seems not to have been taken into account at all which again, leads to essentially this result of him being separated from the family and having to somehow seek to return by virtue of this Court. The officer didn't take into account the right to justice i.e., the right to –

TIPPING J:

But had any interim order been made?

MR DELIU:

No, no interim –

TIPPING J:

Well, how can you possibly argue that it was a breach of natural justice? It may have been a breach of all sorts of other things but breach of natural justice?

MR DELIU:

In my submission, it's a factor that the officer can consider on the removal, I've made my argument –

TIPPING J:

Oh, it may be a relevant consideration but what I'm having difficulty with is how you bring it under natural justice?

MR DELIU:

The relevant consideration being access to justice. In other words, I've argued for two propositions that the officer has to consider upon removal, firstly is the long term –

TIPPING J:

You are going far too fast. Are you saying that it's not really natural justice, it's failure to take into account a relevant consideration namely, access to justice?

MR DELIU:

Yes.

BLANCHARD J:

At what stage?

MR DELIU:

At the stage where judicial review proceedings were afoot.

BLANCHARD J:

So he should have reconsidered the removal order?

MR DELIU:

Either reconsidered the removal order or considered as a factor whether he even has to take steps to enforce the removal order. There's nothing to mandate –

BLANCHARD J:

That means he should have looked at the matter again under section 58?

MR DELIU:

Yes, it's arguably a change in circumstance anyway.

TIPPING J:

Simply by filing an application for judicial review and not seeking an interim order, you somehow or other lock in the position, do you, through this?

MR DELIU:

In this particular case because of the consequential result on the family because of the separation of the family. I'm not saying that in all immigration cases whenever –

TIPPING J:

You seem to me to have been looking through the index of a possible judicial review textbook and thinking of all the possible heads you can bring the same point under.

ELIAS CJ:

Well, I've done that many times.

TIPPING J:

That's a very candid observation.

ELIAS CJ:

Mr Deliu, it's not a very attractive argument I have to say because it was open to him to seek an interim order from the Court and it would have application in a number of other circumstances where humanitarian considerations come into a decision in respect of which there is subsequently an application for judicial review. On your argument, the decision maker, as long as they had some discretion to reconsider, would always have to do it.

MR DELIU:

Not always and not have to and the reason is what it involves here, is the rights of a New Zealand citizen child which –

ELIAS CJ:

I understand that but the decision could involve other important humanitarian rights.

MR DELIU:

I agree Your Honour but if we were to put it as a pyramid, I would say that the rights of the New Zealand citizen child is at the apex of the pyramid, in the humanitarian hierarchy. Part of the reason for that is, this Court's duty as well, to consider the child. The Court has, I submit, an over-arching duty to consider the rights of children because of their especially vulnerable position and that's made obvious in some of the Canadian decisions discussing the parens patriae jurisdiction. So, by analogy, if this Court has such an over-arching duty to consider the child, why shouldn't an officer also have the same level of duty of the highest order. So, therefore when there are judicial review proceedings afoot that will affect the child, one way or another and may possibly separate the child, again in New Zealand and not to break the point, then in my submission, there's nothing to stop the officer from being obliged to so do so, to do so again –

ELIAS CJ:

All right. Well, I think we understand the argument.

MR DELIU:

Another consideration that perhaps hasn't been looked at carefully to this point but, in my submission, is one that should at least be considered. The officer appears not to have taken into account at all any obligations that the State would have to the child. It has been looked at in the sense of education and –

ELIAS CJ:

Isn't that the same argument we've heard about the rights of the citizen child? I thought those arguments have been very much to the fore.

MR DELIU:

What I'm trying to say is, what the officer appears to have basically balanced is this abstract argument that gets raised time and time again by the Crown in immigration cases, of border control, border security, the sovereign's right to control who enters and who exits but simply nothing more, it's a generic statement that in and of itself means nothing. It's essentially a hollow phrase. Again, when compared to the actual rights that are an issue here, so in my submission, it's wrong for immigration and for the government to keep relying on just a simple hollow notion, they must give actual reasons and justifications for this. In other words, the example that I gave in the submissions is a terrorist or somebody of serious criminality, then yes, the State can bring that in as a factor militating against stopping the removal. But if the State just simply gives these abstract notions, that can't be enough. In other words, if the shoe is on the other foot –

ELIAS CJ:

I'm lost, I'm absolutely lost with this argument. What's the argument that you're making?

ANDERSON J:

That the Immigration Officers gives too much weight to the Immigration Act policy of border control, is that it?

MR DELIU:

Yes Your Honour, thank you.

ANDERSON J:

So it's an argument as to weighting.

MR DELIU:

Well, it's not even weighting. In my submission, it's wrong for them to simply use this as a generic catch phrase in every decision. What I'm saying is, in every decision, obviously if somebody is allowed, if an overstayer is allowed to stay, or that's what's being decided, and if the overstayer is ultimately allowed to stay, of course that overstayer, a), breached the immigration system in some way or another, possibly more or less gravely, and if he's allowed to stay, of course it's breached the principles that people who are waiting overseas have to wait and this person got to basically cut to the front of the line.

ELIAS CJ:

All right, we understand the argument.

MR DELIU:

Well, very briefly, I'd like to discuss, again very briefly just to make the point on the choice, because I alluded to this earlier, the Crown –

ELIAS CJ:

On the choice?

MR DELIU:

That it's the – in other words, that it's the parents' choice, what happens to the child. As I've said, at least the Canadian Court in *Francis* actually called it disingenuous to say that.

ANDERSON J:

This is the argument run by Mr Orlov who represents Jarvis, you don't – your arguments must be father-based, which really is basically a family concern rather than the child's individual status.

MR DELIU:

It's father-based Your Honour in the sense that, as was raised earlier, that the officer was basically contemplating that the removal of the father might happen first and then the removal of the mother might happen next, and then the child would follow along with them again, because it's the parents' choice. I believe the officer actually even says that it's the parents' choice as to what –

ANDERSON J:

Jarvis doesn't get two bites of the apple by having two counsel appearing to put up the arguments which relate specifically to him.

MR DELIU:

That's fine Your Honour, I can move on from that but I should say, the officer did determine that it's my client's choice, just the same as he determined –

ELIAS CJ:

And so did the Removal Authority.

