EDITORIAL NOTE: CHANGES MADE TO THIS JUDGMENT APPEAR IN [SQUARE BRACKETS].

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IN THE FAMILY COURT
AT MANUKAU

FAM-2014-092-000858
[2018] NZFC 2784

IN THE MATTER OF	THE ORANGA TAMARIKI ACT 1989
BETWEEN	CHIEF EXECUTIVE OF ORANGA TAMARIKI - MINISTRY FOR CHILDREN Applicant
AND	[VUE LIEN] First Respondent
AND	[LIAO XING] Second Respondent
AND	[CHU XING] born on [date deleted] 2014 Child the application is about

Date:	19 January; 26, 27 and 28 July; 21 August; 29 September; 2 October; 20, 21 November 2017
Appearances:	M Maplesden and L Kovaleski for the Chief Executive A Tagi for the First Respondent G Cole for the Second Respondent A Cooke for [D Xue] and [E Xue] K Goldsbury as Lawyer for the Child
Judgment:	13 April 2018

RESERVED JUDGMENT OF JUDGE AG MAHON

BACKGROUND

[1] [Chu Xing] (child) ("[Chu]") was born on [date deleted] 2014. His life profoundly changed on [date deleted] 2014 when he arrived at Auckland Airport from [a South East Asian country [("SEAC")] with his parents, the respondents [Vue Lien] ("[Ms Lien]") and [Liao Xing] ("[Mr Xing]"). The respondents were arrested and charged with importation of methamphetamine. [Chu] became an unaccompanied child and was placed in the care of Oranga Tamariki ("the Ministry").

[2] On [date deleted – five days later] 2014, the Ministry was granted temporary custody of [Chu] under s 78 of the Oranga Tamariki Act 1989 ("the Act"). After 2 weeks with temporary caregivers, [Chu] was placed with [Joey Ray] and [Katrina Ray] who cared for him until [month deleted] 2016. He has since been in the care of [Dylan Xue] and [Emma Xue].

[3] On 18 December 2018, the Court made a declaration [Chu] was in need of care and protection. The temporary custody order was discharged and replaced with a final custody order in favour of the Chief Executive under s 101. An order was made under s 110(2) appointing the Chief Executive as an additional guardian.

[4] After initially pleading not guilty to the charges, the respondents changed their pleas to guilty. The quantity of methamphetamine in their possession was substantial and they were each sentenced to 7 years 7 months imprisonment. [Ms Lien] was paroled and deported in January 2017 and [Mr Xing] paroled and deported in February 2017.

APPLICATIONS

[5] The applications for determination by the Court are:

(a) The Ministry application for approval of the plan for [Chu] to be transitioned from the care of [Mr Xue] and [Ms Xue] into the care of his mother in [the SEAC]. This application is supported by [Chu]'s parents.

(b) The application by [Chu]'s appointed lawyer, Mr Goldsbury, for an order varying the custody order to include a condition that [Chu] is not to be removed from his current caregivers until further order of the Court. This application is supported by [Mr Xue] and [Ms Xue].

(c) An application by [Mr Xue] and [Ms Xue], in the alternative, for an order placing [Chu] in their custody under s 101 and appointment as additional guardians of the child under s 110(2) of the Act.

[6] To understand the outcome of this case it is necessary to address the factual background and Court hearings in detail.

PRELIMINARY HEARINGS

Hearing 5 September 2014

[7] The Ministry's initial plan was to transition [Chu] into the care of family members in [the SEAC], given the length of time before either parent would be released from prison and could be considered as a possible caregiver of the child.

[8] By the time of the first Court hearing [Chu]'s maternal grandmother ("[Mrs Mei-Lien]") and an aunt of [Mr Xing] had been contacted. Neither was prepared to care for [Chu] and as there were no other family members known, the option of [Chu] returning to extended family in [the SEAC] was no longer available.

[9] The alternative of [Chu] returning to [the SEAC] to the custody of [the SEAC]'s social services had been considered but it had been difficult to contact [the SEAC]'s authorities. Counsel advised the Court that the Ministry had experienced similar problems with [the SEAC] in the past.

Hearing 18 December 2014

[10] [Chu] did not see his parents for some months after [date deleted] 2014 and by the second hearing in December 2014, he had only seen his mother twice for an hour and his father once. [Chu] then started seeing his parents monthly.

[11] In his report for the December hearing, [Chu]'s social worker [Murray Boyd] described [Chu]'s first visit with his mother:

> [Chu] cried continuously and [Ms Lien] found it hard to comfort him. She carried him around the room, rocking him in her arms. It was observed that she didn't check his nappy or enquire if he needed feeding.

And the second visit:

> [Chu] was more settled, however did not greet [Ms Lien] with a smile. [Ms Lien] lifted him and rocked him in her arms. [Chu] needed a nappy change and although informed of this [Ms Lien] seemed reluctant to acknowledge this. She attempted to feed [Chu], however he would not feed whilst in the soiled nappy. After further prompting [Ms Lien] did change [Chu], but left him unattended on the sofa. The social worker moved to stop [Chu] from falling to the floor, [Chu] then took the bottle from [Ms Lien].

[12] The social worker described the parents as initially "somewhat uncooperative, in providing details of family who may be able to care for [Chu] in [the SEAC]". There was no family member on his paternal side available to care for [Chu]. His maternal grandmother, [Mrs Mei-Lien], declined to care for him because she was working and already caring for [Chu]'s [older siblings]. She said she could not afford to also care for a child as young as [Chu].

[13] The declaration, final custody and additional guardianship orders were made by consent. The plan objectives were for:

(a) [Chu] to remain in the care of Ministry approved caregivers until [the SEAC]'s Embassy could return [Chu] to a safe placement in [the SEAC].

(b) The placement with the current caregivers was to be monitored and supported.

[14] The assistance to be provided by the Ministry in support of the plan was:

(a) The social worker to monitor the plan.

(b) [Chu] was to see his parents at least monthly and a social worker was to sight [Chu] at least every eight weeks to ensure he was meeting his milestones.

(c) To continue liaison with lawyer for the child and other professionals to ensure [Chu]'s care and protection needs were met.

(d) To offer any necessary assistance to return [Chu] to his homeland.

(e) To liaise with the [SEAC's] Embassy about returning [Chu] to a safe family placement in [the SEAC] once a family had been identified.

[15] On 10 August 2015, Mr Goldsbury sought urgent court intervention because of his concern that the Ministry had failed to take effective steps to implement the plan. Mr Goldsbury advised the Court:

(a) He had made his own enquiries with the [SEAC's Embassy] in December 2014 and obtained the name of a contact person in [the SEAC] with whom the social workers could discuss [Chu]'s return. He immediately gave this information to the Ministry but discovered in June 2015 that the Ministry social workers had made no further enquiries with the [SEAC]'s authorities about [Chu]'s return to [the SEAC].

(b) He had raised his concerns at a regional office level of the Ministry and following a meeting with the regional manager, the Ministry then wrote to the [SEAC]'s Social Welfare Department but had received no response to the letter.

(c) He was worried about the long-term implications for [Chu] of remaining in the care of Ministry caregivers for several years and developing a relationship with them. Then after their release from prison, he would be placed in the care of parents with whom he did not have a relationship and return with them to [the SEAC].

Hearing 29 October 2015

[16] In his May 2015 report for the six-monthly review of the orders, [Mr Boyd] advised:

(a) [Chu] was doing well with his caregivers.

(b) There had been no response from the [SEAC's Embassy] to enquiries about the assistance available if [Chu] was returned to [the SEAC].

(c) [Chu]'s monthly visits with his mother had been going well. While he had fewer visits with his father because [Mr Xing] was in a prison outside [location 1 deleted], now [Mr Xing] was in [a location 1] prison these visits were also monthly and positive.

(d) Contact had been made with a [SEAC]-based social worker who had met with [Chu]'s maternal grandmother. She had been told by [Mrs Mei-Lien] that the family did not want to care for [Chu] because [Chu] was a *Huài zhǒng* child, which in English means "bad seed", a superstition that a child is cursed and brings bad luck to a family.

