



*Ding v Minister of
Immigration;
Ye v Minister of
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Introduction

When I was approached by the conference organisers six months ago and asked to provide a commentary on *Ding v Minister of Immigration (Ding)*,¹ the Court of Appeal's decision was still reserved. Baragwanath J's decision in the High Court, however, seemed to offer ample material for academic reflection. In an innovative judgment, his Honour had sought to nudge the *Tavita*-type cases (concerning the rights of the child in immigration decision-making) out of the paradigm in which, he clearly felt, they had got trapped. Instead of focussing, as others had done, on international obligations concerning the protection of children, his Honour proposed the existence of a more potent common law duty on the State to protect citizen children, and posited that relevant immigration powers ought to be exercised consistently with it. For me, his judgment raised fascinating questions as to the sustainability of the claim that such a common law duty exists, and as to the tension between a citizenship-based and a best interests-based paradigm for protecting the interests of children of overstayer parents.

One month ago, the Court of Appeal finally handed down its decision in the case (now, renamed *Ye v Minister of Immigration (Ye)*).² Of the five Court of Appeal justices who heard the appeal, however, only Glazebrook J (dissenting in part) pursued themes remotely similar to those of Baragwanath J. For the other four justices – Hammond and Wilson JJ (delivering what might be regarded as the controlling judgment) and Chambers and Robertson JJ (dissenting in part) – Baragwanath J's claim of a common law duty of protection grounded in citizenship was not even worth a mention. Nor did either judgment consider it necessary to explore the scope of international obligations relating to the protection of children. This was because as far as these justices were concerned, it is simply not possible as a matter of statutory interpretation to read the powers at issue in *Ye* subject to an implied duty of protection, whether deriving from international law or, indeed, common law.

* Senior Lecturer, Faculty of Law, Victoria University of Wellington. This paper was presented at the Legal Research Foundation conference: "Human Rights at the Frontier: New Zealand's Immigration Legislation – an International Human Rights Law Perspective", Auckland, 12 September 2008. At the time of the conference, the decision of the Court of Appeal in *Ye v Minister of Immigration* [2008] NZCA 291 had recently been handed down but the subsequent Court of Appeal decision in *Huang v Minister of Immigration* [2008] NZCA 377 had not been.

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¹ (2006) 25 FRNZ 568 (HC).

² [2008] NZCA 291.

The yawning gulf between Baragwanath and Glazebrook JJ on the one hand, and the other four justices on the other, reflects the very real difficulty of the *Tavita*-type cases and the strength of the interests at stake on both sides of the equation. In this paper, I identify two competing – and, in their own ways, compelling – narratives underlying cases such as *Ye*: a child-centred narrative and a compliance-centred narrative. These two narratives, or versions of them, underlie the competing approaches taken by the various Court of Appeal judges in *Ye*.

In developing a critique of the *Ye* judgments, I begin by examining whether previous Court of Appeal authority provides any direct assistance with how to reconcile these competing narratives in the specific circumstances presented by *Ye*, ie, in relation to the exercise of the powers to make and cancel removal orders found in sections 54 and 58 of the Immigration Act 1987 (the Act). I conclude (in agreement with Chambers and Robertson JJ) that the relevant authorities are inconclusive at best.

In my view, however, Chambers and Robertson JJ (as well as Hammond and Wilson JJ) have underestimated the relevance of, and assistance to be derived from, more general appellate authority on the significance of international obligations to the exercise of statutory powers. In particular, they have failed to appreciate the significance of the closely analogous decision of the Supreme Court of New Zealand in *Zaoui v Attorney-General (No 2)* (*Zaoui No 2*).³ At very least, *Zaoui No 2* and like-minded cases reveal a framework within which to resolve the competing interests presented by the *Ye* case. That framework is the common law presumption of consistency with international law, together with the companion presumption requiring consistency with fundamental rights recognised by the common law itself.

With respect, the error in the dominant approach taken by the Court of Appeal judges in *Ye* (Glazebrook J excepted) was their Honours' failure to engage with this framework. In particular, under this framework, as developed by the Supreme Court in *Zaoui No 2* and by the Court of Appeal in earlier case law, it is unsafe to conclude that the empowering language in a statute is incapable of being read down to promote an interpretation consistent with underlying values found in international law (or the common law) without first assessing the scope and significance of those protected values.

Their Honours' refusal to engage with the scope and significance of the protected values at issue in the *Ye* case was also regrettable for another reason. It had the effect of ceding the territory occupied by those values to the child-centred narrative without, first, exploring the possibility that those values might in fact accommodate the compliance-centred narrative. To my mind, Baragwanath and Glazebrook JJ's views as to the scope and significance of relevant international law and common law obligations were, at very least, contestable. From a rule of law perspective, it would surely be preferable for that contest to have been played out in the competing Court of Appeal judgments. In other words, it would have been preferable for Chambers and Robertson JJ to have fully investigated the possibility that the underlying international law and common law values might in fact be consonant with *their* view of where the justice of the case lay before defaulting to the undesirable conclusion that New Zealand's statutory scheme is incapable of delivering on international law or fundamental common law rights.

³ [2006] 1 NZLR 289.

The Statutory Scheme and the Associated Humanitarian Guidelines

As cases such as *Ye* ultimately turn on the interpretation of the relevant statutory powers, it is necessary by way of background to outline relevant provisions in the Immigration Act 1987 governing the situation of overstayers.

The starting point is that a person who is not a New Zealand citizen is entitled to be in New Zealand only if he/she is the holder of a permit granted under the Act or is exempt under the Act from the requirement to hold a permit. Conversely, a non-New Zealand citizen who does not hold a permit is in New Zealand unlawfully and is under an obligation to leave New Zealand.⁴

Generally speaking, a person who is in New Zealand lawfully (for example, because they are the holder of a temporary permit) is entitled to apply, in the prescribed manner, for a residence permit.⁵ Although the grant of residence is a matter of discretion, applications must be considered in conformity with applicable government residence policy.⁶ The content of that policy is a matter for the government of the day.⁷

Typically, the *Tavita*-type cases concern a person (or persons) whose temporary permit has expired and has not been renewed.⁸ Perhaps an application for refugee status has been unsuccessful; perhaps one was never made. Perhaps the person was eligible for residence but failed to apply; perhaps he/she was ineligible and did not bother; perhaps he/she applied for residence and was refused. In any event, the person has become an overstayer.⁹ His/her continued presence in New Zealand is now unlawful in terms of the Act, he/she is no longer entitled to apply for residence and he/she is under an obligation to leave New Zealand.¹⁰

At this point, section 47 provides a right to appeal the requirement to leave New Zealand to the Removal Review Authority (the RRA) on humanitarian grounds. The RRA determines the appeal on the papers and may grant it if the RRA considers that “there are exceptional circumstances of a humanitarian nature that would make it unjust or unduly harsh for the person to be removed from New Zealand” and, in addition, “it would not in all the circumstances be contrary to the public interest to allow the person to remain in New Zealand”.¹¹

⁴ Immigration Act 1987, ss 4, 34 & 45.

⁵ Immigration Act 1987, s 17.

⁶ Immigration Act 1987, s 13C.

⁷ Contrary to an apparent misconception held by Chambers and Robertson JJ, current policy does not contain a general “humanitarian circumstances” category. That category was abolished in 2001 (and was, in any event, always hedged by, for example, sponsorship requirements). There is a “family” category but it does not comprehend a grant of residence based on parenthood of a New Zealand-born dependent child. Compare *Ye v Minister of Immigration* [2008] NZCA 291 at paras 521 and 526 per Chambers and Robertson JJ.

⁸ Similar issues also arise in revocation cases (where a person’s residence permit is subject to revocation on the grounds, for example, that it was acquired on the basis of fraud or misrepresentation) and in deportation cases (where a person who holds a residence permit is liable to deportation on grounds of, for example, criminal offending). For want of space, I give only passing consideration to these situations in this paper.

⁹ This informal terminology, which is not deployed in the Act, is used here as a convenient shorthand.

¹⁰ Immigration Act 1987, s 17(2).

¹¹ Immigration Act 1987, 47(3). Corresponding (though not identical) rights of appeal to the Deportation Review Tribunal on humanitarian grounds exist for those whose residence status is

If no appeal has been brought within 42 days, or if the appeal is unsuccessful, the person becomes liable for removal from New Zealand.¹² Section 54 provides that the chief executive of the Department of Labour or a designated immigration officer “may make a removal order” if satisfied, in essence, that the person is unlawfully in New Zealand and has exhausted any appeal right. The removal order authorises any member of the police to take the person into custody and to proceed to execute the order (ie, to put the person on a plane).¹³ It was the exercise of statutory powers during this removal phase that was at issue in *Ye* and is the focus of this paper.

Because Chambers and Robertson JJ placed some reliance on it, it is important to note that there was a change in 1999 to the timing of the removal order. Prior to 1999, the making and service of the removal order occurred prior to appeal to the RRA and, indeed, triggered that right of appeal. If the appeal was unsuccessful or no appeal was brought within 42 days, the removal order could then be executed. Since 1999, however, the 42-day period for lodging an appeal is triggered instead by the mere expiry of the person’s temporary permit rendering their presence in New Zealand unlawful.¹⁴ It is only once the appeal right has been exhausted that the removal order is served (and, potentially, quickly executed).¹⁵

Under section 58, a designated immigration officer may, at any time, cancel a removal order. However, section 58 is one of a number of provisions in the Act to be cast as what the Immigration Bill 2007 describes conveniently as an “absolute discretion”.¹⁶ Specifically, section 58(5) stipulates that:

Nothing in this section gives any person a right to apply to an immigration officer for the cancellation of a removal order, and where any person purports to so apply –

- (a) the immigration officer is under no obligation to consider the application; and
- (b) whether the application is considered or not,—
 - (i) the immigration officer is under no obligation to give reasons for any decision relating to the application, other than the reason that this subsection applies; and
 - (ii) section 23 of the Official Information Act 1982 [requiring the provision of reasons] does not apply in respect of the application.