MR DELIU:

Yes, yes, exactly and I would argue that's wrong, both the Canadian Court has said that that's wrong and there's at least one American Court that I'm aware of that actually said that the law will recognise that as not being any choice at all.

ELIAS CJ:

Yes, we understand that argument.

MR DELIU:

And so in my submission, as part of the officer's decision, he wrongly takes into account basically, for lack of a better word, the father's sins, the father's

overstayer status is wrongly taken into account and it's basically said well, the father's here illegally, that's too bad and now the child –

TIPPING J:

It can't be wrongly taken into account, it's wrongly weighted in your submission.

ELIAS CJ:

Anyway, this is all, we've covered all this, really.

TIPPING J:

This is just nonsense.

ELIAS CJ:

I think you should – you would assist us better if you developed additional arguments or you simply indicated that you adopt Mr Orlov's argument.

TIPPING J:

There is actually very little new against Mr Orlov in your submissions.

MR DELIU:

Well if I may briefly, I don't think Mr Orlov has raised the form itself. In my submission, the form itself is defective in that it doesn't allow an opportunity for the child's interests to actually be –

TIPPING J:

He did raise that and he got rather a frosty reception.

ELIAS CJ:

We're looking to the substance Mr Deliu, rather than the form of the form.

TIPPING J:

I think your case is really failure to take account of the matters you've referred to and overriding unreasonableness, and frankly, if you can't add any more, I'd sit down.

MR DELIU:

Well very briefly, only because it was raised in the earlier arguments as to the basis of the decision, since it was raised, in my submission, the sections do not form the basis of the decision any more than the other sections in the Immigration Act that deal with deportation. The deportation standard is that it would be unduly harsh to deport. There's just –

ELIAS CJ:

Are you talking about section 47 now, when you say the sections?

BLANCHARD J:

Bear in mind Mr Deliu, we've had the argument about the way in which the Act fits together or doesn't fit together thrashed out ad nauseam last week and Mr Orlov has touched on it again. It really would have to be a totally new point for you to make that would have any influence at all.

MR DELIU:

The only point that I wanted to make, and Mr Orlov didn't address it, I don't know what was addressed last week for obvious reasons, would be the section that deals with the deportation rather than removal, because, in my submission, it's essentially the same effect. If somebody is in the process of being removed but for whatever reason, the officer decides not to remove them, then it has the effect of basically granting them eventually if not immediately, residency in New Zealand. In other words, if the officer decides not to remove, the person will get on some form of a temporary permit because they must have a temporary permit to be in New Zealand.

BLANCHARD J:

We're aware of that, that was canvassed last week.

MR DELIU:

And then, again eventually, they'll get on a residency permit, the ultimate effect is. So why shouldn't the standard, if anything, instead of the exceptional circumstances test, which is what I heard in arguments this morning, why shouldn't it be the unduly harsh test that deals with deportation? Because essentially what the officer is looking at is, do you leave for the mid to long term or do you stay permanently? So if that is –

BLANCHARD J:

The exceptional circumstances test has unduly harsh in it as its central element.

ANDERSON J:

Isn't deportation concerned with people who are lawfully here but may get sent out?

MR DELIU:

Yes.

ANDERSON J:

Whereas removal is concerned with people is concerned with people who are unlawfully here and should be out?

MR DELIU:

Yes, yes.

ANDERSON J:

Presumptively.

MR DELIU:

And then the only other brief point on that is Your Honours asked the question before, then what's the basis for the officer, I didn't see Mr Orlov argue it and I don't know if it was argued otherwise, that the policy actually makes it appear that they are actually basing it simply on the International Conventions, both

the humanitarian questionnaire itself refers nominally to the various conventions, and then in fact, the policy itself actually says, at D4.45, "the effect of International Conventions on removal actions", so in my submission, in reading that, it is basically the International Conventions that have brought about the humanitarian interview process, again because of *Tavita* obviously. Again, that's only for the Court because I haven't seen it argued before, that it could be the policy showing that it's only because of International Conventions. In other words, the policy doesn't say that the policy is formulated based on sections 54 and 55 from memory.

ELIAS CJ:

Well it has to go back to that, because that is the legislative authority.

MR DELIU:

Well unless the bench has anything more, there's nothing I could really add.

ELIAS CJ:

Thank you, Mr Deliu. Mr Carter, it's nearly 1 o'clock, but your submissions substantially repeat some of the argument we had last week and it isn't necessary for you to develop those submissions further. I think we would be most assisted by your concentrating on the argument we've heard today and in particular on the facts in the present appeals. You might just like to get underway if that suits, or if you'd prefer to take time over lunch, we could take the adjournment now.

MR CARTER:

Well, since Your Honours offered, I think I would prefer and I think that might be of benefit to all because I think I can just with the hour over lunch, I think I can distil down to something quite brief, immediately after lunch I would estimate something in the region of quarter of an hour to half an hour.

ELIAS CJ:

Yes thank you very much, we'll take the lunch adjournment now and we'll resume at 2.15.

COURT ADJOURNS: 12.51 PM

COURT RESUMES: 2.17 PM

ELIAS CJ:

Thank you. Yes, Mr Carter.

MR CARTER:

Thank you, Your Honour. Subject of course to any questions from the bench, I am proposing to be brief. First of all, a housekeeping matter I've handed up through Madame Registrar with a copy to my learned friends an addendum correcting some referencing errors and footnotes in the first respondent's submissions and I apologise for those errors but hopefully now that we've attempted to correct them, when Your Honours look again at the written submissions, it won't be too confusing.

Just in respect of what I submit are the key factual matters for the Court to consider in relation to this case, it's submitted that there are four and it can perhaps best be understood by reference to four material distinctions between this case and the circumstances of Ms Ding in the Ye/Ding appeal. Firstly, on the evidence before the High Court, Jarvis will accompany Ms Huang to China if Ms Huang is removed, and how do we know that? Because in response to the relevant question on the humanitarian questionnaire, that's what she says.

Secondly, in this particular case, the same Immigration Officer conducted each interview of both the father and mother and unusually, in this case, cross-examination of the Immigration Officer was allowed following application to Justice Asher in the High Court and my friends have referred Your Honours to the notes of evidence in the course of argument this morning. His Honour Justice Asher in the High Court expressly found that the Immigration Officer regarded Mr Cui and Ms Huang as two separate people to whom separate factors applied and approached each interview with an open mind. So there's an express finding made with the benefit of not only Mr Fennell's affidavit

evidence but after seeing and hearing him under cross-examination from my friend Mr Orlov.