(e) As there was no suitable family placement, the only option immediately available for [Chu] in [the SEAC] was placement in a state orphanage. While he didn't have any details about the appropriateness of such a placement, the social worker noted the Ministry's duty of care to [Chu] to ensure any return to [the SEAC] was to a safe loving environment with protective caregivers who would meet [Chu]'s needs and wellbeing. This objective could not be met if [Chu] was placed in an orphanage and the best outcome was that he returned to [the SEAC] with one or both of his parents after their release from prison.

[17] In his updated report of 22 October 2015, required because of the delay in a review hearing taking place, [Mr Boyd] noted that while [Chu] had become accustomed to seeing his mother, he did not appear to have a strong attachment to her. By contrast, [Chu] showed a positive attachment to his father.

[18] [Mr Boyd] recorded [Mr Xing]'s response when he told him [Mrs Mei-Lien] had described [Chu] as a *Huài zhǒng* child:

> [Mr Xing] became very emotional and walked in circles with a look of despair on his face. He repeated several times, 'did she say it like that', he then stated that [Chu] will not go to his mother and that he ([Mr Xing]) will look after [Chu] on his return to [the SEAC].

[19] Judge Rogers presided at the review hearing and saw no alternative but to approve the review and continue the existing orders. She recorded her concern about the situation the Court faced:

> This file is extremely troubling. I acknowledge and endorse the concerns expressed by Mr Goldsbury in his reports dated 10.08.15 and 28.10.15. It seems impossible to elicit any response from the [SEAC]'s authorities which would assist [Chu]. This is particularly disappointing given [Chu] is an infant citizen of [the SEAC] but that country seems to have no interest in his circumstances – effectively stranded in a foreign country with both parents incarcerated.

Hearing 4 February 2016

[20] The next review hearing was before Judge Southwick. Her Honour was concerned that despite Judge Rogers' endorsement of Mr Goldsbury's concerns at the hearing on 29 October 2015, three months later the Ministry still had no information from the [SEAC]'s government about what would happen to [Chu] if he was returned to [SEAC] without his parents.

[21] Judge Southwick noted:[1]

> (i) Any proposal to send this child to [the SEAC] is currently out of the question, based upon the information which has been received from the [SEAC]'s authorities. Mr Goldsbury supports that conclusion, as I do.
>
> (ii) Thought has to be given to the fact that [Chu] is developing important attachments and, therefore, very careful decisions need to be made.
>
> (iii) A parenting assessment of [Chu]'s parents is currently being undertaken.
>
> (iv) Once [Chu]'s parents are released from prison, they will undoubtedly be deported to [the SEAC]. The critical question will therefore be, when they return to [the SEAC] should they, in effect, be returning with their child, or should he be retained in New Zealand in the likely care of the [SEAC] couple referred to above.[2]

[22] Her Honour concluded:[3]

> Many questions cannot be answered at this point, in particular the question of whether [Chu]'s parents should return to [the SEAC] with their child. I have to say, given the seriousness and nature of the charges, the court would have to

1 Minute of Judge M Southwick QC dated 4 February 2016 at [6].

2 [Mr Xue] and [Ms Xue] had been identified as the new caregivers for [Chu] by this stage and he was spending time with them in preparation for transition from Mr and Mrs [Ray]'s care.

3 Judge Southwick, above n 1 at [7].

> receive very persuasive evidence that this child's best interests would be served by returning to [the SEAC] with his parents.

Parenting Assessment 29 June 2016

[23] A parenting assessment was prepared by [Katelyn Fields] a clinical psychologist at [location 1] Specialist Services, on the following brief from the Ministry:

(a) To comment on any psychological factors that may impact on the parents' capacity to safely parent [Chu].

(b) To assess the nature of their individual relationships with [Chu].

(c) To provide recommendations for any additional therapeutic input/intervention that may be indicated following assessment.

[24] The psychologist strongly recommended an increase in contact between [Chu] and both his parents but in particular, with his mother, as more contact "is most likely to support [Chu]'s eventual transition back to his parents' care".

[25] [Ms Fields] placed her recommendation in the context of a child whose home and family life would have continued to be in [the SEAC] were it not for his parents' criminal offending:

> Under UNCROC (United Nations Convention on the Rights of the Child), it is well understood that [Chu] has a right to have relationships with both his parents. Without collateral information or any assessment of [Chu]'s care environment in [the SEAC] (with his parents and/or maternal grandmother) it will remain unclear as to whether his care needs will be met once he exits New Zealand. However the alternative of him being potentially, permanently, removed from his parents' care and residing further in New Zealand raised enormous uncertainty about how this would ensure or support his rights to his family and culture.

[26] [Ms Fields]'s report did not address the following matters:

(a) The psychological consequences for [Chu] from losing the attachments he had developed with his Ministry caregivers; or

(b) The effect on the nature of the relationship between [Chu] and his parents of [Chu]'s removal from their care at [under 3 months] old with subsequent contact with them, being brief and infrequent; or

(c) How the limited increase in contact she proposed would change the relationship between [Chu] and either parent to an extent where he could be placed in their permanent care.

Hearing 27 October 2016

[27] Judge Skellern was unable to conclude the review because the updated plan and report were only filed on the day of hearing and [Ms Lien] had not had the opportunity to consider the documents. Mr Goldsbury raised concerns about the plan which were shared by the Judge. Her Honour noted that a lot more information was required for the Court before the planned return of [Chu] to either of his parents could take place and made the following observations:[4]

> …There is the lingering concern that when the mother is released on parole from serving a sentence for very serious drug offending that [Chu] may simply be placed back in her care and sent to [the SEAC] given what appears to be a less than adequate scaffold to make this enormous change in his life.
>
> The Ministry for Social Development have assured me today that they certainly would not be placing [Chu] back with his mother and putting them on a plane to [the SEAC] and that before that occurred it would be the subject of participation by the other parties in consultation with Mr Goldsbury.

Lawyer for the Child Application 28 November 2016

[28] Mr Goldsbury applied to vary the custody order by adding a condition that [Chu] was not to be removed from his current placement without further order of the Court. He did so because of his concern that the parole hearing for [Chu]'s mother could occur as early as 23 December 2016 and it was the Ministry's intention that on her release, [Chu] would be deported with his mother to [the SEAC].[5]

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4 Minute of Judge A-M Skellern dated 27 October 2016 at paras [4], [5].

5 At no time in the past four years has the Ministry made application for a visa permitting [Chu] to remain in New Zealand on a temporary basis.

[29] Mr Goldsbury referred to the comments of Judge Skellern at [27] above in support of the application.

Hearing 5 December 2016

[30] In the documents filed for this hearing the Ministry identified a risk of possible retribution to [Ms Lien] from the drug gang if she returned to [the SEAC] with [Chu] and committed to make enquiries with Interpol to find out what had happened in similar cases.

[31] By this hearing date the Ministry had received a limited response from the [SEAC's Embassy] about what would happen to [Chu] if he did not live with his family in [the SEAC]. The [Embassy] had confirmed [Chu] would be placed in an orphanage and eventually offered for adoption.

[32] The plan of the Ministry to facilitate return of [Chu] to [the SEAC] with his mother remained unchanged.[6]

SUBSTANTIVE HEARING

Day 1 - 19 January 2017

Evidence of mother [Ms Lien]

[33] The substantive hearing was brought forward to 19 January 2017 because of the impending deportation of [Ms Lien]. Prior to the hearing, [Chu]'s social worker, [Ms Zan], filed a report of her visit to [Chu]'s maternal grandmother's home in [region 1 deleted] of [the SEAC] as [Ms Lien] proposed to live with her mother on return to [the SEAC]. She had met with [Mrs Mei-Lien] and [Chu's siblings] who live with their maternal grandmother.

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6 [Ms Lien] and [Mr Xing] originally told the Ministry they were going to live together with [Chu] on their release but by this time [Ms Lien] was clear that she would not be resuming her relationship with [Mr Xing].

[34] [Ms Zan] concluded there were no safety concerns for [Chu] in the household of his maternal grandmother. It was also her view that [Mrs Mei-Lien] was committed to supporting her daughter and grandson.

[35] [Bob Delano], a Ministry psychologist with its Specialist Services unit, filed a parenting assessment of [Ms Lien] dated 17 January 2017, in which he concluded:

(a) [Ms Lien] had the "parenting practices, skills and insights which would support her successfully resuming care of [Chu]."

(b) The transition of [Chu] to his mother's care could be virtually immediate on [Ms Lien]'s release once weekly contact between mother and child had been established.