The apparent stringency of this provision is somewhat belied by the fact that it is at this stage that the Immigration Service has interposed a humanitarian interview process. As a result of observations made by the Court of Appeal in *Tavita v Minister of Immigration*,¹⁷ the Immigration Service introduced guidelines to ensure that a humanitarian assessment is conducted before removal orders are executed. These guidelines were updated in 1999.

threatened by revocation (where the residence permit was obtained on the basis of, for example, fraud or misleading representation) or deportation (where the residence holder has been convicted of criminal offending): see Immigration Act 1987, ss 22 and 105.

¹² Immigration Act 1987, s 53.

¹³ Immigration Act 1987, s 55.

¹⁴ Immigration Act 1987, s 47(2). But see s 47(2)(b) containing a later date for persons who have applied for reconsideration.

¹⁵ The Immigration Bill 2007 retains the basic post-1999 configuration.

¹⁶ Immigration Bill 2007, no 132-2, cl 5D.

¹⁷ [1994] 2 NZLR 257.

The relevant paragraphs in the Immigration Service's *Operational Manual* note that it is essential that New Zealand's obligations under international law are "taken into account when executing removal orders" and lists several treaties that may apply in such circumstances – the International Covenant on Civil and Political Rights (the ICCPR), the Convention Relating to the Status of Refugees and associated protocol, the Convention Against Torture, and the Convention on the Rights of the Child (UNCROC). The Manual then directs immigration officers, when determining whether or not to "execute a removal order", to take into account the particulars of the case and the impact of removal on the rights of the person being removed and their immediate family, and to balance those factors against various itemised factors relating to the right of the State to control its borders.¹⁸

These paragraphs in the *Operational Manual* are supplemented by a detailed "humanitarian questionnaire" to be completed "at [the] time of proposed service or execution of [the] Removal Order".¹⁹ Stage one of the questionnaire is designed to elicit general information to establish whether further investigation (at stage two) is warranted. A stage two investigation is triggered in all cases, amongst others, where the interviewee has New Zealand born children and/or immediate family living in New Zealand. The stage two interview process includes a range of questions relating to the situation of any dependent children. At stage three, the immigration officer documents his/her assessment, first, of the interviewee's personal situation and secondly, of countervailing public interest factors. He/she then weighs the competing matters and documents his/her conclusion.

Returning to the legislation, two other provisions should be noted, each enabling (but not requiring) the grant of a permit to an overstayer. First, under section 35A, the Minister of Immigration may, at any time, grant a permit to an overstayer, as long as there is no deportation order or removal order in force in respect of that person. At all relevant times, the section 35A power has been delegated to immigration officers of a certain status. It is, essentially, the mechanism by which a person whose removal order had been cancelled under section 58 is then granted a permit.²⁰ Like section 58, section 35A is cast as an absolute discretion: there is no right to apply for a permit under section 35A, no obligation for any such an application to be considered, and no obligation to give reasons for any decision.²¹

Finally, section 130 of the Act, read together with section 7(3)(a)(ii), authorises the Minister of Immigration to make a "special direction", granting a permit to a person in respect of whom a removal order is in force. As with sections 35A and 58, a similarly worded "absolute discretion" clause applies.²² At all relevant times, this power had also been delegated to immigration officers of a certain status (although, in fact, the Ye/Ding family made numerous requests for special directions direct to the Minister's office and they appear to have been dealt with by that office).²³

¹⁸ New Zealand Immigration Service *Operational Manual* (1999) paras D4.45 and 4.45.5 (available at www.immigration.govt.nz/nzis/operations_manual/index.htm, accessed 10 September 2008).

¹⁹ New Zealand Immigration Service, "Humanitarian Questionnaire".

²⁰ See *Operational Manual*, above n 18, para A.15.4.1 Schedule 1 and para D4.25.a.ii; and prior instruments of delegation dated 25 May 2005 and 30 September 1999.

²¹ Immigration Act 1987, s 35A(2).

²² Immigration Act 1987, ss 7(4) and 130(6).

²³ See *Operational Manual*, above n 18, para A.15.4.1 Schedule 1 and prior instruments of delegation dated 25 May 2005 and 30 September 1999.

The Factual Matrix

The *Ye* appeal involved consolidated proceedings pertaining to two distinct family groups – the *Ye/Ding* family and the *Qiu* family – each constituted by New Zealand born children and overstayer parents. I focus here exclusively on the *Ye/Ding* family as illustrative of the kind of issues that these type of cases raise.²⁴

Mr Wei Guang Ye and Ms Yueying Ding arrived at the border in May 1996 and were initially refused permission to enter New Zealand. They then applied for refugee status, at which point, the Immigration Service issued them with temporary permits in order to regularise their status while their refugee claim was determined.

The application for refugee status and a subsequent appeal to the Refugee Status Appeals Authority were eventually declined – in part on credibility grounds. By this time, however (June 2000), the couple had three New Zealand-born children: Willie Ye (born in 1997), Candy Ye (born in 1998) and Tim Ye (born in 2000). At the time of the challenged decision, the oldest of the New Zealand-born children was eight years old; the youngest five. There are also two older siblings that remained in China.

Mr Ye and Ms Ding's temporary permits then expired. They lodged an appeal with the RRA on humanitarian grounds but eventually abandoned it. Over the next few years, they made seven requests in all to the Minister of Immigration for special directions allowing them to stay in New Zealand (the most recent, concurrently with the humanitarian interview process that was the subject of the judicial review proceedings). These requests raised, with varying degrees of specificity, concerns about the situation of the New Zealand-born children, including the treatment they might receive on return to China as a result of China's one-child policy. Each request was declined.

Removal action against the couple over this period seems to have been delayed by them moving to addresses that they did not disclose to the Immigration Service. In June 2004, however, the Immigration Service caught up with Ms Ding and served a removal order on her. This prompted a belated application for judicial review of the 2000 decision of the Refugee Status Appeals Authority. Meanwhile, the couple had again gone AWOL but in November 2004, the Immigration Service located them, served a removal order on Mr Ye and took him into custody, and conducted humanitarian interviews in respect of each of them. During the course of Ms Ding's interview the immigration officer discovered her on the toilet floor, bleeding from cut wrists, in an apparent suicide attempt.

The immigration officer did not consider that the family's circumstances warranted cancellation of the removal orders and, in December 2004, Mr Ye was removed from New Zealand (following an unsuccessful application for interim orders). The Immigration Service decided to allow Ms Ding to remain in New Zealand pending the outcome of the judicial review proceeding. This was struck out in April 2005 but Ms Ding had, again, gone to ground.

In August 2005, a psychological report was prepared by a Dr Foliaki at the request of friends of Ms Ding. It recorded an allegation from Ms Ding of abuse in the marriage, her suicide attempt and fears for her children and her own wellbeing should they be

²⁴ The summary of facts given here is a composite of the summaries given in the various High Court and Court of Appeal judgments.

compelled to go to China. Dr Foliaki diagnosed Ms Ding as having a major depressive disorder with a very real risk of suicide.

Later in August, the Immigration Service relocated Ms Ding, served a further removal order on her and took her into custody. A crisis assessment team described her as “clearly acutely distressed and ... at risk of self-harm” but did not consider that she was “psychiatrically unwell”. A further humanitarian interview followed. As Ms Ding had expressed doubt as to whether she would take the children back to China with her, she was also interviewed by the Children and Young Persons’ Service and arrangements were made to take the children into its care.

On 31 August, the immigration officer issued a written decision, deciding not to cancel the removal order. He first documented in broad terms the history of the couple’s interactions with the Immigration Service. He then noted that he had “considered the interests of the 3 NZ born children” and that he understood that “Ms Ding may face financial difficulties with the schooling and any hospitalisation of the 3 NZ born children”. He then documented at somewhat greater length his conclusions as to factors telling against cancellation: his view that Ms Ding had no family support in New Zealand and, conversely, would have such family support in China; the fact that the three children spoke Cantonese; and Ms Ding’s limited ability to support herself and the children in New Zealand. He noted the submission that Ms Ding was “suffering from a depressive disorder, domestic violence and emotional abuse” but observed that “these claims are recent and have never been put as submissions to the RSB, RSAA, RRA and the 6 representations to the Minister of Immigration”. He also noted that the claim of abuse from her husband was undocumented, and that she could call on the protection of the Chinese police once back in China. He recorded that he had considered the rights of the New Zealand government to determine who should remain within its borders and concluded:

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

Ms Ding then sought judicial review of the decision-making process surrounding the making of and refusal to cancel the removal order, and the Ye children were, somewhat unusually, joined as plaintiffs. Affidavit evidence before the High Court developed the theme of marital abuse and breakdown; the poor financial circumstances on return to China; and Ms Ding’s assessment that it would be preferable to leave the children behind in New Zealand. It also documented the current circumstances of the Ye children (each of whom was well integrated into New Zealand society); their health circumstances (Willie has asthma and Candy has eczema); and the strong bonds between the children and their mother. Evidence was also given as to Chinese laws discriminating against foreign nationals with respect to access to the free compulsory education system, although no evidence was given as to how these laws would be applied in practice to the Ye children.

The High Court made an interim order preventing Ms Ding’s removal from New Zealand pending determination of the proceedings. In August 2006, Baragwanath J issued his decision, declining the application for judicial review (although, as will become clear, his Honour was highly sympathetic to the plaintiffs’ situation). The Ye children (but not their mother) appealed. On 7 August 2008, the Court of Appeal

issued its decision, granting the Ye children's appeal by a majority of 3 to 2 (but dismissing the consolidated *Qiu* appeal).

Two Competing Narratives

Before proceeding to analyse the approaches taken by the various judges, I pause to note that this description of the factual matrix contains within it the seeds of two distinct narratives – each compelling in its own way. The first and “child-centred” narrative starts with the special vulnerability of children and supplements this with the fact that all children born in New Zealand prior to 1 January 2006 (and the Ye children all fall into this category) are New Zealand citizens by birth.²⁵ For children in this situation, the removal of a parent from New Zealand necessitates either their own relocation, with the de facto loss of whatever benefits New Zealand citizenship might be thought to entail, or their separation from one or both parents.