His Honour Justice Asher also expressly found that the Immigration Officer had considered Jarvis' asthma, his access to social, medical and schooling services in China, his relationship and attachment to his parents and the fact that Jarvis is a New Zealand citizen. So that's not only evident from a review of the humanitarian questionnaires but the subject of an express finding by His Honour Justice Asher in the High Court.

Thirdly, any tick the boxes or pro forma suggestion in the approach of the Immigration Officer here is simply not open, in my submission. In the course of cross-examination, the Immigration Officer gave evidence that out of approximately 30 to 35 humanitarian interviews he had conducted in the previous 12 months, this is himself personally as one Immigration Officer, he had cancelled the removal orders probably in respect of six and the reference in the notes of evidence is to volume 2, tab 36, page 344. In addition, he gave, having been prompted by a question or questions in cross-examination, he gave a specific example in the past year of a family where the mother and father were of different nationalities and had several children, I think from memory, four, and he exercised his discretion to cancel a removal order because of their particular circumstances which were that if removal was continued, the practical outcome was, in the particular circumstances of that family, that the father and mother could not live in the same country.

Fourthly, there was a relatively recent Removal Review Authority decision in this case which addressed the humanitarian factors raised on behalf of Ms Huang and between the time of that decision and the humanitarian interview, there were no significant or material changes in circumstances.

TIPPING J:

What do you say as to the only point I think that was raised against that, that the child had, you know, was two years older?

MR CARTER:

Well if there was some material change in circumstances arising from the elapse of two further years, it wasn't actually drawn to the attention of the Immigration Officer in the course of the interview.

TIPPING J:

It wouldn't have needed to be as long as he could count.

MR CARTER:

He would be aware of course that the child is two years older and from the time of the Removal Review Authority decision but other than that, there was no other significant factor that arises.

TIPPING J:

Are you saying there's nothing sufficiently significant in that simple fact?

MR CARTER:

Yes Sir. Now in terms of the other point that perhaps I've, that I made I think several times in the previous hearing last week is the theme I was trying to emphasise, that the Immigration Officer in these circumstances can only play the cards with which he has been dealt and the humanitarian questionnaire, the questions in it is intended to provide a series of prompts to elicit information and the information that was obtained from both mother and father in this particular case was very limited. So the Immigration Officer can only act on the information that he's given.

Of course, there's still the question of any duty to enquire or obtain further information, but as submitted in the written submissions, there is no duty to enquire and the responsibility or burden of proof lies on the person liable to removal, the duty to enquire that was said to arise from Australian decisions relied on by Her Honour Justice Glazebrook in the Court of Appeal decision was very limited. In the *MZXRS* case, Federal Court of Australia of 2009, the test was whether there was information not presently available which could

readily have been obtained by the making of a simple enquiry. It's my submissions that there's nothing in this case that falls into that kind of test.

McGRATH J:

Do you have a reference to that case, is there a tab number for that?

MR CARTER:

Yes, it's volume 3, tab –

BLANCHARD J:

What's the case called?

MR CARTER:

MZXRS v –

McGRATH J:

M for Mary is it?

MR CARTER:

Yes, *MZXRS v Minister for Immigration and Citizenship*, and that's volume 3, tab 90.

McGRATH J:

9-0 was it?

MR CARTER:

9-0, yes. Now one factor that is relied on by the appellants but is in my submission conspicuously absent from a fair reading of both humanitarian questionnaires is the black children point, but again, although that was the subject of discussion and analysis in the second Removal Review Authority decision, there was nothing that comes out of the humanitarian questionnaire which specifically flagged the one child policy or the black children phenomenon in the humanitarian interview.

BLANCHARD J:

Sorry, I don't follow that?

MR CARTER:

Well if Your Honour, there's certainly references to, in the responses to the questions in the humanitarian questionnaires, that's both of them, to the possibility of restricted access to –

McGRATH J:

Could you perhaps just take us to the particular responses and whichever is most convenient to you.

ELIAS CJ:

The reference is to restricted access to education and medical assistance, which, are you saying, must have been directed at the black child issue?

MR CARTER:

No, I'm saying the opposite, that there are those references using that general description, but it's not couched in terms of the one child policy, black children –

BLANCHARD J:

Do you mean the parents' responses don't raise the question of a black child policy?

MR CARTER:

Yes Sir.

ELIAS CJ:

But it's against the background that that was a major feature of the decision of the Removal Review Authority.

MR CARTER:

Well certainly that is in the background, but the response –

ELIAS CJ:

Why else would there be anxieties about access to medical assistance and to education?

MR CARTER:

Well it could be for a number of different reasons, it could arise, for example, from the foreign birth of the child, there's also a reference I think in Ms Huang's –

BLANCHARD J:

But isn't there some obligation to follow that up? For the Immigration Officer to get clarity from these people about what it is they're concerned with? Given the background that the Chief Justice refers to.

MR CARTER:

Yes, well it's certainly in the background –

ELIAS CJ:

Well, it's not really in the background. This woman was given a temporary permit so that her child wouldn't be aborted if she went back to China.

MR CARTER:

Yes and that was – certainly the risk of that was something that arose from the one child policy. In terms of – there is no reference in the, that's the first Removal Review Authority decision, where of course there was no focus on Jarvis because he hadn't been born at that stage but there is no real focus, well no focus in the first decision on the black children phenomenon. In relation to the second decision of 2003, a series of – that appears at tab 22 of volume 1, there is a focus there on an analysis of whether the child Jarvis would be subject to disadvantage or detriment that might amount to exceptional circumstances of a humanitarian nature –

TIPPING J:

May I make a suggestion to you, that had it not been for this earlier two year decision of the RRA, your better point is that it was adequate, the humanitarian interview, in the light of the earlier RRA, not that there's no general duty to pursue matters that haven't been sufficiently raised by applicant. I would have thought that was a much more typical proposition. Surely your better point and I express no net view on its ultimate merit, is that you don't have to be so thorough if the RRA has already dealt with the point and nothing has changed in principle on that issue.

MR CARTER:

Yes, I accept that Sir, that is a better point. I would also emphasise that it's very difficult to get to the bottom of the effect of the one child policy on this family, including the black children discrimination, or potential for discrimination phenomenon, without specific information coming from the persons who are being interviewed.