(c) To ensure a successful transition it was important that information about [Chu] was shared between his caregivers and [Ms Lien].

[36] [Ms Lien] was the only witness at the January hearing. In her evidence, she initially said she wanted to return to [the SEAC] with [Chu] when she was deported a few days later. [Ms Lien] was going to live with her mother in [region 1]. [Mrs Mei-Lien] was committed to supporting her caring for [Chu].

[37] Mr Goldsbury then had the following exchange in cross-examination of [Ms Lien] about the potential risks of retribution from the drug gang for which she and [Mr Xing] had been couriers, after [Ms Lien]'s return to [the SEAC]:

Mr Goldsbury Are you worried that people who are part of the drug trafficking will want to hurt you and [Mr Xing] because the drugs that you were taking to New Zealand have been taken by the Police?

[Ms Lien] Yes.

[38] [Ms Lien] also said she needed to find a sufficiently well-paid job before she could meet the costs of caring for [Chu].

[39] It was clear from [Ms Lien]'s evidence that there was a potentially serious risk to [Chu]'s physical safety if he returned with his mother to [the SEAC]. The hearing was adjourned and [Ms Lien] deported to [the SEAC] a [period of time later] without [Chu].

[40] I made directions requiring the Ministry to file the following further evidence before the adjourned hearing date in July:

(a) A comprehensive plan for [Chu]'s transition into his mother's care in [the SEAC].

(b) An independent report on the nature of the risk [Chu]'s mother faced from drug gang retribution.

Days 2, 3 & 4 – 26-28 July 2017

Evidence of [Bruce Boyd]

[41] [Mr Boyd] was [Chu]'s social worker from the time that [Chu] came into the care of the Ministry in [month deleted] 2014 until November 2016.

[42] [Mr Boyd] had a telephone conversation with [Mrs Mei-Lien] in July 2014. He recalled only one telephone conversation with [Mrs Mei-Lien] during his period as the social worker. When [Mrs Mei-Lien] said she could not afford to have [Chu] in her care, she was not told that failing to do so may mean that he never returned to [the SEAC] because of the relationships he had formed with his caregivers during the period of his parents' imprisonment.

[43] Mr Goldsbury showed [Mr Boyd] a letter to Mr Goldsbury from [Peter Steadman] dated 17 June 2015. [Mr Steadman] is the [location 1] area manager of the Ministry. He apologised for the [location 1] office failing to follow up with the contact information Mr Goldsbury had given for a social worker in [the SEAC]. [Mr Boyd] said that he had emailed the address provided by Mr Goldsbury in December 2014 but received no response. Enquiries with the [SEAC]'s authorities were then moved to national office level.

[44] [Mr Boyd] agreed that there were concerns about the lack of attachment between [Chu] and his mother from a number of sources over the period.

[45] [Mr Boyd] had told [Chu]'s current caregivers, [Mr Xue] and [Ms Xue], about [Mrs Mei-Lien]'s belief that [Chu] was a *Huài zhŏng* child. On reflection [Mr Boyd] thought the Ministry social worker may have misunderstood what the [SEAC]'s social worker said about her conversation with [Mrs Mei-Lien] on this topic. [Mrs Mei-Lien] may have meant [Chu]'s childhood had been unlucky because of the criminal offending of his parents.

[46] During his two-year period as [Chu]'s social worker, [Mr Boyd]'s focus remained on returning [Chu] to [the SEAC]. After it was clear there was no prospect of [Chu] returning to the care of other family members in [the SEAC], the Ministry strategy changed to one under which [Chu] would return to [the SEAC] on the release of the first of his parents from prison.

[47] The Ministry had tried to ascertain the risk of drug gang retribution but had not received a response to these enquiries either from the [SEAC]'s police or Department of Social Welfare.[7]

[48] [Mr Boyd] said that the [location 1 office] tried to contact [the SEAC]'s social services for advice not only on safety issues for [Chu]'s return to [the SEAC] but also on the appropriateness of the maternal home environment. A letter on the Ministry file however challenges this assertion as it confirmed no enquiries had been made of any of [the SEAC]'s authorities about [Chu]'s return before May 2015.

[49] [Mr Boyd] agreed that the monthly and then fortnightly contact [Chu] was having with each of his parents during the two years he was the principal social worker, was not contact which would maintain an attachment relationship with either parent. He described the purpose of the visits as "for their relationships, for him saying he knew – would still know who his parents are".

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7 The police had however confirmed that neither parent was known to them in [the SEAC].

[50] [Mr Boyd] was unsure about the extent and outcome of enquiries the Ministry made with the prison authorities about [Chu] living with his mother in prison. The question was asked in the context of the following comment [Mr Boyd] had made in his report of 10 February 2016, nearly two years after [Chu] had been uplifted. [Chu]'s father had asked that [Chu] be allowed to live with him or [Ms Lien] in prison:

> [Mr Xing] has been told that it would not be possible for [Chu] to live in the men's prison with him and that [Chu] is too old to live in the women's prison. [Mr Xing] was also informed that there would be no funding for [Chu] to live in the women's prison due to their immigration status.

[51] [Mr Boyd] understood the following had occurred when the Ministry explored the option of [Chu] joining [Ms Lien] in the mother and child unit of the prison:[8]

(a) Enquiries were made with the Department of Corrections in 2014. As neither [Chu] nor his mother had New Zealand immigration status, the Ministry would have been required to meet the costs which they declined to do.

(b) In mid-2016 further enquiries were made to ascertain whether [Chu] could live with his mother for the final few months of her sentence. The request was declined because the mother and child unit is only available for children under two years old.

[52] In June 2016 after a six-month transition into their care, [Chu] was moved from Mr and Mrs [Ray] to the care of Mr [Xue] and Ms [Xue] in preparation for his return to [the SEAC]. [Mr Xue] is a [South East Asian] of [ethnicity deleted] and [Ms Xue] is a [South East Asian] of [ethnicity deleted]. By living with [SEAC] caregivers, [Chu] would have some "cultural input" in preparation of his reintroduction to [SEAC] culture with his mother the following year.

Evidence of [Mathilda Griffin]

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8 Notwithstanding that I twice requested the Ministry provide the Court with evidence of all enquiries made with the prison authorities, the outcome of those enquiries and final decisions made on the issue of [Chu] being placed in the mother and child unit at [location 1] Women's prison, the Ministry failed to provide this evidence.

[53] [Ms Griffin] was [Chu]'s social worker for about six months from December 2016. [Ms Griffin] wrote the reports and plans of 5 December 2016 and 16 May 2017.

[54] It was [Ms Griffin]'s evidence:

(a) She had supported the goal of returning [Chu] with his mother to [the SEAC].

(b) [Ms Lien] was enthusiastic about [Chu] returning with her to [the SEAC] country in [month deleted] 2017 when [Ms Griffin] visited her in the prison on 12 December 2016.

(c) Access between [Chu] and his parents had increased to weekly contact at the end of 2016.

(d) Access between [Chu] and his mother had been going well and [Chu] was now calling [Ms Lien] "mummy".

(e) She was satisfied all the necessary enquiries had been made with the [SEAC]'s authorities, international social workers, immigration and corrections to ensure [Chu] would be safe with his mother in [the SEAC].

(f) The June 2016 parenting assessment had recommended an increase in contact between [Chu] and his parents and had not identified any significant concerns about [Chu] returning to their care.

(g) She relied on reports from the access supervisor after the increase in contact later in 2016, for her assessment that there was "clearly attachment and bonding with both parents".

(h) Her view as an experienced social worker was that [Chu] knew who his parents were and by implication had a close relationship with them.

(i) [Chu] needed "to continue to feel secure and re-establish trusting relationships with his parents and it [was] in [Chu]'s best interests that he is reunited with his mother".

[55] Under cross-examination [Ms Griffin] said:

(a) She had not seen the Tuituia report prepared on 15 July 2016 in which the social worker had assessed a very weak attachment between [Chu] and his mother. She didn't agree with this assessment.

(b) It was not usual practice for the Ministry to place a child back in the care of a parent with whom he had only spent very occasional periods and no overnight time for the previous two and a half years. [Ms Griffin] was however confident that by the time of [Ms Lien]'s release in late January 2017, [Chu] would have developed a "good attachment with his mother" as a result of the increase in contact to two hours each week.