In the specific case of the Ye children, they are all now of school age, New Zealand is the only home that they have known and they are integrated into the New Zealand community. Their mother has indicated repeatedly her intention to leave them in New Zealand if she is removed so the possibility of separation from a parent with whom they are closely bonded is very real. If they do return to China with their mother, the best that can be said on the information currently available is that their situation is uncertain. Unresolved questions hang over Ms Ding's mental state, her ability to support herself and the children in China, her allegedly abusive relationship with the children's father, the possibility that the children will suffer discrimination in access to free education on grounds of their New Zealand nationality, the extent to which the children will be able to integrate well into the Chinese education system given their lack of Mandarin and the possibility of discrimination as a result of their parents' disregard of China's one child policy. Regardless of how much weight one puts on these possible threats to the children's welfare, many of which are as yet unsubstantiated, it is hard to gainsay their mother's assessment that it is in the children's “best” interests that they remain in New Zealand and that their mother remains with them.

The competing, and perhaps equally compelling, “compliance-centred” narrative is a story about the integrity of New Zealand's immigration system and the difficulty of policing it. At the heart of this narrative is the desirable goal reflected in the Long Titles to the Immigration Amendment Acts of 1991 and 1999 of ensuring that persons who do not comply with immigration procedures and rules are not advantaged in comparison with those who do. This narrative would point out, as do Chambers and Robertson JJ, that privileging the parenthood of New Zealand-born children as a ground for exceptional treatment of overstayers creates a perverse incentive for prospective immigrants to “hide for as long as you can and have as many children as you can.”²⁶ While this is not an accurate description of the behaviour of the Ye/Ding family given that all three children were born while the parents were lawfully in New Zealand on temporary permits, it is the case that temporary permits would never have been granted to the couple had they not made an application for refugee status that was ultimately held to lack credibility. It is also true that the length of the couple's sojourn in New Zealand and the extent to which the children have thus become integrated into New Zealand society is due in no small part to the couple's frequent

²⁵ See Citizenship Act 1977, s 6(1) (as amended by the Citizenship Amendment Act 2005).

²⁶ *Ye v Minister of Immigration* [2008] NZCA 291 at para 573.

relocations to undisclosed addresses – almost certainly with the deliberate intention of evading the Immigration Service.

This narrative might point out that there are unfortunately many people in the world community who would like to come to New Zealand in order to create a better life for themselves and their families; that many such people either have children or aspire to have children who might benefit from New Zealand's high standard of living; and that Mr Ye and Ms Ding have essentially “queue jumped” over those with a more legitimate claim.

The compliance-centred narrative would also stress (as, again, do Chambers and Robertson JJ) the numerous points within the scheme of the Act at which humanitarian considerations can legitimately be considered. These include the processes for evaluating claims of refugee status, humanitarian elements within current residence policy,²⁷ the section 47 right of appeal to the RRA, and the Minister's (and his/her delegates') extraordinary discretion to grant a permit to an overstayer under sections 35A or 130. Mr Ye and Ms Ding utilised a number of these avenues – the last extensively.

The right of appeal to the RRA is perhaps particularly significant to this narrative. Prior to 1991, there was a right of appeal on humanitarian grounds, but to the Minister of Immigration. The decision, in 1991, to repose that power instead in an independent authority was designed to create a fairer and more robust appeal right. Parliament having done so, it does seem somewhat counterintuitive that overstayers should be able to exercise what Chambers and Robertson JJ describe as a “choice of forums” and have a full evaluation of their humanitarian circumstances instead (or additionally) conducted at the point of removal. That point in the process might be thought to be a time for action, not contemplation; and immigration officers charged with compliance duties hardly the best placed repositories of a duty to conduct a serious evaluation of the humanitarian consequences of removal. There must in any event be a serious question mark over the practicality of resolving the sort of factual issues left outstanding in respect of the Ye children at this point in the process.

If my first narrative were to be given a right of reply at this point, it would declaim that the sins of father (or mother) should not be visited on the children, and that the children are no less deserving of protection because their parents failed to comply with immigration rules and policies. It would also point out that the schematic analysis conducted above (stressing the various points in the legislation where humanitarian factors can more appropriately be considered) assumes that the children's interests will be adequately advanced by their parents at appropriate times within the statutory scheme. There are all sorts of reasons why prospective immigrants fail to make the appropriate applications at the appropriate times or fail to back up such applications with full evidence and submissions. These include ignorance of the processes, bad advice, lack of resources, disorganisation, fear of contact with authority, bad English, and so on. None of this, my second narrative would continue, is the fault of the children, nor does it render them any less in need of protection.

Ye v Minister of Immigration – the Competing Judicial Approaches

²⁷ Although this can be overstated. See above n 7.

These two narratives, or versions of them, underlie the competing approaches taken by the Court of Appeal judges in *Ye*.

Ironically, given that Baragwanath J dismissed and the Court of Appeal granted the *Ye/Ding* judicial review application, the High Court decision had been clearly grounded in the child-centred narrative. Baragwanath J considered that contrary Court of Appeal authority precluded him from adopting what he saw to be the correct approach so denied the application. He nevertheless identified his preferred framework and, in effect, invited the Court of Appeal to overturn him and apply it.²⁸

In the Court of Appeal, only Glazebrook J essentially took up this invitation. She would have granted both the *Ye* and the *Qiu* appeals (although she did not agree with Baragwanath J on all of the details of his analysis).

At the other extreme, Chambers and Robertson JJ's joint judgment is firmly grounded in the compliance-centred narrative. They would have denied both appeals on the basis that humanitarian considerations relating to the impact of removal on the children were irrelevant to compliance action (or inaction) taken under sections 54 and 58 of the Act.

Hammond and Wilson JJ agreed with Glazebrook J that the *Ye* appeal should be granted and with Chambers and Robertson JJ that the *Qiu* appeal should not be. Their joint judgment is therefore controlling. They are clearly influenced by both narratives but their judgment effects an unstable compromise that is reliant in large part on the grace of the Immigration Service rather than on legal obligation.

Key features of three Court of Appeal judgments are now discussed.

A *The child-centred approach – Glazebrook J*

If the child-centred narrative just articulated is to have legal bite then it must be transformed into some kind of concrete obligation on the State that can be invoked as a source of influence on the interpretation of the relevant statutory powers. The attempt to articulate such an obligation is at the heart of Glazebrook J's judgment.

Previous Court of Appeal and High Court case law had, of course, identified international law and, in particular, article 3.1 of UNCROC (stipulating that in all actions concerning children the best interests of the child are to be a primary consideration) as the potential source of such an obligation. There was, however, a question as to how far these authorities went. In the High Court, Baragwanath J had considered that Court of Appeal authorities such as *Puli'uvea v Removal Review Authority*²⁹ had treated the relevant international obligations as giving rise to no more than bare "*Wednesbury*" review, by which he meant that mere consideration of the interests of the family had been held to be sufficient to discharge any obligation and protect the decision-maker from review.³⁰ Glazebrook J, however, takes a less jaundiced view of the authorities. As she reads them, the courts have used the common law presumption of legislative consistency with international law to require immigration decision-makers to treat the best interests of the child as a *primary* consideration when making decisions about the future of overstayer parents – an

²⁸ *Ding v Minister of Immigration* (2006) 25 FRNZ 568 at paras 278-281.

²⁹ (1996) 2 HRNZ 510.

³⁰ *Ding v Minister of Immigration* (2006) 25 FRNZ 568 at paras 142-162.

approach that she endorses. This is, she says, something more than a “minimalist *Wednesbury* approach” because it enables the court to review the weight attached to the best interest factor.³¹

Nevertheless, Glazebrook J recognises limits to the strength of the obligation derived from international law. She accepts, as other judges have done, that the child’s interests are only “a primary” consideration and are not paramount;³² and she also identifies as a counterweight, international law recognising the right of the State to control its borders and expel non-citizens.³³ To her mind, there is a “clash of two fundamental concepts of international law” that have to be balanced.³⁴ Immigration officers must therefore assess the detriment to the child if the removal proceeds and balance it against the State’s right to control its borders. Where the detriment to the child is low, and even where it is greater but does not constitute a significant and sustained breach of the child’s basic human rights, it is likely to be outweighed by the State’s interest in border control.³⁵

One of the interesting features of Glazebrook J’s judgment – a feature that is shared with the High Court judgment – is her Honour’s attempt to locate an additional domestic source of obligation that might impose a more exacting standard of review on immigration decision-makers than the standards found in international law. The plaintiffs had argued in this respect that section 4 of the Care of Children Act 2004 applies. It stipulates that in any proceedings involving “the role of providing day-to-day care for, or contact with, a child” the welfare and best interests of the child must be the “first and paramount consideration”. Glazebrook J rejects this argument,³⁶ but is attracted instead to the idea that the State’s common law duty to protect its citizens provides a basis, in the case of citizen children, for a more exacting form of review than that justified by international law alone. In her view, removal of a citizen child’s parents may amount in practice to the de facto removal of the child him or herself, in contravention of the fundamental right of citizens to reside within New Zealand. That is because the alternative is the equally unpalatable separation of the child from one or both parents. Such de facto removal also deprives the child of other rights and benefits of citizenship such welfare, health care and education.³⁷

Glazebrook J concludes that a child’s New Zealand citizenship must therefore be “taken into account” as a separate factor in any decision relating to the removal of its parents.³⁸ Although she utilises, in this respect, the language of “relevant considerations” rather than the language of interpretive presumptions in describing the effect of citizenship on the decision-maker, the tenor of her decision is not consistent with citizenship being, as Baragwanath J would put it, a “mere *Wednesbury* factor”. It is, she says, an “important” factor that, in some cases will swing the balance. In particular, she posits that serious potential detriment to a child falling short of a

³¹ *Ye v Minister of Immigration* [2008] NZCA 291 at paras 87-88 per Glazebrook J.

³² *Ibid* at paras 59-79 per Glazebrook J.

³³ *Ibid* at paras 116-122 per Glazebrook J.

³⁴ *Ibid* at para 123 per Glazebrook J.

³⁵ *Ibid* at paras 124-133 per Glazebrook J.

³⁶ *Ibid* at paras 18-58 per Glazebrook J.

³⁷ *Ibid* at paras 97-109.