BLANCHARD J:

Such as, where they are going.

MR CARTER:

Yes precisely, where they're going because of the regional variations, particularly as between cities and rural areas and if one reads any of the refugee status appeals authority decisions and there are many of them, dealing with the one child policy, there is a very detailed analysis of specifics, starting with the basics of where will you be going if you return –

TIPPING J:

So this is question 18, "Where will you live in your home country?" and you say that in each case that they were unspecific, therefore it couldn't be pursued in any sensible way.

MR CARTER:

Yes Sir.

TIPPING J:

Is that the nub of it?

MR CARTER:

Yes. The Removal Review Authority decision mentions, or refers back to the refugee status branch decision concerning Ms Huang and that appears at tab 21 of volume 1 and there is an analysis by the refugee status officer, so that's the officer not the refugee status appeals authority but the first tier of the refugee enquiry. There's an analysis, beginning at pages 203, going through to 206 about the doubts, if that's the correct word, of the application of the one child policy in particular circumstances and in particular parts of China. Just at the stop of page 204, there's a quote, that's 204 of the case on appeal, there's a quote from a then recent UK Home Office report which at the top of page 204, page 11 of the RSB decision. The officer notes that in Fuyang in 1998, remarried couples are permitted to have one more child if the sum of the children from previous marriages do not exceed two. Now that's in relation to one area and it's not known, there's no evidence to suggest that if Ms Huang were to rejoin Mr Cui in China that that is the part of China they would settle in but that's just an indication that in at least one part of China, a remarried couple such as Ms Huang and Mr Cui who have had one more child, would not necessarily be caught by the one child policy at all. The analysis, just a cursory reading of the RSB analysis of previous refugee decisions, indicates that it is not straightforward at all as to whether the one child policy with bite in relation to particular circumstances. It's actually a very detailed enquiry that's required, remembering that both before the refugee status officer and the refugee status appeals authority there is an interview or live hearing and there's cross-examination and that sort of –

ELIAS CJ:

It's directed at a different point though, isn't it? I'm just really wondering whether it's appropriate to be too dismissive about it in connection – if the position can't readily be identified and you're talking about a child who would

be disrupted in any event, whether it is appropriate to just go on the conclusion that's been reached for different purposes here?

MR CARTER:

I accept of course that the enquiry of a refugee decision maker is different and it's narrower in a sense as to whether there's been persecution for a convention reason but nevertheless, the authority does in some of these decisions look at, based on country information and the evidence that's been given by the claimant, whether there is – they are obviously looking at whether there is something that might amount to persecution but it also can be used as a basis for determining whether the sort of detriment that might arise as assessed by the refugee decision maker, gets anywhere near the exceptional circumstances of a humanitarian nature standard. For example, one case which is referred to at the foot of page 204 and 205 of the same refugee status officer's decision, that's *Refugee Appeal No 2124/94 re LYB*, in that case which is summarised there, at the bottom of 204, top of page 205, the authority had determined that under the convention as a matter of law, the person was not entitled to refugee protection but nevertheless went on to consider whether on the evidence there might be a risk of persecution. The analysis was that services in the form of accommodation, health and education while not available from the public sector would be available from the private sector and that none of the difficulties whether taken singularly or cumulatively were sufficient to establish persecution. That's persecution but the sorts of things that are described don't, in my submission, get anywhere near the exceptional circumstances test.

ELIAS CJ:

So you think that persecution is a lower standard that section 47 provides? Is that the submission? Because I'd have some difficulty with that.

MR CARTER:

Well it is a narrower enquiry than the exceptional circumstances test. Whether there is –

ELIAS CJ:

That's really an undue hardship or whatever it is –

TIPPING J:

Isn't it narrower in one sense because of the fact it's got to be linked to a qualifying ground.

MR CARTER:

Yes, a convention reason.

ELIAS CJ:

Yes.

TIPPING J:

But prima facie, it would seem much harsher than exceptional humanitarian, I mean it's sort of active mistreating.

MR CARTER:

Well exceptional circumstances of a humanitarian nature that would render –

TIPPING J:

I don't know whether this refugee stuff is really, apart from any factual material that might emerge from it that the officer might reasonably have been aware of, I would have thought that's its sole relevance.

ELIAS CJ:

And the factual material seems to be an acknowledgement that people in this position will face difficulty and discrimination. It seems to take you quite a long way really.

MR CARTER:

Well some, yes, could in particular circumstances, but my main point in this area is that the Immigration Officer is – where does the Immigration Officer start on the very limited information that he's got, including he doesn't even

know what part of China the person liable to removal might return to, and given the difficulty, in particular, the particular circumstances of particular cases of arriving at a conclusion as to what the effect of the one child policy in relation to particular individuals might be. Given how difficult it is for a specialist Tribunal such as the RSAA, absent credible detailed information coming from the person liable to removal in the humanitarian interview procedure –

ELIAS CJ:

Who may not be able to give any information about it at all. I mean, this argument would not be acceptable if you were talking about a risk of torture, for example, it wouldn't be good enough to say, well, the Immigration Officer can't really ascertain and it's for the potential torture victim to demonstrate the risk. You have got an official government policy here, you have got all of these general acknowledgements of discrimination which may not come to be applied to the particular case but there's no way of knowing that.

MR CARTER:

But Your Honour, first of all, torture and right to life –

ELIAS CJ:

I know torture's different, I'm not trying to say it's the same, but I'm saying your argument, if applied to torture, would not be acceptable and if there is a humanitarian concern, which could lead to undue hardship within the meaning of section 47, it just doesn't seem good enough to say, "Well, how's the Immigration Officer going to ascertain that in a particular case?"

MR CARTER:

Well except in most, or I should perhaps – many immigration cases, I should say, concerning destination countries all over the world, there will often be human rights issues with the destination country. Here of course, we're focusing on the People's Republic of China, in *Al-Hosan*, that was a case in the Court of Appeal, the focus was on conditions in Jordan, and the effect that discriminatory policies that's seen in Western terms against Muslim woman

might have in relation to Ms Al-Hosan. There's always something in different countries, but one of the points that came out of the decision in *Al-Hosan* in the Court of Appeal was that general country information, whether it's just a general reference to the one child policy or practices of the Jordanian state in *Al-Hosan*, general country information isn't enough because you have to relate it to the specific circumstances of a specific individual.