(c) It would be hard "for a little boy to actually just go off with his mum with whom he has not spent any time" but she justified her support for that outcome in January last year because of his mother's imminent deportation.

(d) She could not explain why, if it was the goal of the Ministry to effect return of [Chu] to [the SEAC] with either of his parents following their release, she did not press for an immediate increase in contact from mid-2016, as recommended by [Ms Fields].

(e) Her only concern for [Chu] in [the SEAC] was the potential retribution to [Ms Lien] from the drug gang.

(f) After it became apparent that [Chu] could not return to [the SEAC] with either parent, there was no discussion about assessing and comparing the relationships [Chu] had developed with his caregivers who are part

of his "family group", or the implications for [Chu] of losing these relationships.[9]

(g) In fact, at no time during the period she was involved with the file was the plan to return [Chu] to [the SEAC] with one of his parents after release from prison reviewed, despite the mother's evidence at the January hearing.

(h) Notwithstanding the Ministry policy that a social worker makes a home visit to any foster placement at least once every eight weeks, neither she nor [Ms Zan] had visited the home of [Mr Xue] and [Ms Xue] during [Ms Griffin]'s period as the social worker.

Evidence of [Bob Delano]

[56] [Mr Delano] completed three parenting assessments for the Ministry, dated 17 January 2017, 22 September 2017 and 31 October 2017.

[57] In his first report, completed [shortly] before [Ms Lien]'s deportation, the psychologist:

(a) Assessed that [Ms Lien] had developed a positive relationship with [Chu] during his visits to her in prison. Although [Ms Lien] struggled to establish boundaries with [Chu], the limits of the prison environment made it difficult for her to do so.

(b) Had no concerns about [Ms Lien]'s parenting knowledge, skills, practices, insights or expectation as a parent. He saw [Ms Lien] exhibit "high levels of ability to interact and respond to [Chu]'s needs".

(c) Believed that because [Chu] had developed such secure attachments with his family group in New Zealand, it was more likely he would be able to transition to the same relationship with his mother. This belief

[9] There was never a prospect of [Chu] being deported with his father as [Mr Xing] had no family support or certainty of accommodation on his return to [the SEAC].

was based on his knowledge that children with secure primary attachments are more easily able to form multiple attachments.

(d) Concluded that any stress and disorientation for [Chu] returning to his mother's care would be largely mitigated if the adults involved (caregivers, [Ms Lien] and [Mrs Mei-Lien]) were able to cooperate in sharing information and supporting the transition.

(e) Relied on [Ms Zan]'s assessment following her visit to [Chu]'s maternal grandmother's home in [the SEAC] in December 2016, that there were no risks for [Chu] living in that environment.

(f) Decided that as [Chu]'s parents were not intending to resume a relationship following deportation, there was minimal risk of any drug syndicate retribution to [Ms Lien] because the link with the syndicate had been with [Mr Xing].

[58] Under cross-examination [Mr Delano] agreed:

(a) The Court did not have sufficient evidence about the nature of the attachment relationship between mother and son, nor about the consequences for [Chu] of severance of his existing attachment relationships with [Mr Xue] and [Ms Xue]. He had not observed [Chu] with the caregivers, nor otherwise met them.

(b) There is a difference between assessment of an adult-child "relationship" and assessment of an "attachment relationship". Observing children with a parent was not an assessment of either attachment or maternal sensitivity unless an element of stress was introduced during the observation and this had not occurred.

(c) He had not assessed the nature of the "attachment relationship" between [Chu] and his mother rather his assessment had been of their "relationship".

(d) A broader parenting assessment would have been helpful for the Court but his report addressed the brief he had been given by the Ministry. The brief did not require him to assess the attachment between [Ms Lien] and [Chu] or the nature and security of the relationship between [Chu] and his foster parents.[10] [Mr Delano] had raised a concern about the adequacy of the brief with his supervisor but they concluded it was sufficient.

(e) By July 2017, it would have assisted the Court if his parenting assessment had addressed [Chu]'s attachment relationships with his caregivers and the implications for those relationships if [Chu] returned to [the SEAC].

(f) The loss of the relationships with his caregivers following [Chu]'s return with his mother had possible long term negative consequences. Such consequences could be ameliorated if [Chu] developed a secure attachment relationship with his mother. If he did not, the psychological and emotional risks for him in adolescence and adulthood were substantial.

(g) Ensuring that [Chu] successfully transitioned into his mother's care would require the highest quality parenting skills by [Ms Lien].

(h) He had presumed [Chu]'s language skills were developing but did not know what language(s) [Chu] understood or spoke with any fluency. When told that [Chu] understood a few words in Mandarin but mainly communicated with [Mr Xue] and [Ms Xue] in English, the psychologist agreed this would mean "some unsettledness and problematic issues for him in the transition".

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10 [Mr Delano] concluded from reports on the file that [Chu] had good attachments with his caregivers.

(i) Neither was [Mr Delano] aware when preparing his report that the Ministry's plan for the January hearing remained that [Chu] would return to [the SEAC] immediately on his mother's release from prison. He agreed this was now the least desirable outcome given it was six months later and the changes which had occurred since his January report.

(j) [Mr Delano] had telephoned [Chu]'s grandmother, [Mrs Mei-Lien], when preparing his first report. [Mrs Mei-Lien] told him the family supported [Chu] living with his mother in [Mrs Mei-Lien]'s home and the community would support her. He did not ask [Mrs Mei-Lien] about the nature and extent of that support. [Mr Delano] agreed this information was "highly relevant" to his assessment.

Evidence of [Alice Zan]

[59] [Ms Zan] has been [Chu]'s social worker since May 2016. She was present in Court on each day of the hearing as it is the practice in care and protection cases for the key social worker to sit with Ministry counsel during hearings.

[60] [Ms Zan]'s involvement with the file began when [Chu] came into the custody of the Ministry because she is of Chinese ethnicity. She was the interpreter for [Chu]'s contact with his mother in prison and for at least one visit with his father.

[61] Based on her observations of these visits (the first of which she thought was at the end of 2014), [Ms Zan] held no concerns about the relationship between [Chu] and his mother. She rejected the suggestion that [Chu] had struggled at any time with this relationship. In her view, the distress [Chu] showed on the first visit was to be expected as mother and child were apart for several months after [Ms Lien] and [Mr Xing] were arrested.

[62] She was present when the social worker completed the 2016 Tuituia report on the quality of [Chu]'s relationship with each parent. [Ms Zan] disputed the assessment of the report writer that the relationship between [Chu] and his mother was very poor.

[Ms Zan] also disputed reports that [Chu] had a closer relationship with his father than with his mother.

[63] [Ms Zan] assessed [Mrs Mei-Lien] as a suitable caregiver during a two hour visit to her home in December 2016 and observed:

(a) [Mrs Mei-Lien]'s home was clean and tidy;

(b) [Chu's siblings] were polite and well behaved;

(c) [Mrs Mei-Lien] was aware of [Chu]'s needs and she had the skills to support [Ms Lien] in meeting those needs.

[64] [Ms Zan] gave details of the Ministry's plan for [Chu]'s transition into the care of his mother which included:

(a) [Ms Zan] and one other person travelling with [Chu] to [the SEAC].

(b) [Ms Zan] remaining there for an undetermined period depending on what she found on arrival;

(c) [Ms Zan] having the role of monitoring the transition, assessing the situation, finding resources and providing support if required by the family.

[65] [Ms Zan] was satisfied that [Mrs Mei-Lien] had not said [Chu] was a *Huài zhǒng* child. Nor was she concerned about [Mrs Mei-Lien]'s denial that the social worker to whom she was thought to have made the comment had even visited when a visit had clearly taken place. [Ms Zan] thought [Mrs Mei-Lien] was understandably confused about the difference between a government social worker and someone from the [name deleted] Foundation visiting her, as a Foundation member had met with [Mrs Mei-Lien].

[66] In the 2014 phone conversation with a social worker from the [location 1] office, [Mrs Mei-Lien] not only declined to take [Chu] because she was working and caring for his [siblings], but also criticised her daughter for her stupidity and lack of

intellect. [Ms Zan] believed this to be an understandable response in the circumstances.