³⁸ *Ibid* at paras 110-115.

serious and sustained breach of the child's human rights might outweigh the right of New Zealand to protect its borders if the child is a citizen but not otherwise.³⁹

In short, then, Glazebrook J sees the State as having substantive international law and common law obligations to children – most particularly citizen children – that preclude immigration officers from removing their parents if to do so will place the children at a level of risk above a certain threshold. Importantly, she sees these substantive obligations as having significant consequences for the sufficiency of the inquiry that immigration officers must undertake before deciding to remove the parent of a dependent child. She accepts that the focus of any inquiry at the removal stage can be confined to new and updating information that has not yet been considered by, for example, an independent appeal authority.⁴⁰ She also accepts that the overstayer parents would normally be expected to put all relevant updating information before the Immigration Service.⁴¹ The practical effect of this latter concession is, however, entirely undermined by her Honour's conclusion that if the parents fail to discharge this responsibility, the immigration officer must ask questions "to elicit the relevant information".⁴²

Her Honour also posits that the child has an independent right to be heard, whether in person or through their parents as representatives. This means that the immigration officer must ensure that the parent is informed of their representative role and is asked questions specifically directed to ascertaining the views of the child. Finally, inquiries must also comprehend any publicly available information pertaining to conditions in the destination country, and any such information held by the Immigration Service, including by its refugee status division.⁴³

Against that background, Glazebrook J then concludes that the current provisions in the Immigration Service's *Operational Manual* and the associated humanitarian questionnaire are inadequate. In her view, the itemised list in the Manual of countervailing factors relating to the State's interest in border control invites undue concentration on those factors at the expense of the best interests of the child; there is inordinate concentration on the parents' situation and conduct; and there is insufficient focus on the situation and perspectives of the child itself.⁴⁴

In essence, then, Glazebrook J identifies significant implied limits on the exercise of removal powers under the Act, deriving from both international law and common law. It would be fair to say that in reaching the conclusion that the legislation is capable, as a matter of statutory interpretation, of supporting this restrictive reading, she does not indulge in the sort of extensive analysis of the statutory scheme that characterises the compliance-centred approach of Chambers and Robertson JJ, discussed below. Nevertheless, her Honour does explicitly confront the absolute discretion provision in section 58(5) and, indeed, accepts that as a result of it, a decision not to cancel a removal order made under section 58 is unreviewable. She does not, however, have the same concerns about the reviewability of the section 54 power to make a removal order. In her view, unless there is a risk of flight, the appropriate time for conducting

³⁹ Ibid at paras 132-133 per Glazebrook J.

⁴⁰ Ibid at paras 161-162 per Glazebrook J.

⁴¹ Ibid at para 148 per Glazebrook J.

⁴² Ibid.

⁴³ Ibid at paras 138-150 per Glazebrook J. Where adverse information of this kind is to be relied on, it must be put to the parties for their comment.

⁴⁴ Ibid at paras 177-181 per Glazebrook J.

the humanitarian assessment that she envisages is when deciding whether to exercise the section 54 power. In cases where there is a flight risk, it is acceptable to delay the assessment until after the removal order has been served and the person taken into custody. In such cases, however, the humanitarian assessment ought, in her view, to be treated as a delayed exercise of the section 54 power (and therefore susceptible to review) rather than as an exercise of the section 58 cancellation power.⁴⁵

B *The compliance-centred approach – Chambers and Robertson JJ*

The joint judgment of Chambers and Robertson JJ sits in contradistinction to Glazebrook J's child-centred approach and is firmly grounded in the compliance-centred narrative. It contains no discussion whatsoever of the scope of any duty of protection the State might owe to citizen children at either common law or international law. Instead, the judgment is characterised by a detailed analysis of the statutory scheme. Their Honours' primary conclusion is that in light of that scheme there is no, or almost no, room for any inquiry to be made into humanitarian circumstances when the powers to make and cancel removal orders under sections 54 and 58 of the Act are being exercised.

Their Honours are at pains to emphasise that this does not mean that humanitarian considerations go unaddressed in the scheme of the Act. There is no dispute, they say, that the rights of New Zealand-born children are relevant to the position of aliens in New Zealand but "the primary question is ... where and when such matters are considered".⁴⁶ They identify a number of points within the statutory scheme when, in their view, humanitarian considerations can more appropriately be taken into account.⁴⁷

In considering the scheme of the Act, their Honours place significance on the change, introduced in 1999, to the point in time at which removal orders are made and served. Until 1999, removal orders were made and served prior to any appeal to the RRA and, indeed, triggered that right of appeal. In their Honours' view, immigration officers would have then been required to take into account humanitarian circumstances before making and serving the removal order so as to avoid unnecessary appeals to the RRA.⁴⁸ Since 1999, however, the removal order is made and served following exhaustion of the appeal right. Their Honours consider that in those circumstances, it would undermine the RRA's role for immigration officers to weigh humanitarian considerations when deciding whether to make a removal order under section 54. If an appeal has been taken and dismissed, the immigration officer will be re-determining the very question reposed in the RRA; if no appeal has been taken, the immigration officer will be giving the overstayer a "choice of forums" that is not provided for by the Act.⁴⁹

Other factors that their Honours identify as supporting their view that humanitarian considerations are irrelevant to the exercise of the section 54 power to make a removal order include the fact that section 54 contains an express list of the matters that immigration officers must be satisfied of (essentially, factual verification that the

⁴⁵ Ibid at paras 159-160 and 226 per Glazebrook J.

⁴⁶ Ibid at para 430 per Chambers and Robertson JJ.

⁴⁷ Ibid at para 526-527 per Chambers and Robertson JJ.

⁴⁸ Ibid at para 446 per Chambers and Robertson JJ.

⁴⁹ Ibid at para 459 per Chambers and Robertson JJ. See also para 563.

person is liable for removal);⁵⁰ the intention stated in the Long Title to the Immigration Amendment Act 1999 of “streamlining” immigration procedures;⁵¹ the fact that overstayers are also able to engage in “special pleading” to the Minister of Immigration under section 130 (and thus, a humanitarian assessment under section 54 might countermand the Minister’s decision as well as the RRA’s);⁵² the difficulty in identifying the criteria that would need to be implied into the statute to meet humanitarian concerns; and the fact that a process (as well as criteria) would also need to be implied into the Act.⁵³

Turning to the section 58 power to cancel a removal order, in their Honours’ view section 58 is an empowering provision only that cannot confer rights or expectations and that is unreviewable.⁵⁴ It will be remembered that it is at this point in the process that the Immigration Service has interposed its post-*Tavita* humanitarian interview and assessment process. Not only do their Honours consider this to be unnecessary as a matter of legal obligation, they go so far as to suggest that it is “wrong” (read, I think, unlawful).⁵⁵ Their Honours speculate (incorrectly, as it happens) that the humanitarian assessment procedure may be a redundant relic of the pre-1999 legislative scheme that was intended to apply, under that scheme, to the making and service of removal orders *prior to* the right of appeal to the RRA being exercised.⁵⁶ In their view, for the reasons already given, it is inappropriate for immigration officers to be conducting a humanitarian investigation after the appeal right has been exhausted (or has not been exercised).⁵⁷ In any event, a decision purportedly taken under the humanitarian interview process does not, they say, amount to a statutory decision taken under section 58 of the Act and is not reviewable. The humanitarian questionnaire cannot confer rights on Ms Ding that the statute did not give her, and any errors in reasoning in the non-statutory process cannot be subject to judicial review.⁵⁸

Their Honours’ judgment is, with respect, somewhat opaque as to the circumstances in which the section 58 cancellation power *might* be exercised appropriately. For example, their Honours do accept that it is perhaps appropriate (although, one assumes, not legally required) for immigration officers to check that there have been no significant changes of circumstance since the matter has last been considered, but it is not entirely clear how such an (appropriate) check would differ from the (inappropriate) interview and assessment process currently conducted by the Immigration Service.⁵⁹ Elsewhere their Honours note that the function of section 58 is to enable the Minister or relevant officials to cancel a removal order “where the Immigration Service or the minister has *independently* determined that an overstayer’s

⁵⁰ Ibid at paras 457-458 and 561 per Chambers and Robertson JJ.

⁵¹ Ibid at paras 457-458 and 561 per Chambers and Robertson JJ.

⁵² Ibid at paras 460-461 per Chambers and Robertson JJ.

⁵³ Ibid at paras 562 and 565 per Chambers and Robertson JJ.

⁵⁴ Ibid at para 541 per Chambers and Robertson JJ.

⁵⁵ Ibid at para 539 per Chambers and Robertson JJ.

⁵⁶ Even under the pre-1999 scheme, the primary point at which humanitarian assessments took place was following exhaustion of any appeal right, when immigration officers were deciding whether to take the ultimate step of executing the removal order. This is clear from the applicable guidelines but also from the facts of *Puli'uvea*, discussed below.

⁵⁷ *Ye v Minister of Immigration* [2008] NZCA 291 at paras 534-536 per Chambers and Robertson JJ.

⁵⁸ Ibid at paras 462, 529, 540 and 541 per Chambers and Robertson JJ.

⁵⁹ Ibid at paras 539 and 544 per Chambers and Robertson JJ.

status should be reconsidered”.⁶⁰ Again, though, it is not entirely clear what precisely distinguishes such an “independent” review from the Immigration Service’s current assessment process.

Their Honours are also clearly influenced by the broader questions of immigration policy and fairness that pervade the compliance-centred narrative. They suggest that it is “grossly unfair that those who wait patiently overseas seeking permission to immigrate here and those who lawfully depart before their permits expire are much worse off than those who flout our law and remain as illegal overstayers”;⁶¹ that privileging parenthood of New Zealand born children creates an incentive for overstayers to “hide as long as you can and have as many children as you can”;⁶² and that this is directly contrary to a fundamental premise of the Act, namely, “that persons who do not comply with immigration procedures and rules are not advantaged in comparison with persons who do comply.”⁶³

⁶⁰ Ibid at para 558 per Chambers and Robertson JJ. (their italics) See also para 572.

⁶¹ Ibid at paras 564 per Chambers and Robertson JJ.

⁶² Ibid at para 573 per Chambers and Robertson JJ.

⁶³ Ibid at paras 574 per Chambers and Robertson JJ.

C *Hammond and Wilson JJ's unstable compromise*

Hammond and Wilson JJ's judgment, though controlling, is the shortest of the three by a considerable margin. Their Honours appear to have been influenced by both the child-centred and the compliance-centred narrative to some extent, but do not explore either in any detail.