That's unless Your Honours have any questions, that's all I was proposing to address on the factual side.

ELIAS CJ:

Yes, thank you Mr Carter. Mr Deliu –

TIPPING J:

I'm sorry, I thought you said on – I do have a question. I'm sorry, I thought that was all you were going to talk about on the factual side of things, but one thing that's puzzled me from the start of becoming involved in this case Mr Carter, is why is the questionnaire not built around section 47(3)? Was it not appreciated that 47(3) had some relevance if not strong guidance, at least, for this sort of exercise?

MR CARTER:

I can speculate, I don't have a direct answer Sir, but I can speculate that the answer probably arises from the fact that the genesis of the questionnaire was in the template guidelines that were developed administratively following the *Tavita* decision.

TIPPING J:

It is pretty odd if, and I emphasise if, the essential criteria in section 47(3) that the decision makers mind is not directed to the issues arising under section 47(3), there is a rather amorphous mention of conventions and children's interests being a primary consideration and so on, but speaking for myself, I don't find this questionnaire, if one takes 47(3) across, if you like, to those other sections, is not really very helpful at all because it doesn't assist in

directing the mind of the decision maker, as I read it, to the crucial issues that have to be determined. That's not fatal, clearly, but it's not helpful.

MR CARTER:

And I accept that, the questionnaire doesn't refer explicitly to section 47(3), and I'm stuck with that, so…

TIPPING J:

Well I didn't think you were going to pull a rabbit out of a hat, but I thought there could be some factor in this that I was overlooking that would make one's inclination to be quite critical about that not so fair.

MR CARTER:

No, although it was, to be fair in my submission to the Department and the Minister, as I said, the genesis of the –

TIPPING J:

Never mind the genesis, once you've got 47(3) in the equation, which, with respect I would have thought was a fairly obvious factor in the equation, legally, it does seem very odd that you don't have the questionnaire focused on the legal issues, ultimately on the legal issues that have to be determined.

ANDERSON J:

Like what are the relevant circumstances analysis, are they exceptional? Are they of a humanitarian nature? What circumstances relate to issues of unjustness and unduly harsh? Are they? That type of –

MR CARTER:

Well although in my submission, given that one is dealing with an Immigration Officer, it's not practical to become overly legalistic in dissecting the section 47 test by reference to all the numerous authorities that are being decided under it.

ANDERSON J:

I wasn't suggesting authorities, I was just suggesting a template that actually focused on the elements of what may well turn out to be the appropriate test.

MR CARTER:

Well the words that I suggested in the hearing last week was something a little more simple than the terms of section 47 itself, which was simply something like, "some exceptional factor."

TIPPING J:

Is there anything in a manual anywhere that would give the Immigration Officer a better steer, if you like, than this questionnaire on this sort of issue when it comes to sections 54 and 58 in this sort of area?

MR CARTER:

I don't believe so Sir.

McGRATH J:

Is the position Mr Carter really that the Department seems to have taken the view that the exceptional circumstances test is a test for the Removal Authority which the Department doesn't get into because there's a rule of law saying you're unlawfully in New Zealand, section 47 is a test that applies to the Removal Authority at looking at appeal against that rule and then sections 54 and 58 have been seen as outside of section 47 to date. But what has been seen as relevant to them, via *Tavita,* are the conventions that you've mentioned?

MR CARTER:

Yes, I think that's a – because there isn't any express direction from 54 and 58.

TIPPING J:

If 47(3) is significant, at least significant, if not basically guiding the 54 and 58 consideration, the fact that it hasn't been seen by the Department in that light almost underlines the fact that decision makers will err in law.

MR CARTER:

Well, it does create a risk of erring in law, but my submission is that even if there isn't any express reference on the humanitarian questionnaire form to section 47(3) terms as a matter of substance, the decision in this case has met the standard.

TIPPING J:

I understand that point, yes.

McGRATH J:

You've sought to comply with the *Tavita* standard.

MR CARTER:

Yes, yes.

McGRATH J:

Which the Department knew about very well, as do you.

MR CARTER:

Yes there are many ironies in these appeals Sir. Unless there's anything else, those are my submissions.

ELIAS CJ:

Thank you Mr Carter. Mr Deliu, do you wish to be heard in reply?

MR DELIU:

I believe Mr Orlov wishes to go first and then I could –

ELIAS CJ:

We would normally hear him second.

MR DELIU:

I'll be very brief Your Honour actually. The only actual point that I do want to reply, is Mr Carter raised the point as to the necessity for reasons to enquire and I just wanted to point the Court to, well at least four questions where, in my submission, gave grounds for the officer to have to enquire. The first one was the question was asked, question 18, this is at tab 23 of volume 1, "How will you support yourself in China?", answer, "I don't know." Question 32 then, on page 224, "Will your partner accompany you back to your home country?", "I don't know." Question 40, on the next page, "Will they accompany you back to your home country?", "I don't know", and in fact Your Honours will notice obviously that that question also has in parentheses that if the answer is no, obtain reasons why. I would submit that if the answer is "I don't know", you should obtain reasons why. "What effect on them if they go to China or stay in New Zealand?", question 41, "I have no idea." So the very fact that these were some fundamental questions that were asked and replies were basically given that the father doesn't know, in my submission, did obligate the officer to enquire further.

ANDERSON J:

How?

MR DELIU:

Well asking follow up questions Your Honour, would be the most simple and basic thing, firstly, making sure when interviewing Ms Huang, asking her and explaining the position of the husband and seeing if she knows why he gave those answers, if they've discussed it in the meantime, her interview alone was about a month later so there was certainly time by that point for the officer to ask her. Again, those are just a couple of examples I could think of, but related to that is, Mr Carter is essentially arguing that there should be no obligation on the officer to enquire, but the very humanitarian questionnaire itself, at least in some places, does obligate him to further enquire, so, in my submission, that argument is untenable. If there was absolutely no duty or obligation of the officer to enquire, there should be no follow up questions, and in fact the questionnaire could actually be given to the person being removed and that person being asked to fill it out. The very point of having an

interview obviously entails some further enquiry or else it can be a mechanical process that doesn't require an actual person to ask questions.

That's the only point that I wanted to raise in reply, unless the Court –

ANDERSON J:
18, 31, 32, 41?