[67] [Ms Zan] had prepared a new plan following the January hearing in which she set out the goals [Ms Lien] needed to achieve to be in a position to care for [Chu]. She noted:

(a) [Ms Lien] told her that since returning she had found a fulltime job as [occupation deleted]. [Ms Lien] intended to reduce her work hours after [Chu]'s return to better support his transition to her care.

(b) [Ms Zan] had not received confirmation from [Ms Lien]'s employer of the employment or that it was possible for [Ms Lien] to reduce her work hours. [Ms Zan] understood that the employer would only provide this information after [Ms Lien] had been in her job for three months.

(c) The plan included a requirement that [Mrs Mei-Lien] was available to care for [Chu] when [Ms Lien] was working. [Ms Zan] was comfortable that [Chu] would be in his grandmother's sole care on these occasions despite the lack of any previous relationship between them or a common language.

[68] Nor was [Ms Zan] concerned that [Chu]'s mother and grandmother were going to keep knowledge of [Ms Lien]'s offending and imprisonment secret from the family and community. She was satisfied with the safety plan [Mrs Mei-Lien] and [Ms Lien] had agreed on for [Chu] which was to contact the police if they had any concerns.

[69] When asked to describe [Chu]'s family, [Ms Zan] omitted his New Zealand caregivers notwithstanding they are part of his "family group" under the Act. Like [Ms Griffin], she had not been inside [Mr Xue] and [Ms Xue]'s home but she had seen the caregivers at [Chu]'s pre-school.

[70] The concerns raised in the evidence of [Mr Delano], given immediately before [Ms Zan]'s evidence, did not change [Ms Zan]'s opinion that it was in [Chu]'s welfare and interests to return to [the SEAC] as:

> …[Chu], he is from [the SEAC] and he has his parents back in [the SEAC]. Not only that he has his [siblings] there waiting for him, so it's like all his family is back in [the SEAC] and it is important for him to maintain that connection with his family and also for him to grow up in [the SEAC]. It's an experience and I don't want to take that away from him.

[71] [Ms Zan] agreed that the [location 1] office had not been guided by the Specialist Services unit from 2014 or subsequently, in development of its strategy for [Chu]'s care and future options. [Ms Zan] was unable to explain the gap of three months before [Chu] saw his mother after he was uplifted from his parents. Nor could [Ms Zan] explain why Corrections had declined the two requests for [Chu] to live in the mother and child unit with [Ms Lien].

Day 5 - 21 August 2017

[72] As the evidence could not be completed at the July hearing, the case was adjourned to 21 August 2017 when I heard evidence from:

(a) [Casper Atkins], Senior Advisor for the Ministry's National Office; and

(b) [Chiara Stanislaw], Practice Leader of the [location 1] office, the site responsible for this case.

Evidence of [Casper Atkins]

[73] [Mr Atkins] is Senior Advisor in the National Office of the Ministry and responsible for all international issues relating to children in New Zealand. He was personally consulted by the [location 1] office within days of [Chu]'s arrival in New Zealand. He was also consulted on the transition plan for [Chu]'s return to [the SEAC].

[74] [Mr Atkins] said his team had made "considerable" attempts to contact the [SEAC]'s authorities about [Chu]'s return to extended family members in [the SEAC]. The initial attempts were through the [SEAC]'s Embassy in Wellington. Some of the correspondence with the Embassy was answered and in those cases the correspondence was sent to the [location 1] office site manager.

[75] The information received was however insufficient and the team extended its enquiries to international social services through which the details of a person in [the

SEAC] who could assist were obtained. No response was however received to about 20 emails then sent to different addresses to progress the inquiry. One of the problems with such enquiries was that [the SEAC] has been suspended from the international social services organisation.

[76] [Mr Atkins] was aware of the limitations of the [SEAC]'s care and protection agency and its failure to respond to enquiries was not surprising to him. He knew that if there were no family members capable of caring for him, [Chu] would be placed in a state orphanage.

[77] [Mr Atkins] was questioned about the timing of enquiries made in [the SEAC] and the extent to which social workers in the [location 1] office had liaised with him in addressing [Chu]'s care and protection needs. [Mr Atkins] admitted that there had been very little communication initially and the first detailed transition plan he knew about for reunification of [Chu] with [Ms Lien], was the plan filed for the August 2017 hearing.

[78] He knew that plan recorded a change in direction from the earlier plan, with a longer transition of three months and two options for the transition, one in [the SEAC] and the other in New Zealand. For either option [Ms Zan] and [Mr Delano] would first travel to [the SEAC] to "assess the home situation including natural, community and professional supports". The intended engagement with professionals included a local psychologist and a social worker from the [SEAC]'s child protection services.

[79] The Ministry preferred the option of a transition in [the SEAC] because of the visa issues arising with a New Zealand transition. [Ms Lien]'s conviction and subsequent deportation meant that she would not normally be able to apply to return to New Zealand until 2020. A key consideration in an application for exemption from this rule to allow an earlier return, was the seriousness of the offence on which she was convicted.

[80] The procedure required to re-enter New Zealand either now or after 2020 is the same:

(a) [Ms Lien] would first apply to an Immigration New Zealand office nearest [the SEAC].

(b) Senior members of the New Zealand Immigration Service would be advised the application had been made.

(c) The case for an exception would then be taken to the Sensitive Issues Committee, a group of senior Immigration New Zealand managers who would consider whether it was appropriate for an exception to be granted.

[81] [Mr Atkins] agreed that after [Chu] landed in [the SEAC], the social worker and psychologist could not legally prevent [Ms Lien] or her family members uplifting [Chu] from their care as orders under the Act have no legal effect outside New Zealand.

[82] If the Court decided that [Chu] should remain in New Zealand, the Ministry would apply to Immigration New Zealand for an exception to Immigration Policy to allow him to stay on humanitarian grounds and for the granting of a temporary permit. If a permit was granted, an application for permanent residence would follow. In [Mr Atkins]'s opinion, it was not possible to speculate on the likely outcome of an application but he suggested:

> It would be very difficult to argue the case because the Minister will be looking at exactly the points which I am trying to sort of emphasise here. Does this child have a country? Does he have parents? Are they able to exercise their duties? Do they want him? And to all of these questions the answer is yes. I am not saying that, you know, they won't try but that's some of the things which didn't happen in the other cases because it has to be exceptional circumstances to ask (the Minister) for that.[11] So he would be looking at what are the exceptions in this case. So, he has got a country, he has got parents, he has got a family, you know. That's the problem I can foresee in that sort of application.

[83] Under cross-examination [Mr Atkins] acknowledged that the length of time [Chu] had been out of his parents care and the reason his parents were in New Zealand may also be relevant matters.

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11 [Mr Atkins] referred to his knowledge of two similar cases in his time with the Ministry, one of which had been successful and the other where the Ministry was still waiting for the outcome.

[84] In [Mr Atkins]'s view, an application for exercise of Immigration New Zealand's discretion would be strengthened if [Chu] was under the guardianship of the Court. He saw two possibilities for the agent appointed under guardianship. Either the Chief Executive of the Ministry or Immigration New Zealand could be agent.

[85] While it was unusual for Immigration New Zealand to be the agent in a case where it was their Minister to whom an application to exercise a discretion was to be made, there was a precedent for this occurring with guardianship directions with very specific directions on the agent's obligations.

[86] [Mr Atkins] justified the Ministry's failure to make the enquiries they were now proposing two years earlier on the basis that the Ministry could not be certain about the dates for release of the parents from prison.

Evidence of [Chiara Stanislaw]

[87] [Ms Stanislaw] was involved in the transition plan which was prepared by [Mr Delano] after a two-hour meeting of social workers and the psychologist.

[88] [Ms Stanislaw] questioned the 2016 Tuituia Report's assessment of a very poor attachment between [Ms Lien] and [Chu]. In any event, it was only a "practitioner" report and had not been updated. She based her confidence about the quality of the current relationship between [Chu] and his mother on her discussions with his two social workers and feedback from the transporter for contact.

[89] [Ms Stanislaw] confirmed that after the January hearing it was decided during case review by the [location 1] office, that [Chu] would still be returned to his mother's care. She confirmed the plan had been prepared without any analysis of the comparative risks for [Chu] of returning with his mother to [the SEAC] and remaining with his caregivers in New Zealand.