Like Chambers and Robertson JJ (and presumably for the same reasons), their Honours do not consider that the removal powers found in sections 54 and 58 can be read subject to a limiting requirement that humanitarian considerations must be considered in the course of their exercise. Where their Honours differ from Chambers and Robertson JJ is in their view as to the implications of the Immigration Service voluntarily undertaking to do so under its humanitarian interview process. In their view, it is "well within the competence of a Government department – and one would have thought it admirable – to see that international obligations ... are respected".⁶⁴ The humanitarian interview process was, they say, adopted for "good reasons", including "an endeavour to squarely face international law obligations", and there was no reason for the Court to roll back the safeguard.⁶⁵

Their Honours also consider that the humanitarian assessment process, though voluntarily undertaken, is susceptible to judicial review. It is, they posit, "a well established principle of public law that a body should follow its own established internal 'rules'".⁶⁶ In Ms Ding's case the immigration officer had, in effect, voluntarily undertaken to consider whether to cancel the removal order and had issued something he himself endorsed as a formal "decision". By voluntarily reconsidering a lawful decision that had already been made under section 54, he was exercising a statutory power of decision which was reviewable for error of law, notwithstanding the limiting language of section 58(5).⁶⁷

Having reached the point that the decision is reviewable, their Honours consider that it is plain on the face of the decision that the immigration officer erred in law by "ask[ing] himself the wrong question".⁶⁸ The immigration officer should not have inquired into whether it would be in the "best interests" of the Ye children to return to China.⁶⁹ Rather, the question for him was whether there was "something about the circumstances of the children which meant that Ms Ding really should be allowed to stay – perhaps for some defined period of time – in New Zealand?"⁷⁰ As a result of this failure, Hammond and Wilson JJ hold that the *Ye* appeal (but not the *Qiu* appeal) should be granted.

It is to be noted that their Honours consider the nature of any inquiry to be undertaken under section 58 to be a very limited one that should focus on whether "anything new has occurred, or anything has been over-looked, which should presently occasion concern". Further (and unlike Glazebrook J) they consider that the responsibility for advancing some reason for staying in New Zealand rested with Ms Ding and her

⁶⁴ Ibid at para 393 per Hammond and Wilson JJ.

⁶⁵ Ibid at para 397 per Hammond and Wilson JJ.

⁶⁶ Ibid at para 393 per Hammond and Wilson JJ.

⁶⁷ Ibid at paras 398 and 402 per Hammond and Wilson JJ.

⁶⁸ Ibid at para 403 per Hammond and Wilson JJ.

⁶⁹ Ibid at paras 404-406 per Hammond and Wilson JJ.

⁷⁰ Ibid at para 407 per Hammond and Wilson JJ.

advisors.⁷¹ In these respects, their Honours consider that the Immigration Service’s humanitarian assessment procedure has “got it about right”.⁷² It is, however, unclear what yardstick their Honours are applying in making these pronouncements given their view that there is no legal obligation on the Immigration Service to undertake any inquiry.

What should be clear is that the compromise position adopted by Hammond and Wilson JJ is an extremely unstable one that depends for its existence on the voluntary acquiescence of the Immigration Service. It seems on their Honours’ analysis that if the Service were to abandon its humanitarian assessment process tomorrow, then a failure to take humanitarian considerations into account when making and executing a removal order would be unreviewable.⁷³ Although their Honours are clearly sympathetic to the view that international obligations ought to be taken into account in immigration processes,⁷⁴ there is no exploration in their decision of the content of any relevant obligations, nor of the content of any citizenship-based duty of protection. That is no doubt because ultimately, their Honours accept the view expressed by Chambers and Robertson JJ that the statutory scheme is inconsistent with implied limits being placed, as a matter of law, on the sections 54 and 58 removal powers.

Locating *Ye* within the Previous Case Law

I do not want to dwell on Chambers and Robertson JJ’s more extreme conclusion that the Immigration Service’s humanitarian interview process is inappropriate or unlawful as, with respect, I doubt it can be sustained. The starting point is that humanitarian considerations must, at very least, be within the range of permissible considerations that officials are entitled to take into account when exercising their broad powers to cancel removal orders and to grant permits to overstayers. Once this is conceded, then it is difficult to see how it can be unlawful or inappropriate for the Immigration Service to interpose guidelines to promote consistency and ensure that deserving cases are not missed – unless, of course, the guidelines are so rigid as to unlawfully fetter the discretion (and they are clearly not that).

The more interesting issues are whether, voluntary guidelines aside, the relevant statutory powers can, as a matter of law, be read down to accommodate protection of the interests of children and families at the point of removal and, if so, to what extent and on what basis. Four of the Court of Appeal judges say: not at all. In contrast, Glazebrook J identifies both limiting criteria and an accompanying procedural framework which, she says, constrain the exercise of the relevant statutory powers.

In evaluating these competing claims, a key issue is whether any guidance can be derived from prior case law.

⁷¹ Ibid at paras 409 and 412 per Hammond and Wilson JJ.

⁷² Ibid at para 412.

⁷³ Ibid at para 402 per Hammond and Wilson JJ.

⁷⁴ See eg ibid at paras 385, 393 and 397 per Hammond and Wilson JJ.

A *The Court of Appeal and the Tavita cases*

Turning first to prior Court of Appeal authority on the rights of the child in immigration decision-making, the meaning and significance of this case law is one of the many questions on which the *Ye* judges do not agree.⁷⁵ Glazebrook J's considers that her decision is consistent with this previous case law and that her four colleagues have, in effect, overruled it.⁷⁶ Chambers and Robertson JJ accept that previous Court of Appeal authorities establish the relevance of international obligations to section 47 humanitarian appeals but argue that none of these authorities hold that international obligations must be taken into account when exercising the removal powers at issue in *Ye*. In their view, they are not overruling cases such as *Tavita v Minister of Immigration* and *Puli'uvea v Removal Review Authority* but, rather, grappling with the questions those cases left unanswered.⁷⁷ Hammond and Wilson JJ do not discuss earlier authority.

With respect, Chambers and Robertson JJ are closest to the truth on this point. *Tavita* itself was a judicial review from an appeal on humanitarian grounds to the Associate Minister of Immigration.⁷⁸ The relevant remarks were, in any event, cast as no more than provisional observations, no orders were made and the case was adjourned sine die to enable the Associate Minister, who had not in fact known about the child's existence when he made his decision, to reconsider it.⁷⁹

Puli'uvea v Removal Review Authority is likewise inconclusive. The case involved two challenges: first, to a decision of the RRA to dismiss a humanitarian appeal and, secondly (analogous with *Ye*), to a subsequent decision of an immigration officer, taken pursuant to the Immigration Service's humanitarian guidelines, to carry out the removal order. On the facts, the Court was satisfied that overall consideration had been given to the interests of the children and, accordingly, the Court did not resolve the question whether, as a matter of law, either the RRA or an immigration officer exercising removal powers is required to take into account, or act consistently with, relevant international obligations.⁸⁰

Looking more closely at the Court of Appeal's reasoning on the second challenge, the Court noted the disagreement between the parties as to which statutory powers precisely were at issue when a person was being removed, observing that it was not even clear whether there had been an exercise of a statutory power of decision at all. Assuming there had been, however, the Court observed that all of the powers that might be at issue (those concerning cancellation and execution of removal orders, and those concerning the granting of permits in exceptional cases) "state powers in a broad way" and are not "expressly confined by standards, criteria or purposes." Accordingly, there might be a question, bearing in mind the presumption of consistency with international law, whether those powers "could be subject to limits read in by reference to the treaty texts."⁸¹ The Court did not, however, decide the

⁷⁵ This perhaps underlines the point that I made when I wrote about these cases in 2004 that this is an area that is fraught with confusion and uncertainty: Geiringer "Tavita and All That: Confronting the Confusion Surrounding Unincorporated Treaties and International Law" (2004) 21 NZULR 66.

⁷⁶ See *Ye v Minister of Immigration* [2008] NZCA 291 at paras 202-203 Glazebrook J.

⁷⁷ *Ibid* at paras 548-557 per Chambers and Robertson JJ.

⁷⁸ [1994] 2 NZLR 257. This process has now been replaced by the right of appeal to the RRA.

⁷⁹ *Ibid* at 266.

⁸⁰ *Puli'uvea v Removal Review Authority* (1996) 2 HRNZ 510.

⁸¹ *Ibid* at 519.

point as it was satisfied that if there was such an obligation it had been adequately discharged on the facts.

The Court of Appeal committed itself further on the subject of RRA appeals two years later in *Schier v Removal Review Authority*, in which it noted that the process of considering whether exceptional humanitarian circumstances exist on appeal to the RRA “plainly includes, when the facts require, considering the impact of removal on family members.”⁸² The Court of Appeal also appears to have accepted in subsequent cases, at least implicitly, that the rights of the child are relevant to humanitarian appeals against deportation to the Deportation Review Tribunal,⁸³ and to ministerial decisions to grant or decline a character waiver under immigration policy.⁸⁴

Until *Ye*, however, the Court of Appeal had not had cause to re-examine the statutory powers concerning the making and execution of removal orders. Chambers and Robertson JJ are therefore, with respect, quite right to point out that prior case law is inconclusive as to whether these powers must be read subject to limits derived from international law.⁸⁵

B *The Supreme Court and Zaoui No 2*

What, though, of more general appellate authority on the significance of international obligations to the exercise of statutory powers? It is here that, I think, Chambers and Robertson JJ have underestimated the significance of prior authority. In particular, the unanimous decision of the Supreme Court in *Zaoui No 2* is surely highly relevant – both because of its general guidance as to the application of the presumption of

⁸² *Schier v Removal Review Authority* [1999]1 NZLR 703, 708. Even here, though, there are outstanding questions. In *Schier*, the Court held that it was unable to review the “sufficiency” of consideration given to the children’s interests. But is that because, on the Court’s reading, international law did not require it? Or is that because the Court considered itself limited to a “minimalist *Wednesbury* approach”? More generally, is the section 47 threshold of “exceptional circumstances” consistent with the adequate discharge of New Zealand’s international obligations (for example, the requirement in article 3.1 of UNCROC that in all actions concerning children, their best interests are to be a “primary” consideration)? Or does it create too onerous a threshold?