MR DELIU:
18, 32, 40, 41 Sir.

ANDERSON J:
Thank you.

MR DELIU:
Thank you Your Honours.

ELIAS CJ:
Yes thank you, Mr Deliu.

MR ORLOV:
Your Honours, if I may, I just wish to reply and if I may have only 10 minutes to reply on that issue, apart from the others, as to the statutory source. I understand the concern of this Court which appears to me, particularly New Zealand concern in terms of jurisprudence as to not create judicial law making, and that is why this Court is, and the Court of Appeal has been concerned about the statutory source of the *Tavita* interview, because there appears to be a, if I understand correctly the Court's logic, if it doesn't have a source –

ELIAS CJ:
I don't think that what's being, well first, I'm not sure that this is arising out of reply. I don't understand the Court's concern to be about the basis of the

interview. The Court is concerned as it has explored with you with the statutory criteria that the Immigration Officer is applying.

MR ORLOV:

Yes, but Ma'am this is my point and if I can address this very carefully now –

ELIAS CJ:

Well I want to know what your submission is directed to Mr Orlov so that I can understand it.

MR ORLOV:

It's directed to the statutory basis of the criteria, there is none. And I want to explain.

ELIAS CJ:

Are you making the submission that this is a discretion that is wholly untrammelled, are you?

MR ORLOV:

Ma'am, it's a discretion that is judicially created by the Courts and which Parliament, through the will of policy via the executive decision of the *Tavita* policy has chosen to accept the Court's guidance.

BLANCHARD J:

Well that's an argument that you made this morning but it's not a reply point.

MR ORLOV:

Well Sir it is because I just want to establish because Mr Carter was answering your questions as to section 43 and the incongruence of the tests, and I just –

ELIAS CJ:

Not 43, 47.

MR ORLOV:

47. If I may, it's at 8.3 of my submissions when I talk about *Tavita* as the source and what considerations –

TIPPING J:

What submission are you replying to?

MR ORLOV:

The submission about the section 47 being the test that guides the decision maker.

TIPPING J:

The question was asked on the hypothesis that if that is the correct legal approach, then.

BLANCHARD J:

I don't think Mr Carter is arguing that section 47(3) is the test. He was being asked about what the position would be if it were.

TIPPING J:

Yes, because I asked the question.

BLANCHARD J:

So there's nothing to reply to.

TIPPING J:

There's nothing to reply to. You've got to understand and abide by the rules of advocacy, it's as simple as that.

MR ORLOV:

Yes Sir. If the Court doesn't want to hear me on that reply –

TIPPING J:

It's just not open to you.

MR ORLOV:

It's just that the Court –

BLANCHARD J:

We've heard you on the subject, thank you Mr Orlov.

MR ORLOV:

Yes. Now the next point is that in reply, my learned friend was discussing the consideration in the interview itself, the sources of the facts that were before him, not only in relation to the previous decisions of the Removal Review Authority but also as to the questions he had to ask, and he talked about the material distinctions between this case and *Ding*. Now, the first material distinction he refers to is that Jarvis will accompany to China. Now, I think that's answered, in the plethora of affidavits, filed in the Court by the first appellant, related to the issue linked to the accompaniment of China and the problems accompanying to China –

ELIAS CJ:

That's all ex post facto, isn't it? I mean, we're concerned with the information at the time the decision was made. Is that right?

MR ORLOV:

It depends which – it goes back to the issue in which manner one construes the process. For example, in my submission, if the appellant can advise the Court what information she had orally put before the officer and what information was in her mind, on an anxious scrutiny or even a superficial scrutiny –

ELIAS CJ:

Why should this Court look at the evidence if – what did the Judge who heard the evidence, conclude on this point?

MR ORLOV:

The Judge – that goes back to the answer Ma'am again, what is the status of the appellate process? In my opinion, it is a re-hearing and the Court is allowed and permitted to make its own conclusions on the facts before them, contrary to what the trial Judge found especially if the –

BLANCHARD J:

But this is a review of the immigration officer's decision, it's made on the basis of an answer from your client to the question, "Will the child accompany you back to your home country?" "Yes, he will come with us if we are removed from New Zealand."

TIPPING J:

That's number?

BLANCHARD J:

Question 40.

MR ORLOV:

Sir, it's like one that uses the example of the loaded question that asks, for example, when did you kill your husband, type of thing. The answer, "Yes, he will come with us," is qualified by the fact that we are faced with an impossible choice. If he comes with us, he will be in a serious situation and we are so stressed that we don't know, can we take him, do we leave him, we have no ability to set our mind to the question because in fact we are being forced to make an impossible choice. I don't want to use the analogy lightly but it's the choice very similarly to either abandoning your child in an orphanage or taking him to a place where he may simply have his quality of life totally destroyed. It's not a real choice and the answer should be made in that context –

BLANCHARD J:

Mr Carter was merely distinguishing this case from the cases we heard last week.

MR ORLOV:

Sir, what I was trying to say is that he can't –

BLANCHARD J:

You are trying to broaden that distinction out, in order to make a different point.

MR ORLOV:

Well Sir, the other issue is the affidavits that are available, that were supplied to the Court which sort of explained their answers initially, showed that there was clear evidence that they would be discriminated against, that the child would be discriminated against, that there were asthma issues, all of this and embellished that evidence and the trial Judge had that evidence before him. If one looks at the context, for example, what I'm saying is, if the mother in extreme stress, given a limited time, explains all she can, she's not given an opportunity to really make any further documentary submissions, et cetera, especially the father –

ELIAS CJ:

Look, we're not concerned with that. We are concerned with whether the decision reached by the immigration officer was based on correct understanding of his function according to law and whether it was reasonable.

MR ORLOV:

Yes Ma'am and that's why I was trying to say that his function, what is his function according to law, it goes back to the content of the test. In other words, what considerations is he looking at when he decides this interview, what does it mean? Now, what I was trying to say is that at 8.3 of my submissions, where –

ELIAS CJ:

We don't need to go back into your submissions. You need to respond to points that have been raised against you in oral argument today.

MR ORLOV:

Yes Ma'am and that's what I'm doing. What he didn't consider was for example, the primary right of the child to normal family life as dictated by International Convention on Civil and Political Rights which was discussed in *Tavita* and furthermore, in the case itself, I want to point to Justice Asher's comment which is what both the interview officer himself had stated to Justice Asher in evidence, as to what he was meant to consider, this is paragraph 11 of my submissions –

ELIAS CJ:

What point are you replying to?