Adjournment of August Hearing

[90] After the evidence from the Ministry's witnesses, the Court was in a position where eight months after the hearing had begun the evidence in support of their application for [Chu]'s return to [the SEAC] was woefully inadequate. During the

lunch adjournment Ministry counsel obtained the consent of the parties and lawyer for the child to an application to adjourn the hearing to enable the Ministry to obtain further evidence from [the SEAC].

[91] I granted the adjournment as it was important the Court received all relevant evidence, notwithstanding this was the second delay in resolution of the case. In addition, one of the options proposed was for [Chu] to be transitioned into his mother's care in New Zealand, an option which I indicated I favoured as it would enable the Ministry to monitor the transition and intervene if required.

[92] In my minute granting the adjournment, I noted that the evidence from the Ministry to date met neither best practice standards of social work nor the Ministry's obligations under the Act.

Day 6 - 29 September 2017

The Ministry report of [Ms Lien] and [Mr Xing] and support network in [the SEAC] regarding [Chu]

[93] [Ms Zan] and [Mr Delano] visited [the SEAC] between 10 – 21 September 2017 and filed a comprehensive report on:

(a) The family environments of [Ms Lien] and [Mr Xing];

(b) Support services available to [Chu]'s mother;

(c) The risks and advantages of directing a return of [Chu] to [the SEAC].

[94] The report concluded that [Chu] should return to his mother's care in the [region 1] under two alternative transition plans, each to occur over a 12-week period:

<u>Option A (the Ministry's preferred plan)</u>

(a) A transition in [the SEAC].

(b) Ideally [Mr Xue] (and/or [Ms Xue]) would be the primary person(s) to assist in the transition "from one secure relationship (as caregiver) to another (his mother)".

(c) The plan would be supported and monitored by the [SEAC]'s Department of Social Welfare.

(d) [Ms Zan] and one or both caregivers would remain as long as required during the transition period.

Option B

(a) Option B continued to be a transition in New Zealand with the requirement that [Ms Lien] would first need to gain exemption to the Immigration New Zealand policy barring her application to return until 2020.

(b) The transition would be monitored and assessed in New Zealand by the Ministry in the usual manner.

[95] The plan was amended at my direction to rewrite the part (repeated in a previous report) which questioned whether [Mr Xue] and [Ms Xue] were committed to cooperating with the transition. Ministry counsel acknowledged:

(a) [Mr Xue] and [Ms Xue] had supported the Ministry in all decisions made for [Chu]'s welfare.

(b) [Mr Xue] and [Ms Xue]'s legal challenge to the return was made in good faith because they were concerned the Court did not have sufficient evidence about the risks for [Chu] returning to his mother's care.

[96] The report included the following information and assessments:

(a) [Mrs Mei-Lien] and [Ms Lien] had expressed "some initial embarrassment" that the Ministry staff had travelled to [the SEAC] to

meet with them in the family home but after the purpose of the visit was explained, both women were welcoming.

(b) Since [Ms Zan]'s visit the previous December, [Mrs Mei-Lien] had moved and [Ms Lien] now lives with her mother and [her children] in a three-bedroom town house in a small settlement in [region 1].

(c) Both women work fulltime but the work hours and [Ms Lien]'s advice as to her salary had not been verified.[12]

(d) [Mrs Mei-Lien] and [Ms Lien] were worried about [Chu]'s caregivers visiting their home because they might talk to others in the community about the reason for their visit. If the reason was known there would be great shame on the family and the [children] may be bullied at school.

(e) [Ms Lien] was aware of the activities of a 3-4-year-old and the report writers further observed:

> [Ms Lien] exhibited some insight into the likely difference or difficulties she might encounter if he was to return to [the SEAC] including food, language and different style of living.

(f) There was an appropriate local pre-school and school for [Chu].

(g) The [Foundation] would try to support the family but its office was 5-6 hours' drive away.

(h) The [region 1] office of the Social Welfare Department had agreed to give ongoing support to the family for two years but there was no information about the nature of that support.

[97] The report identified some risks for [Chu] on return including:

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12 The report did not address the ability of [Ms Lien] to reduce her work hours to be more available for [Chu] in the period until he started school as planned.

(a) The Ministry would no longer have jurisdiction. This problem would however be ameliorated by the commitment of the Department of Social Welfare to assist in the transition and continue to update the Ministry and the New Zealand Family Court of their involvement with and progress of the family.

(b) [Chu] was not familiar with [the SEAC]'s customs, language, food and climate.

(c) While it is preferable a child learns a second language before the age of three, [Chu] would acquire language and other skills with the significant adult support proposed, especially the commitment of his mother and maternal grandmother.

Evidence of [Bob Delano]

[98] In his oral evidence [Mr Delano]:

(a) Justified his decision to support the return of [Chu] to [the SEAC] although he had not assessed the relationship between [Chu] and his caregivers, as all the evidence on file showed there were no "problematic concerns".

(b) Agreed that the long-period of no physical contact between [Chu] and his mother raised difficult issues for the Court. He maintained that the transition would nevertheless succeed because research on children changing care concludes that in most cases it takes 4-6 weeks to develop an attachment relationship with a stranger. The 12-week period in the transition plan in this case was therefore sufficient.

(c) Said a similar period would be required to re-establish the relationship between [Chu] and his father. [Mr Xing] was however in a poor financial position, worked long hours and lived in inadequate accommodation with his partner and young child in [region 2 deleted].

(d) There were too many risks to consider reintroduction of [Chu] to him during the transition period unless [Mr Xing] travelled to [region 1] and remained there for a significant period. [Mr Xing] would have to meet with [Chu] in the Department of Social Welfare office in [region 1] due to the antipathy [Mrs Mei-Lien] and the maternal family had to him. As [Mr Xing] could not afford the cost of travel or time off work and the Department of Social Welfare would not assist with his costs, [Mr Xing] had not been included in the transition plan.

(e) Described his role in the planning process as limited to preparing a plan which minimised distress for [Chu] in the transition. While he agreed the risks to [Chu] from the loss of his attachment relationships and his life in New Zealand if he returned to [the SEAC] were also highly relevant, analysis of these risks was not part of the Ministry brief to him. As with his January report, he was only required to address the areas in the brief.

(f) While effective communication among all those involved in [Chu]'s transition was essential, he was aware [Chu]'s mother had been negative and suspicious about the caregivers.

(g) Success of the transition could be assessed about two months into the three month period. If the transition was not proceeding positively at that stage then the reason(s) why would need to be determined. Whether intervention then occurred would be a matter for the Department of Social Welfare. He didn't know the Department's threshold for intervention.

(h) While it was never too late to transition [Chu] back to his family in [the SEAC], by the time of the September hearing [Chu] was at an age where if the transition did not occur within the next few months, the challenges for [Chu] adapting to the change would be more significant.

Evidence of [Alice Zan]

[99] The focus of cross-examination of [Ms Zan] was on the following parts of the plan:

(a) [Mrs Mei-Lien]'s use of physical discipline and the fact this parenting method is legal in [the SEAC]. [Ms Zan] did not believe [Chu] was at risk. [Chu]'s mother and grandmother used physical discipline sparingly with his [siblings] and were prepared to work with alternative methods of discipline.

(b) [Ms Lien]'s work hours were from 8.00am until 9.00pm. There was no evidence about whether she could change these hours to be available for [Chu] either in the first three months of the transition or afterwards as [Ms Lien] had promised. [Ms Zan] had not had time to check whether this information was now available.

(c) Support from the [Foundation] would be minimal because its office was so far away.

(d) She was confident support was available from the Department of Social Welfare. Details of the nature of the support and thresholds for ongoing supervision and intervention after a transition, were not however included in the plan. Other than noting that the [SEAC]'s social workers would become increasingly involved as the transition developed, there was no plan for what would happen if the transition was not working.

(e) [Ms Zan] was not aware of the financial support available for the maternal family.

(f) She relied on [Ms Lien]'s opinion that there was no longer any risk of retribution by the drug gang or money lenders.

(g) On the issue of risks for [Chu] if others become aware of his mother's drug conviction and imprisonment, [Ms Lien] was satisfied with the strategy she and [Mrs Mei-Lien] had agreed on. The strategy was to tell [Chu]'s siblings and fellow students that he couldn't return earlier because he was studying overseas. [Ms Zan] wasn't concerned that [Chu]'s life back in [the SEAC] would then be based on a lie.