⁸³ *Faavae v Minister of Immigration* CA 125/97, 23 July 1997, holding that the text of article 3.1 does not require “separate consideration” of the interests of the child, independently from the interests of its parents – all the more so if the child is still unborn or very young. Implicit in this is that the Court accepted that article 3.1 was relevant.

⁸⁴ *Rajan v Minister of Immigration* CA 89/03, 3 July 2003, Appendix 2, para 3, holding, in an interim orders decision, that the Associate Minister had “correctly directed himself that the best interests of the ... children are, in terms of New Zealand’s international obligations, a primary consideration” and noting that a “child-centred” rather than a “parent-centred” approach is appropriate. This case is perhaps consistent with Glazebrook J’s suggestion in *Ye* that the case law requires the decision-maker to take the best interests of the child into account as a primary consideration rather than as a mere *Wednesbury* factor (though note, the decision was authored by Glazebrook J herself). See also *Rajan v Minister of Immigration* [1996] 3 NZLR 543, in which the Court of Appeal avoided having to decide whether the Minister of Immigration is required to consider international obligations when deciding whether to revoke a residence permit under section 20(1)(b) of the Immigration Act.

⁸⁵ On the other hand, there is not the smallest whiff of a suggestion in *Puli’uvea* that the Immigration Service’s decision to interpose a humanitarian interview process onto the exercise of such removal powers is inappropriate or unlawful. Indeed, the *Puli’uvea* Court considered that the humanitarian assessment served to rectify any alleged inadequacies in the RRA’s prior consideration of the interests of the children. Chambers and Robertson JJ’s more extreme conclusion to this effect must, therefore, be seen to be at least inconsistent with the tenor of previous authority.

consistency with international law in administrative law cases, and because of the highly analogous legal and factual matrix in which the case arose.⁸⁶

Zaoui No 2 also concerned an administrative power found in the Immigration Act 1987: section 72, conferring on the Governor-General a power, by order in council, to deport a person who has been certified to be a threat to national security. The Supreme Court invoked the presumption of consistency with international law in tandem with the interpretive direction in section 6 of the Bill of Rights, which requires that if it can be, legislation must be interpreted consistently with the rights and freedoms contained in the Bill of Rights. The Court held that in light of these rules of construction, section 72 has to be read down to ensure consistency with New Zealand's international human rights obligations as well as with the rights and freedoms contained in the Bill of Rights.

One of the interesting things about the Supreme Court's approach in *Zaoui No 2* is that it invoked the two rules of construction (relating to consistency with international law and consistency with the Bill of Rights) almost in the same breath and in such a way as to suggest that it regarded them as of essentially the same character. Further, in an earlier set of proceedings to reach the Supreme Court, also relating to Mr Zaoui's situation, the Supreme Court had paired the presumption of consistency with international law with the common law "principle of legality" – the principle that fundamental rights recognised by the common law cannot be overridden by general or ambiguous words.⁸⁷

As I have suggested elsewhere, the *Zaoui* litigation thus reflects an apparent convergence in the approach of New Zealand's highest court to interpretation of legislation in conformity with the Bill of Rights, in conformity with fundamental values protected by the common law and in conformity with international law.⁸⁸ A similar approach can be seen playing out in Glazebrook J's decision in *Ye*, in which she identifies and explores a common law duty relating to the protection of citizens, and uses it to reinforce and to magnify the State's obligations at international law. In the High Court, Baragwanath J had done this explicitly through the mechanism of the "principle of legality", positing, in essence, that the fundamental common law rights protected through the principle of legality include the right of the child citizen to receive protection from the State.⁸⁹ Glazebrook J does not explicitly utilise the language of interpretive presumptions to describe the impact of citizenship on immigration decision-makers, but the tenor of her remarks are to similar effect.⁹⁰

Zaoui No 2 thus suggests that the correct framework in New Zealand for determining the impact of international treaty obligations on the exercise of statutory power is the common law presumption of consistency. More specifically, the close analogy between the legislative provisions at issue in *Zaoui No 2* and *Ye* ought immediately to be apparent. Notwithstanding the different statutory language of "deportation" as opposed to "removal",⁹¹ both cases involved the exercise of a broad power to remove

⁸⁶ [2006] 1 NZLR 289 (NZSC).

⁸⁷ *Zaoui v Attorney-General* [2005] 1 NZLR 577 (NZSC) at 646.

⁸⁸ Geiringer, "International Law through the Lens of *Zaoui*: Where is New Zealand At?" (2006) 17 PLR 300, 317-318.

⁸⁹ *Ding v Minister of Immigration* (2006) 25 FRNZ 568 (HC), especially paras 5, 30, 222, 225, 261 and 268.

⁹⁰ See above n 39 and associated text.

⁹¹ The Immigration Bill 2007 would remove this linguistic distinction.

a non-New Zealand citizen from the country. In *Ye*, however, Chambers and Robertson JJ summarily reject any analogy between the two cases on the basis that section 54 of the Act (at issue in *Ye*) “sets out explicit criteria” for the exercise of the power, making it inappropriate for the Court to graft on additional criteria (and, presumably, section 72 – at issue in *Zaoui No 2* – does not).⁹²

It is not at all clear to me that this is a valid basis for distinguishing the two cases. Section 54(1) stipulates that: “The chief executive, or any [designated] immigration officer ... may make a removal order ... if ... satisfied that section 53(1) or section 70(3) applies to [the] person.” Sections 53(1) and 70(3) list the basic factual criteria supporting liability for removal, for example, that the person is unlawfully in New Zealand and either has not lodged an appeal to the RRA within the prescribed time or has had such an appeal dismissed.

Section 72 of the Act stipulates that: “Where the Minister certifies that the continued presence in New Zealand of any person named in the certificate constitutes a threat to national security, the Governor-General may by Order in Council, order the deportation from New Zealand of that person.”

In both cases, the exercise of the discretion is thus contingent on the decision-maker being satisfied of the existence of a factual state of affairs: in the case of section 54, that the person is unlawfully in New Zealand and has exhausted their appeal rights; in the case of section 72, that the person is the subject of certification by the Minister. Once that factual state of affairs exists, the discretion is, at least on the face of the statute, open-ended.

There are a number of additional features of the statutory scheme at issue in *Zaoui No 2* that reinforce the analogy with the *Ye* case. First, the power at issue in *Zaoui No 2* (as in *Ye*) facilitates the ultimate act of removing a person from New Zealand at the end of a lengthy statutory process: the making of a security risk certificate; review by the Inspector-General; then a decision by the Minister of Immigration to rely on the certificate. There are several indications in the scheme of the Act (if anything, stronger than with respect to the removal powers at issue in *Ye*) that once this statutory process has reached its fruition, the person is to be removed expeditiously and without further intervention.⁹³ Despite this, the Supreme Court focused on the language of section 72 in isolation, and concluded that there is nothing in the statement of broad power contained in section 72 to preclude it being read down to ensure consistency with international law.⁹⁴ This is, with respect, similar to Glazebrook J’s approach to the statutory scheme in *Ye*. She focussed on the statement of broad power in section 54, undeterred by indications elsewhere in the scheme of the Act (such as the absolute discretion provision in section 58) that this late stage is not the time for extensive inquiry.

Secondly, the Supreme Court in *Zaoui No 2* was prepared to graft significant substantive and procedural limits onto the exercise of the section 72 power in order to ensure consistency with international law. The substantive limit that the Court envisaged was an absolute bar on exercising the section 72 power if to do so would

⁹² *Ye v Minister of Immigration* [2008] NZCA 291 at para 561 Chambers and Robertson JJ.

⁹³ For more detailed exploration of this point see Geiringer, “International Law through the Lens of *Zaoui*”, above n 88, 316-317.

⁹⁴ *Zaoui v Attorney-General (No 2)* [2006] 1 NZLR 289 (NZSC) at 321-322.

result in the deportee being returned to a country where he or she would be in danger of torture or arbitrary deprivation of life (in breach of article 3 of the Convention Against Torture, articles 6 and 7 of the ICCPR, and sections 8 and 9 of the Bill of Rights). This was a more absolute limit on the exercise of the statutory power than that claimed by Glazebrook J in *Ye*, which is directed to adequate weighing of the children's interests rather than a particular result.

The procedural constraint envisaged by the Supreme Court in *Zaoui No 2* was that those charged with responsibility under section 72 would need to take adequate time to address the issues of fact and judgment involved in ensuring substantive compliance with the international law (and domestic human rights) obligations. The Supreme Court noted that there was no pressing prescriptive time requirement in section 72 that might impede such an inquiry, that the government would be obliged to give reasons in respect of its decision and that the right to natural justice would attach. This approach is consistent with Glazebrook J's focus in *Ye* on the adequacy of the inquiry that is to be undertaken (and is inconsistent with Chambers and Robertson JJ's view that it is illegitimate to graft a process onto the statutory scheme).

Finally, the fact that the power at issue in *Zaoui No 2* is to be exercised at the highest levels of Cabinet decision-making and that it concerns issues of national security might, if anything, make it *less* susceptible to judicial supervision than the removal powers at issue in *Ye*.

In short, then, in light of the closely analogous Supreme Court authority of *Zaoui No 2*, Chambers and Robertson JJ (and indeed, Hammond and Wilson JJ) have surely been far too quick to conclude that the removal powers at issue in *Ye* are incapable of being read subject to implied limits designed to ensure consistency with international (and perhaps common) law. Neither, though, should one be too quick to assume the opposite: that the robust approach taken by the Supreme Court in *Zaoui No 2* to achieving an international law-consistent interpretation would *necessarily* be replicated in the *Ye* case. That is because the key to understanding *Zaoui No 2* and the Supreme Court's robust approach to the utilisation of the presumption of consistency is the nature of the international and domestic obligations at stake in that case and the extent of the State's deficit with respect to meeting them.