MR ORLOV:

I'm replying to that point that my learned colleague hasn't addressed what factors, when he was addressing that he considered all the relevant factors, he hasn't even addressed the public policy factors in the *Tavita* test that he was meant to look at which was the family life –

BLANCHARD J:

Are you attempting to make his argument for him and then respond to it?

MR ORLOV:

No, I'm simply responding to what I understand to be his argument –

BLANCHARD J:

I do not understand how this can possibly be a reply.

ANDERSON J:

See Mr Orlov, Mr Carter made four points of distinction, so you can reply to his four points of distinction, saying well, they are not distinguished, or whatever. Then he made a few other points about duty to enquire but that's the scope of your permissible replies.

MR ORLOV:

Mr Carter said the immigration officer considered all the factors relating to the child, that is as I understand, I wrote that down, that's what I understand what his submission is. He considered and therefore he did what he had to do. In my submission, he didn't considered at all.

ANDERSON J:

For the reasons you gave in your main submissions.

MR ORLOV:

No, no Sir. He didn't consider because the starting point of the consideration is that the family is the natural and fundamental unit of the society and that each child shall have the right to such measures of protection as required. It is at the humanitarian interview stage which is the last and final step before removal that the detailed consideration takes place. That was what the evidence that Mr Fennell gave, he didn't have a detailed consideration of the child's family unity and rights, he didn't look at it virtually at all. What he did consider –

ELIAS CJ:

You've made these points to us.

MR ORLOV:

Yes but this is in response of the consideration Ma'am.

ANDERSON J:

Argument doesn't necessarily gain weight by constant repetition Mr Orlov.

MR ORLOV:

Sorry. Your Honour, the other issue that I understand is in relation to the black child issue that Mr Carter was saying that this has already been dealt with by the Removal Review Authority, et cetera. I understand that was his point that I am entitled to reply to, if the Court can correct me on that. I'm just sorry, Your Honour because of the complexity of these arguments, it's very difficult for me to know what is a point that –

ANDERSON J:

He said in summary that nothing came out of the humanitarian interview questionnaire which flagged the hei haizi, or the black child issue, specifically and then he was referencing it to particular areas or particular variations and enforcements, so the essence of what he was saying is that well, there's a generalised perception there but there's nothing that was sufficiently specific or flagged in the interview to show that that would be fact be encountered by the family.

TIPPING J:

Or was anything new, if you like, from the time when it was considered by the authorities.

MR ORLOV:

Yes, in other words, you are saying that there are no new issues raised at the time that it was considered by the authority. However, to reply in terms of the new issues, I have actually set down the very serious and contradictory evidence and I've set that down in my submission, as to what the various authorities did find in relation to the black child issue –

ANDERSON J:

So, can you just give us the references?

MR ORLOV:

This is at 62 of my submissions.

ANDERSON J:

Submissions, para 62.

MR ORLOV:

Yes, onwards. Now, I take extracts as to what the findings where. In my submission, 62 paragraph (b), I refer to the RRA decision, volume 1, tab 22, at 34 and I would like to quote it because it's very important what they did find

and that goes further, that Mr Fennell misguided himself as to the test and as to what he considered. It says, in my submission, "The imposition of a fine or denial of health and educational facilities in China has been considered by this authority on a number of occasions. The fact that welfare services such as health and schooling may not be freely accessed by second born children in China does not mean that such services will be denied." Now, they accept in my submission by this statement that they will not be freely accessed. That's discrimination. They accept that black children are discriminated against. So, he misguided himself as to the test. This is a child who will be discriminated against and I think there's no question there.

ANDERSON J:

Wouldn't you really say that a relevant consideration in the mix was that there were economic barriers to education?

MR ORLOV:

Yes Sir but not only economic barriers, discriminatory economic barriers –

ANDERSON J:

Well look, if you come to New Zealand from overseas and you are not a New Zealand citizen, you pay for tertiary education, is that discriminatory?

MR ORLOV:

It is in terms of the considerations a New Zealand citizen –

ANDERSON J:

I mean, it does discriminate but is it illegitimate discrimination?

MR ORLOV:

But Sir, that's not the test because you are a New Zealand citizen who is forced to go to China by his parents and that's the point. You are a New Zealand citizen who is having his right taken away. I don't say that's it's discriminatory to pay for education, what I'm saying is the discriminatory is forcing the child via de facto to go back to China where he won't get free

education. In other words, depriving him of his right to education which is guaranteed by his citizenship and that's a right spaced analysis and that is exactly what Mr Fennell didn't do. I want to go further Sir, if I can turn to (c), 62(c), "The authority noted that while it is clear that children born in breach of the one child policy will not be eligible for State subsidised benefits, there is no evidence to suggest that such benefits cannot be accessed by paying for them." So it accepts that again, both black children and quite possibly New Zealand citizen children, won't get any of the State subsidised benefits which makes Mr Fennell's argument simply, in my submission, irrational in terms of the unreasonable test. I mean Sir, the other problem is he's saying public policy but no one has addressed Your Honours on public policy, Mr Carter –

ELIAS CJ:

Well, I wouldn't have thought it really helped you too and as you say, nobody has addressed us on that, so why in reply are you raising it?

MR ORLOV:

I was going to qualify that, that Mr Carter mentioned public policy considerations about removing overstayers and he talked about that in his reply as I understand it.

ELIAS CJ:

Well, I'm getting lost, so I don't remember.

MR ORLOV:

What I wanted to say is it's not – public policy doesn't just say that. What I'm saying is it's against public policy in terms of our jurisprudence on children, to remove New Zealand born children in this circumstance. The public policy is removing a New Zealand child to a country like China, where he will be discriminated against, is also against public policy and that's a fact that should have been considered. It is not in New Zealand's international image to be seen as a country that throws out it's citizens –

ELIAS CJ:

Don't warm to this theme Mr Orlov because in reply it is not appropriate for you to be addressing us as if we're a jury. What is the point that you want to make?

MR ORLOV:

That he failed to turn his attention to the relevant consideration of what public policy means in this case. It's not just a policy of controlling the borders but it's the policy of balancing that against the best interests of a New Zealand child and he didn't perform that balancing exercise at all. I go on, it's very important because the enquiry Mr Carter has been addressing that the Removal Review Authorities and other findings as if it was somehow something that has already been decided or res judicata as well and he couldn't enquire into –

ELIAS CJ:

He didn't make that submission.