[100] [Ms Zan] disputed [Mr Delano]'s evidence that the nature of the relationship between [Chu] and his caregivers and the effect on those relationships of [Chu] being removed from them needed to now be assessed by the psychologist. She was worried that the delay in completing such a report would make the transition more difficult to implement.

[101] Nor did [Ms Zan] accept that the consequences of the [SEAC]'s transition not working for [Chu] were worse than the consequences of him remaining in New Zealand and potentially losing contact with his [SEAC] family.

[102] She could not explain why Mr Goldsbury had not been invited to meetings about [Chu] either in 2017 or previously, as would usually occur. She had made recent decisions for [Chu] with the assistance of senior social workers in regional and national office.

[103] The Ministry had still not fully complied with the directions I made at the hearing in January.

Day 7 - 2 October 2017

Evidence of [Alice Zan]

[104] Notwithstanding the concerns [Ms Zan] had about use of physical discipline by [Chu]'s grandmother, she chose not to discuss the issue with [Mrs Mei-Lien] during the visit she and [Mr Delano] made to the maternal grandmother's home. She did not do so as she had raised the topic in a telephone discussion with [Mrs Mei-Lien] before [Ms Lien]'s release from prison.

[105] [Ms Zan] was confident that the transition in [the SEAC] would be successful, notwithstanding that no one other than [Chu]'s mother and grandmother knew why [Chu] had remained in New Zealand. If [Chu] struggled in the classroom in [the SEAC], the only information his pre-school teachers needed was that he had been cared for overseas and it was to be expected that he may be unsettled at times during the transition back into his mother's care.

[106] She nevertheless agreed that if others in the community found out why [Ms Lien] had remained in New Zealand, [Chu] would be rejected. She went further to say that the community rejection would be not only of [Chu] but also his mother, [siblings] and grandmother.

[107] [Ms Zan] had few concerns for [Chu] on return. Her concerns focused on the need for his mother to receive assistance in developing parenting skills and discipline techniques for [Chu] which did not include physical discipline.

Evidence of [Chiara Stanislaw]

[108] [Ms Stanislaw] was questioned about the steps taken by the Ministry to ensure [Chu] had appropriate contact with both his parents during their time in prison. She was aware that in mid-2016 [Ms Fields] had recommended contact between [Chu] and his mother increase but that increase did not occur for another six months.

[109] On the issue of why [Chu] was not placed in the mother and child unit in prison, [Ms Stanislaw] gave an explanation which had not been given previously. She said the issue was not progressed because Mr Goldsbury was concerned [Chu] was not eligible for the unit.

[110] It was suggested to her that the real reason [Chu] had not gone into the unit was the reluctance of the Ministry to fund the costs which would have been incurred for several years until [Ms Lien]'s release. [Ms Stanislaw]'s reply was equivocal and she emphasised that funding was not the issue because the enquiry with the prison was not pursued.

[111] [Ms Stanislaw] was shown email communications with the prison, produced earlier in evidence by Ministry witnesses, regarding enquiries with the prison in 2014. [Ms Stanislaw] then admitted Mr Goldsbury's view on [Chu]'s eligibility to enter the unit was not the reason why the Ministry had not tried to reunite mother and child in prison in late 2014. She said the Ministry chose not to do so as the social workers understood because [Chu] was not a resident that he did not meet the eligibility requirements.

[112] [Ms Stanislaw] was involved in discussions with [Mr Delano] on how best to approach this case from a psychological perspective. She did not recall [Mr Delano] ever talking to her about the importance to the decision about [Chu]'s attachments with his current caregivers. The Ministry was aware of the attachments he had formed. The plan had always been to return [Chu] to [the SEAC] and so [Chu]'s relationship with [Mr Xue] and [Ms Xue] had not been assessed. These relationships were not seen as important in weighing the issues arising from a return to [the SEAC].

[113] [Ms Stanislaw] had known since mid-2015 of the concerns about returning [Chu] to his mother when he had been with caregivers for so long. She could not explain why a plan filed more than a year later, in October 2016, proposed that [Chu] should simply be placed back in his mother's care and then deported with her. She had not seen this plan.

[114] [Ms Stanislaw] agreed that at the time of the January hearing, she supported the social worker's approach of deporting [Chu] with his mother, without any transition plan. By then, [Ms Lien] was having weekly contact with [Chu] in prison and in her view, he had developed a sufficiently close relationship with her.

Assessment of [Chu]'s relationships with his caregivers dated 31 October 2017

[115] [Mr Delano] completed a third report dated 31 October 2017 on the following brief:

(a) To assess the nature of the relationship between [Chu] and his family group in New Zealand including the [Rays], and caregivers, [Mr Xue] and [Ms Xue].

(b) To comment on the implications for [Chu] of those relationships in respect of the risks (if any) of transition back to the care of his mother and grandmother in [the SEAC].

[116] All four caregivers described [Chu] to [Mr Delano] as a child needing firm boundaries and consequences. [Mr Xue] and [Ms Xue] told the psychologist:

(a) [Chu] had become very unsettled from September 2017[13] when Skype contact with his parents was increased.

(b) There had been a recent incident where [Chu] had a tantrum at pre-school and hit a friend.

(c) He was withdrawn at times and his mind appeared to be elsewhere.

(d) [Chu] is sensitive and aware of any change in his routine and became particularly upset when [Ms Xue] was not at home in the morning.

(e) He became much more "clingy" with his caregivers at the time of the change in the Skype contact schedule. When contact was reduced again, his behaviour noticeably improved.

(f) [Chu] understood some Mandarin but could only say a very few phrases.

[117] [Mr Xue] told the psychologist that given his knowledge of [the SEAC], he was worried about the plan for return of [Chu] because:

(a) It appeared both parents owed money to "loan sharks" and had engaged in drug trafficking to repay the debt.[14] If so, there was a risk to [Chu]

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13 Teachers at [Chu]'s pre-school – [pre-school name deleted] – reported frequent anxiety in [Chu] on the days of his contact with his parents.

14 [Mr Xing] is alleged to owe money to loan sharks but the details of the debts, how they were incurred and the consequences for [Ms Lien] and or [Chu] from this indebtedness was not addressed in evidence.

as loan sharks often seek out wider family members to recover debts. [Mr Xue] had personal knowledge of this practice.

(b) If [Chu]'s parents were pursued for debts which they could not repay, there was a risk the loan sharks would engage in what is described as a "red packet" where families adopt out a child for money, or traffic the child to [country deleted].

(c) [Mr Xue] challenged previous evidence about the financial support available for [Ms Lien] given his (recent) knowledge of the very limited support available from the [SEAC]'s government.

[118] [Mr Delano] reported from his observations of [Chu]:

(a) [Chu]'s receptive language appeared to be more advanced than his expressive language.

(b) He had close relationships with Mr and Mrs [Ray] and [Mr Xue] and [Ms Xue]. His closest relationship was with [Mr Xue].

(c) The behaviours which concerned [Mr Xue] and [Ms Xue] were normal behaviours for a child of [Chu]'s age.

[119] As to the implications for [Chu] transitioning from his current caregivers to the care of his mother and grandmother, [Mr Delano] concluded:

(a) Typical of a developing child, [Chu] has been able to form multiple relationships and attachments with several significant adults during his brief life. He appeared to utilise each of his four attachment relationships to ensure his needs were met.

(b) While there appeared to be occasional disturbances in these relationships, such as when [Chu] was responding to stress, this was typical in the circumstances described and "not in excess of what is expected in secure relationships".

(c) As [Chu] had secure relationships with all four caregivers and positive relationships with his pre-school teachers and friends, the transition to the care of his mother and grandmother was likely to create some disruption for [Chu]. [Chu] may exhibit unsettled behaviour momentarily or until able to transfer to "a positive and secure relationship with [Ms Lien] or [Mrs Mei-Lien] and [he] starts sourcing them for continued comfort".

[120] Commenting on the research relevant to the proposed transition for [Chu], [Mr Delano] observed:

(a) [Chu] may experience feelings of confusion, sadness and fear but will do so only if he continually experiences increased stresses or disruption during the transition process.

(b) There may be some regression in [Chu]'s sleeping and eating patterns, difficulties in peer relationships and an increase in behaviours of concern in the medium term.