The relevant obligation in *Zaoui No 2* was the obligation not to remove a person from New Zealand if to do so would place him or her at substantial risk of torture or arbitrary deprivation of life. This non-refoulement obligation has been held to be implicit in articles 6 and 7 of the ICCPR (prohibiting torture and arbitrary deprivation of life but not referring directly to the question of refoulement) and is given express form in article 3 of the Convention Against Torture (in relation to torture). In *Zaoui No 2*, the Supreme Court held that a corresponding non-refoulement obligation is implicit in sections 8 and 9 of the Bill of Rights (the equivalents of articles 6 and 7 of the ICCPR).⁹⁵

Although it is still a question of debate whether this non-refoulement obligation has the status of *jus cogens*, the underlying prohibitions of torture and arbitrary

⁹⁵ *Zaoui v Attorney-General (No 2)* [2006] 1 NZLR 289 (NZSC) at 318-319.

deprivation of life are now widely regarded as having that status.⁹⁶ They are human rights obligations of the highest order, implicating the most basic rights to life and bodily integrity. The associated non-refoulement obligation is well established in the international case law (and express in article 3 of the Convention Against Torture). It is absolute in character and is not subject to exceptions (as is, for example, the non-refoulement obligation in the Refugee Convention).

On the other side of the equation, the Act had completely failed to make express provision for the protection of these fundamental rights – at least in respect of a person in Mr Zaoui’s situation. That this was so was reinforced by the Supreme Court’s principal holding in *Zaoui No 2*, which was that the Inspector-General could not take such humanitarian considerations into account when reviewing a security risk certificate. His only function was to decide whether Mr Zaoui was a security risk and it was irrelevant to that decision what consequences Mr Zaoui would face if deported. If the Supreme Court had not read implied limits into section 72 of the Act, therefore, New Zealand would have completely failed to protect the fundamental rights at issue.

Thus the Supreme Court’s willingness in *Zaoui No 2* to graft implied limits onto the section 72 power has to be understood in light of the strength of the State’s protective obligation in that case, the dire consequences for the individual if it were ignored and the complete failure of the State to create an express framework within which to discharge the obligation.⁹⁷ If it were not for the combination of these factors, the Supreme Court may well have been more inclined to conclude, as the four *Ye* justices (Glazebrook J excepted) clearly did, that the statutory scheme rebutted an international law-consistent or, indeed, Bill of Rights-consistent interpretation.

Zaoui No 2, then, indicates that the correct framework in New Zealand for determining the impact of international treaty obligations on the exercise of statutory power is the common law presumption of legislative consistency with international law. That presumption can be rebutted by an inconsistent statutory scheme. The suggestion that I am making, however, is that the strength of the presumption (and therefore the likelihood that it will be considered to have been rebutted) will differ from case to case and will depend on a range of factors, some of which are independent from the statutory scheme. In particular, the more potent the relevant obligation, the harder the courts will be prepared to push the boundaries of legitimate interpretation to achieve consistency with it – and *vica versa*.

This is implicit in *Zaoui No 2* but is spelled out rather more clearly in earlier Court of Appeal authority on the presumption of consistency with international law, authored by the same judge who authored *Zaoui No 2* – Keith J.⁹⁸ In particular, in *New Zealand Air Line Pilots’ Association v Attorney-General*, Keith J said that the application of the presumption of consistency with international law is to be assessed on a case-by-case basis, bearing in mind “both the international text and the related national statute.”⁹⁹ At the heart of the assessment of the former (the international text) is an accurate evaluation of its precise scope – what does the international obligation

⁹⁶ In *Zaoui No 2*, the Supreme Court considered that there was overwhelming support for the proposition that torture is now a peremptory norm but did not accept that the prohibition on refoulement to torture had achieved the same status: *ibid* at 311-312 & 305-306.

⁹⁷ Cf the Immigration Bill, which attempts to codify the discharge of this obligation.

⁹⁸ Especially *New Zealand Air Line Pilots’ Association v Attorney-General* [1997] 3 NZLR 269 (CA) and *Sellers v Maritime Safety Inspector* [1999] 2 NZLR 44 (CA).

⁹⁹ [1997] 3 NZLR 269 (CA) at 289.

actually require? But in addition, the Court of Appeal cases suggest that other factors may be relevant. In *New Zealand Air Line Pilots' Association* the Court of Appeal's willingness to consider the presumption rebutted by the statutory scheme was influenced in part by the "indeterminacy" of the international obligation at issue in that case (which was contained in an annex to the Chicago Convention on Civil Aviation), its "very limited binding force" and its "relative unimportance" in the pantheon of international law obligations.¹⁰⁰ The Court of Appeal's strong application of the presumption in the subsequent case of *Sellers v Maritime Safety Inspector* was in part compelled by the long pedigree of the relevant obligation (freedom of the high seas) and the fact that it was protected by customary international law as well as treaty, as well as by the close historical and contemporary links between domestic maritime legislation and international law, and the long history of national courts striving to interpret and apply such legislation in light of international law.¹⁰¹

Seen in this way, the presumption of consistency has the potential to facilitate what Treasa Dunworth has described as a "pedigree approach" in which the willingness of domestic courts to facilitate the application of international law depends on a range of factors relating, amongst other things, to the potency and persuasiveness of the particular obligation, and the egregiousness of the particular breach.¹⁰² That same variability and flexibility of operation characterises, I would suggest, the operation of the common law "principle of legality" (also at issue in *Ye*) and of section 6 of the Bill of Rights.

What should be clear from this is that it is dangerous to resolve the question whether a particular statutory power is capable of being read down to ensure consistency with international law (or with common law rights) without first identifying and evaluating the scope and significance of the international/common law duties on which the claim is founded. That was, with respect, the error fallen into by both Chambers and Robertson JJ, and Hammond and Wilson JJ. Having omitted any consideration whatsoever of relevant international law or common law duties of protection, their Honours' conclusion that the statutory removal powers could not be limited was unsafe.

Their Honours' refusal to engage with the scope and significance of the underlying duties of protection being invoked by Glazebrook J was also regrettable for another reason. By refusing to enter into that inquiry their Honours, in effect, ceded the territory occupied by those obligations to the child-centred approach and abandoned the possibility that those obligations might in fact bear an interpretation more consonant with their Honours' view of where the justice of the case lay. In other words, they forced the battle between the child-centred and compliance-centred narratives to be played out on a field external to the underlying obligations. From a rule of law perspective, that is surely regrettable. The conclusion that New Zealand law is incapable of delivering on international law and/or fundamental common law rights is one that ought to be avoided if at all possible. Conversely, the conclusion that those international and common law rights do not go as far as Glazebrook J thinks they go is surely far more palatable.

¹⁰⁰ Ibid.

¹⁰¹ [1999] 2 NZLR 44 (CA) at 46, 57-59 and 61.

¹⁰² For example Dunworth, "Hidden Anxieties: Customary International Law in New Zealand" (2004) 2 NZJPIIL 67. See also Geiringer, "*Tavita* and All That", above n 75, 102-105.

Underlying Chambers and Robertson JJ's argument is a perception that the statutory scheme, read as a whole, is sufficient to meet any humanitarian concerns. With respect, their Honours error was in failing to translate this perception into a legal argument over the scope of the underlying rights and duties. The first question for their Honours ought to have been: do the international law and common law obligations on which Glazebrook J relies in fact require of decision-makers what Glazebrook J thinks they require? It was only if the answer to this question was "yes" that their Honours needed to default to the undesirable position that New Zealand's statutory scheme is incapable of delivering on international law or fundamental common law rights.¹⁰³

Examining the scope and significance of the underlying obligations

In short, then, the error fallen into by the four Court of Appeal justices in *Ye* was their failure to engage with the scope and significance of the underlying obligations being relied on Glazebrook J. Their Honours have thereby been far too quick to cede the ground occupied by these underlying obligations to the child-centred narrative.

Let me be clear. I am not inviting the local judiciary to formulate self-serving conclusions about the scope of international law. I am simply inviting engagement with and exploration of that question, particularly where the answers are not self-evident. With respect, *Ye* is such a case. Prior case law on the meaning and effect of the relevant obligations in the immigration context is, at best, inconclusive and Glazebrook J's conclusions in that regard, at very least, deserving of close interrogation.

Take, for example, article 3.1 of UNCROC – the international provision relied on by Glazebrook J.¹⁰⁴ It provides:

In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

Although article 3.1 has been in the foreground in the numerous post-*Tavita* cases (mainly in the High Court), those cases contain surprisingly little detailed exploration of what it actually means and precisely what it requires in the context of immigration decisions. In *Puli'uvea v Removal Review Authority*, the Court of Appeal noted that the obligation in article 3.1 is stated in "broad and relative terms" and that the best interests of the child are "a (not *the*) primary (and not *paramount*) consideration".¹⁰⁵ These statements are repeated with great frequency in the New Zealand case law and they are certainly a starting point, but they surely leave a lot of questions unanswered.

The value of Glazebrook J's judgment in *Ye* is that she attempts to address some of those questions. For example, she expresses the view that the notion of "primacy" in article 3.1 goes to the weight that the decision-maker attaches to the best interests of

¹⁰³ This is, I think, a key message of cases such as *New Zealand Air Line Pilots' Association v Attorney-General* [1997] 3 NZLR 269 (CA) and also *Wellington District Legal Services Committee v Tangiora* [1998] 1 NZLR 129 (CA), in each of which, the Court of Appeal rejected the supposedly international law-friendly interpretation given to the statute in the High Court in part because it held that the underlying international obligations, properly construed, did not support the result.

¹⁰⁴ I focus here on article 3.1 as it was the focus of Glazebrook J's discussion of international law but other relevant obligations such as articles 23 and 24 of ICCPR are also in need of more careful exploration.

¹⁰⁵ (1996) 2 HRNZ 510 (CA) at 517.

the child; she attempts her own rough calibration of the weight to be attached to best interests vis-à-vis the State's interest in border control; and she outlines the nature of the inquiry that she thinks needs to occur in order for the child's best interests to be assessed.