MR ORLOV:

The issue that was decided by the Removal Review Authority, in terms of what he was saying, was and I put that in my submission at (e) of my submissions, that Ms Huang would not suffer severe penalties in relation to the one child policy. The Removal Review Authority, in my submission, was looking primarily from the focus of her interests, not the child's. There was no serious investigation in what would really happen to this child in terms of his socio-economic –

ELIAS CJ:

You have made this submission to us. We do understand it.

MR ORLOV:

Ma'am, if I can say further, that in the RSB documents which is page 186 to page 187 of the case on appeal, volume 1, tab 20 which is the thing that he also should have and could have taken into account which he didn't there is

clear evidence that the one child policy in some cases leads to even death of children and I want to quote from that. Now that's important because he had no evidence how that policy would be applied to that child –

ELIAS CJ:

Mr Orlov, we've read the material, we know what's in it. Indeed, we pointed out to Mr Carter that the Removal Review Authority accepted that there could be discrimination. You don't need to go further than that, do you?

MR ORLOV:

No Ma'am. In that case, I'll just address Mr Carter's discussion about his consideration that the Judge found that he'd considered all the factors and he'd set his mind, et cetera. If one reads the affidavit of Mr Fennell as to what he did consider which is page 308 of the bundle of case –

ELIAS CJ:

Mr Carter didn't take us to this affidavit.

MR ORLOV:

But I'm replying Ma'am in terms of the considering argument. That he says he considered all he had too.

ANDERSON J:

That's a challenge to the Judge's findings that you are making.

MR ORLOV:

Absolutely Sir. I'm challenging the whole process as it's come because Sir, I go back to the point –

ANDERSON J:

How does it come about by reply then? I mean, you do understand that the scope of reply is to reply, not to have a second whack.

MR ORLOV:

Yes Sir but he talked about the Judge's findings as if they somehow bind this Court –

ELIAS CJ:

What submission did he make that you want to respond too? We don't want to hear loose talk about discussion and have a discussion in response. We want to know what points you are replying too.

MR ORLOV:

Ma'am, I mean, if I'm of course not being helpful to this Court and this Court has already understood the issues, I'm in a sense –

ELIAS CJ:

We've understood the submissions that you've put before us, your written submissions and your oral submissions. We've heard from Mr Carter very shortly and you are now given an opportunity to respond to anything that he has put before us that you want to reply too, that's all.

MR ORLOV:

Yes Ma'am, I understand that but how I understand his argument in reply, that he's saying that well, the trial Judge found that the immigration officer set his mind to all he had to, he considered those things, he considered them properly, that's it, there's nothing left to review. That's how I understand, in summary, his argument of what he's saying. If I'm wrong, in what Mr Carter is saying to the Court, this is what I want to reply to, the consider, the actual consideration. In my submission, Mr Carter is acting on presumptions which he, in my submission, is wrongly acting on.

BLANCHARD J:

Are you saying he's misreading Justice Asher's decision?

MR ORLOV:

What I'm saying is that both Mr Fennell and Justice Asher were wrong because obviously if Justice Asher was correct, then there's nothing –

ELIAS CJ:

Let's just confine it to what Justice Asher said. What are you responding to in terms of the findings relied upon by Mr Carter?

MR ORLOV:

It goes to the content of what Mr Carter terms "consider". If consider means simply to look at and say I've looked at it and tick it, then yes, that is what Mr Fennell did. If consider means actually look at in a logical and reasonable fashion as to the content of what's happening with the child, his best interest, then he did not consider. He did not, in other words, set his mind – his consideration if it existed even, was so superficial as not to be a consideration. I want to point the Court to evidence in rebuttal of that, if I may but if not –

ELIAS CJ:

We don't need evidence in rebuttal of it. You've made this submission to us, that the consideration was defunctory and was one that simply went through the motions.

MR ORLOV:

Yes Ma'am and therefore I can end this by saying, if I may close, by saying that the trial Judge erred in his understanding of the test of consideration, what consideration actually means because if he didn't err and I've given the Court in my initial submissions many different judgments, virtually on the same facts, all in confusion, it means the test has no meaning, it has no actual guidance for anybody. It becomes, in fact, contrary to the rule of law because it's not clear what and how anyone does consider and if ticking – so, it goes back to consider. I think my learned friend is wrong in saying that actual consideration, as it's meant to be, took to place and as *Tavita* intended to take place because consideration must come from the primary element. As Justice Cooke said, of the family interest and rights of the child and that's a deep level of consideration in terms of setting one's mind to it properly. If I can't be helpful any more in showing evidence that he didn't consider, I just

simply refer the Court to the affidavit of Craig Allan Fennell which is at page 308, case on appeal, volume 2 of 3, where he actually virtually in his affidavit of what he did consider, in my submission, hardly even mentions what he thought about in relation to the child. It's virtually absent. He doesn't talk about the way his thought processes –

BLANCHARD J:

You've referred us to that and we will – to the extent that some of us may not have looked at it, we will look at it.

MR ORLOV:

If I may finally in closing, refer you to the paragraphs in cross-examination which I submit prove that he didn't consider. If I may take Your Honours indulgence on that, if not, I –

ELIAS CJ:

I don't see that it's going to help us, I must say Mr Orlov but if you want to give us the paragraph references, we will note them down.

MR ORLOV:

Yes, beginning at page 344 of the same bundle, case on appeal, volume 2 of 3, it's paragraph 5 to 15, page 344, it's paragraph 5 to 20, page 345 and then 25 to 35 of the same page, then at page 346 it's at paragraph 5 to 10 and then at page 347 it's paragraph 10 to 20 and then 20 to 30, at paragraph 348 it's 10 to 15, at 349 it's 25 to 35, at 350 it's 5 to 15, 20 to 30 and 35, moving onto the next page to 5 of 351 –

ELIAS CJ:

You are inviting us to read the cross-examination, that's probably sufficient.

MR ORLOV:

Thank you Your Honour. I will close on that. Thank you so much.

ELIAS CJ:

Thank you Mr Orlov. Right, we will reserve our decision in this matter. Thank you counsel.

COURT ADJOURNS: 3.25 PM

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