To my mind, however, the propositions formulated by Glazebrook J are, at very least, deserving of close interrogation. Take, for example, the proposition that article 3.1 speaks to the weight to be attached to the best interests factor. I must admit that this was a proposition that attracted me when I wrote about the *Tavita* cases in 2004. It seemed to me that the notion of primacy must speak "to the relative weight that must be attached to the consideration in the decision-making process, vis-à-vis other matters legitimately before the decision-maker."¹⁰⁶ That view is supported by a number of commentators. For example, Sharon Detrick has described the best interests factor as "a consideration of first importance amongst other considerations",¹⁰⁷ and Philip Alston has suggested that it creates "a burden of proof on those seeking to achieve a non-child-centred result to demonstrate that, under the circumstances, other feasible and acceptable alternatives do not exist".¹⁰⁸

What I left unsaid in 2004, although it was very much on my mind, was that if the notion of primacy does speak to questions of weight and burden, I struggle to see how the New Zealand immigration framework can be read consistently with it. Under section 47 of the Act, the RRA is only entitled to grant an appeal against the requirement to leave New Zealand if the appellant establishes "exceptional" humanitarian circumstances. This notion of exceptionality is surely the very antithesis of the approach envisaged by Detrick, Alston and others in which the presumption is in favour of the "child-centred" result. Similarly, under the *Tavita* guidelines as applied at the point of removal, the fact that it might be in the "best" interests of the child for the overstayer parents to be allowed to remain in New Zealand is, let us be clear, never treated as sufficient on its own to overcome the New Zealand government's interest in upholding the integrity of its immigration laws. Rather, immigration officers look for something exceptional or unusual about the circumstances of the case – some *special* detriment to the child – to overcome the unstated presumption that the removal will proceed as planned.

It is also perhaps noteworthy that when Glazebrook J proceeds to give specific guidance on the weight to be attached to the best interests factor in removal decisions,

¹⁰⁶ Geiringer, "*Tavita* and All That", above n 75, 87.

¹⁰⁷ Sharon Detrick *A Commentary on the United Nations Convention on the Rights of the Child* (1999) 91. See also Michael Freeman, *A Commentary on the United Nations Convention on the Rights of the Child: Article 3 The Best Interests of the Child* (Martinus Nijhoff Publishers, Leiden, 2007) 61: "That a child's best interests should be 'first consideration' ... is an exhortation to consider specifically the best interests of the child and to give the child's best interests greater weight than other considerations"; and *Minister of State for Immigration and Ethnic Affairs v Teoh* [1995] HCA 20 at para 31 per Mason CJ and Deane J: Article 3.1 gives the best interests of the child "first importance along with such other considerations as may, in the circumstances of a given case, require equal, but not paramount, weight."

¹⁰⁸ Philip Alston, "Reconciliation of Culture and Human Rights" in Philip Alston (ed), *The Best Interests of the Child: Reconciling Culture and Human Rights* (1994) 1, 13. See also Melissa Poole, "International Instruments in Administrative Decisions: Mainstreaming International Law" (1999) 30 VUWLR 91, 105, suggesting that there should be a rebuttable presumption in favour of family unity; David Dyzenhaus, Murray Hunt and Michael Taggart, "The Principle of Legality in Administrative Law: Internationalisation as Constitutionalisation" (2001) OJCLJ 5, 10 ("if the human rights is not given the status of a factor that has to be demonstrably outweighed, then ... the mere mention that the interests of the children had been taken into account would suffice to make the decision "judge-proof").

her recommendations fall far short of what “primacy” – if it does speak to weight – would seem to require. She posits that the likely detriment to the child must constitute a significant and sustained breach of the child’s basic human rights before the best interests of the child outweigh the State’s interest in border control.¹⁰⁹ Indeed, even when the additional factor of New Zealand citizenship is weighed in the balance, she says, a serious potential detriment to the child would be needed to outweigh this State interest.¹¹⁰ On this approach the weight being attached to the child’s best interests is, in the run of the mill case, extremely low.

This invites a number of alternative conclusions. One is that the New Zealand legislative and policy framework is inconsistent with the requirements of international law. A second – and this seems to be the approach being taken by Glazebrook J – is that international law is itself conflicted. The right of a State to control its borders is, she says, a “fundamental incident of the sovereignty of a state”, in relation to which, there is a “consensus at international law”.¹¹¹ On this approach, the New Zealand “exceptionality” approach can be seen as a device to reconcile a “clash of two fundamental concepts of international law – the necessity to take into account the best interests of the child and a sovereign State’s right to control its borders”.¹¹²

A third conclusion, though, might be that the scope and effect of article 3.1 itself must be read down in light of the broader framework of international law. This framework includes recognition at general international law of the State’s right to control its borders, but also includes the framework of UNCROC itself, and specifically those provisions that deal directly with questions of family unity: articles 9 and 10. There is insufficient space here to analyse those provisions – particularly given that there remains controversy over their application.¹¹³ One possible argument with respect to article 3.1, though, is that to the extent that the real concern in cases such as *Ye* is the possibility of a separation resulting between parent and child, these more specific provisions represent the negotiated consensus of the States parties as to what is required, and that article 3.1 should not be interpreted as going beyond this. An argument of this kind was accepted by the Human Rights Committee in *Joslin v New Zealand* – the same-sex marriage case – in relation to article 26 of the ICCPR, a broad anti-discrimination clause.¹¹⁴ The Human Rights Committee accepted that article 26 should not be interpreted in such a way as to undermine the consensus reflected in article 23.2 of the ICCPR, which provides a specific right to marry but limits that right to unions between “men and women”.

My purpose here is to raise issues rather than to resolve them. Another such issue concerns the procedural implications of article 3.1. It will be remembered that Glazebrook J formulates an extensive investigative obligation on the Immigration Service at the point of removal: to question overstayers in order to elicit information about the circumstances of any affected children and to consider any publicly available information (or information held by the Immigration Service itself) pertaining to conditions in the destination country. She also posits that the child has an

¹⁰⁹*Ye v Minister of Immigration* [2008] NZCA 291 at paras 124-133 per Glazebrook J.

¹¹⁰ *Ibid* at paras 132-133 per Glazebrook J.

¹¹¹ *Ibid* at para 116 per Glazebrook J.

¹¹² *Ibid* at para 123 per Glazebrook J.

¹¹³ See, for example, Rachel Hodgkin and Peter Newell *Implementation Handbook for the Convention on the Rights of the Child* (fully revised edition, UNICEF, New York, 2002) p 136.

¹¹⁴ *Joslin v New Zealand*, Human Rights Committee Communication No 902/1999 (17 July 2002).

independent right to be heard, whether in person or through its parents as representatives, and that this means that the immigration officer must ensure that the parent is informed of their representative role and is asked questions specifically directed to ascertaining the views of the child.¹¹⁵

Glazebrook J can certainly point to support for her notion that the Immigration Service must adopt an adequate procedure to discharge any relevant substantive obligations inherent in article 3.1.¹¹⁶ But I am not convinced that there is no room for argument and debate as to the scope of the precise nature of the inquiry that must be undertaken in order to discharge the article 3.1 obligation, and indeed, as to the point at which such inquiry must be undertaken. This links to a third and related issue, which is the extent of the State's margin of appreciation to determine how best to deliver on its article 3.1 obligation in the immigration context. A possible argument, given the relative indeterminacy of the language of article 3.1, is that the margin is a broad one and that it extends, for example, to the State choosing to repose the function of resolving "best interests" claims in an independent authority – the RRA. If that argument were to be accepted, the next question would be whether it is also within the State's margin of appreciation to subject any such claims to reasonable procedural pre-conditions (such as timeframes for lodging the claim, filing fees and evidential requirements). And if so, the further point of inquiry would be whether the procedural pre-conditions that hedge the right of appeal to the RRA under the Act are, in this sense, reasonable.¹¹⁷

As well as being relevant to this question of margin of appreciation, the relative indeterminacy of the language of article 3.1 may also be relevant more generally to the strength with which the Courts ought to deploy the presumption of consistency in relation to it. Remember that in *New Zealand Air Line Pilots' Association* the relative indeterminacy of the obligation was one of the factors that led to the Court's reluctance to deploy the relevant provision as a hard-edged legal rule giving rise to a strong interpretive presumption of legislative consistency. Again, I am simply raising this as an issue for judicial exploration rather than seeking to resolve it. Some caution would certainly be needed in equating the "indeterminacy" of the provision at issue in *Air Line Pilot's Association* (which was found, not in the Chicago Convention itself but in a related annex, and which the Court considered to be of "limited binding force") with the "indeterminacy" of article 3.1 of UNCROC which, notwithstanding its open-textured language, is found in a core human rights treaty – indeed, the most widely ratified human rights treaty – and is quite clearly of binding force.¹¹⁸ My point is simply that there is room for exploration here of the extent of the State's room to manoeuvre in relation to a provision of such broad and indeterminate nature, and of the domestic court's role vis-à-vis the other branches of government in policing its implementation.

¹¹⁵ Ibid at paras 138-150 per Glazebrook J. Where adverse information of this kind is to be relied on, it must be put to the parties for their comment.

¹¹⁶ This was, for example, the argument accepted in *Zaoui No 2*.

¹¹⁷ One point of considerable concern in this regard is the fact that since 1999, the time period for lodging the appeal has been triggered simply by expiry of the overstayer's final permit, rather than by service of an official document (prior to 1999, it was service of the removal order). This considerably heightens the risk that the appeal right will expire while the affected individual is unaware of it.

¹¹⁸ Though see, for example, Geraldine Van Bueren *The International Law on the Rights of the Child* (Martinus Nijhoff Publishers, 1995) p 45, suggesting that article 3.1 "does not create rights and duties, it is only a principle of interpretation which has to be considered in all actions concerning children."

There are, no doubt, other unresolved questions that one could raise about the application of article 3.1 in deportation/removal cases. The broad point is that there is room for contestation about the meaning of article 3.1. And if that is the case with respect to the international obligations at issue in the case, how much more so with respect to Glazebrook J's novel conclusions about the scope of the State's responsibilities at common law towards citizen children?

Conclusion

In short, then, the fault with respect to the dominant Court of Appeal approach in *Ye* was in the failure to engage with the framework provided by the presumption of consistency with international law and the companion presumption of consistency with fundamental rights protected at common law. This led their Honours to neglect to engage with the novel arguments made by Glazebrook J (and also Baragwanath J in the High Court) about the scope and significance of the underlying international law and common law obligations. As a result, the battle between the child-centred and compliance-centred narratives was played out entirely over the correct interpretation of the statutory provisions rather than, as it should have been, over the nature, scope and application of the underlying values protected by international and common law.