(c) If the transition is not handled appropriately, the risks for [Chu] in the longer term are significant. The risks include sustained trauma, attachment disruption and feelings of loss and potential abandonment.

(d) It was the consistency and cooperation among the adults which would assist [Chu] through this process and give him the ability to keep as many other parts of his world intact during the transition.

[121] [Mr Delano] concluded:

(a) [Chu] has the cognitive, social and other abilities to form appropriate relationships with [Ms Lien] and [Mrs Mei-Lien] (and [Mr Xing]).

(b) He is likely to have already picked up on the non-verbal behaviours and inadvertent cues from adults around him and on a return to [the SEAC] he would become more aware of change.

(c) Any changes to his routine need to therefore be gradual "taking into consideration his responses (whether positive or negative) to each step in the transition, with appropriate adjustments being made where required to meet his needs".

(d) If [Chu] did not return to [the SEAC] then weekly contact with [Ms Lien] and [Mr Xing] would be appropriate.

Days 8 & 9 - 20 and 21 November 2017

Evidence of [Bob Delano]

[122] [Mr Delano] was cross-examined on his 31 October 2017 report.

[123] [Mr Delano] had only become aware a few days before the November hearing date, that the option of [Ms Lien] (and possibly her children) returning to New Zealand for the transition was no longer possible.

[124] [Mr Delano] continued to support [Chu] returning to [the SEAC] and in his oral evidence added:

(a) He had no concerns about [Chu] current development.

(b) [Chu] had the cognitive, social and other abilities to form appropriate relationships with his mother and grandmother in [the SEAC].

(c) The 'scaffolding' available from the local psychologist whom [Mr Delano] met on his visit gave him confidence that [Ms Lien] would be supported in the short and medium term with [Chu]'s transition.

(d) He anticipated that the Department psychologist may initially be involved once a week but he had not confirmed this with the psychologist or social worker. He agreed there was no independent evidence of the extent to which social workers or psychologists in the Department office in [region 1] assist families generally or would assist

this family in particular. He relied on an assurance that "assistance" would be available.

(e) The essential professional support on which [Mr Delano] relied was with the psychologist within a therapeutic context to assist [Ms Lien] understand and develop further insight into the needs of [Chu]. Part of this process would be assisting her to understand [Chu]'s day to day routines during the first [years] of his life.

(f) [Mr Delano] expected the transition in [the SEAC] to proceed in the same manner as such a transition would proceed in New Zealand.

(g) He remained confident notwithstanding physical discipline had been a preferred discipline method for [Chu]'s siblings, that both [Chu]'s mother and grandmother would be persuaded to try alternatives with [Chu].

(h) [Chu]'s behaviour would be challenging and he may "act out" with significant defiance if he struggled with the transition. Dealing with this behaviour would be difficult for any parent.

(i) If [Chu] was unable to have his psychological, emotional, social and physical needs met by [Ms Lien] and/or [Mrs Mei-Lien] then longer term behavioural difficulties were likely.

[125] Several times during his evidence, [Mr Delano] emphasised how essential it was that [Ms Lien] had the parenting ability to manage [Chu]'s transition into her care.

[126] [Mr Delano] referred to research in support of his opinion that [Chu] would cope with the transition from secure attachment relationships into the care of his mother and grandmother. He acknowledged that most of the research was of children transitioning in care within a specific country and that even the inter country adoptions which are more akin to the situation for [Chu], occur within a specific structured legal framework.

[127] Notwithstanding that [Chu] will not have the language skills to express his needs or to understand his mother and grandmother's expectations, [Mr Delano] was confident that he would quickly develop relationships with [Ms Lien], [Mrs Mei-Lien] and his [siblings] because of his personality, temperament and social skills.

[128] [Mr Delano] agreed that [Ms Lien] had not been honest in giving contact details for family in [the SEAC] immediately after her arrest and this had resulted in a delay in enquiries being made about the prospect of [Chu] returning to wider family members in [the SEAC]. He also agreed that [Ms Lien]'s decision not to disclose her criminal offending to family members or the community, and her suggestion that any questions be answered with an explanation that [Chu] had been "studying" in New Zealand, was another example of her propensity to dishonesty. He did not however accept that he may have misjudged [Ms Lien]'s credibility or her suitability to parent [Chu].

[129] [Mr Delano]'s assessments of [Ms Lien] in New Zealand and [the SEAC] were made with the assistance of [Ms Zan] as interpreter and [Ms Zan] had accepted [Ms Lien]'s assessments of risk.

[130] [Mr Delano] agreed independent reports will be available about the effectiveness of the Department of Social Welfare and this material could have been made available to the Court.

[131] The fact [Mr Xue] believed interventions for children in [the SEAC] were minimal, did not persuade [Mr Delano] he should be cautious about the effectiveness of the "scaffolding" available to [Chu] from the Department of Social Welfare. He saw [Mr Xue]'s concerns as a personal perspective and not informed commentary.

[132] [Mr Delano] was unable to say with certainty what the first language of the Department psychologist was. He understood the psychologist was of [the SEAC] ethnicity and presumed that [the SEAC's language] would be his first language and Mandarin his second language.

[133] [Mr Delano] agreed that the extent to which [Ms Lien] had parented her other children prior to coming to New Zealand was not clear. However, he did not believe

a further assessment of the history of the relationship of [Ms Lien] and the children was an essential part of his overall assessment of competence and risk for [Chu] in his mother's care.

[134] Because of questions arising about [Ms Lien]'s commitment to [Chu]'s [siblings] when leaving [region 1] for periods in [region 2] with [Mr Xing], [Mr Delano] however agreed that he should have checked whether the [Chu's siblings'] school had any concerns about them.

[135] [Mr Delano] was familiar with reports from the teaching staff at the pre-school where [Chu] attended and the similar concerns held by [Mr Xue] and [Ms Xue]. He believed that in the current circumstances those close to [Chu] may have an anxiety which would be picked up by him. He was confident that he could successfully work with [Chu]'s caregivers to assist them in strategies to minimise the extent to which their anxiety about him leaving them was apparent to [Chu].

[136] The September report prepared by [Mr Delano] and [Ms Zan] was completed without the social worker or psychologist with whom they liaised in [the SEAC] meeting any of the maternal family. [Mr Delano] understood a meeting was planned a week after he and [Ms Zan] had left [the SEAC] (i.e. two months before the November hearing date). He had received no information about whether the meeting took place and if it did, whether there was any relevant material available to the Court from the meeting. He expected that once the Court agreed [Chu] could return to [the SEAC], this information exchange required for a successful transition would commence.

Evidence of [Dylan Xue]

[137] [Mr Xue] described [Chu] as a talkative child who questions everything he and [Ms Xue] do.

[138] [Mr Xue] said he knew about the social welfare system in [the SEAC] because although he has been away from [the SEAC] for [over 20] years, he returns regularly and his family still live in [the SEAC].

[139] He had been unsuccessful in the enquiries he had made about the current effectiveness of the [SEAC] social welfare system. He however knew from family and friends that the minimal social services available to poor families at the time he left [the SEAC] two decades ago, had not significantly changed. The experience of his nephew with the social welfare system only four or five years ago confirmed this fact.

[140] [Mr Xue] responded to the criticisms the Ministry had made of his and [Ms Xue]'s commitment to supporting [Chu]'s return to [the SEAC] with surprise, repeating on several occasions their acceptance of the foster parent role.

[141] The only reason [Mr Xue] and [Ms Xue] had taken steps in Court to challenge the Ministry plan was because of their serious concerns about the risks to [Chu] of returning to [the SEAC]. If the Court directs [Chu] is to return, [Mr Xue] believes it would be too distressing for [Chu] to have Skype contact with him and [Ms Xue] from [the SEAC].

[142] [Mr Xue] believed it was quite likely the transition will fail at an early stage because of the unwillingness and/or inability of [Ms Lien] and [Mrs Mei-Lien] to cooperate with him and the social worker. There is a chance the transition will not even begin if [Chu]'s mother insists on taking him with her at the airport, or within a brief time of visits to the maternal family home beginning.

[143] [Mr Xue] described several incidents of recent oppositional behaviour from [Chu]. One occurred at his pre-school and another when [Mr Xue] was visiting a local mall with [Chu]. On the second occasion [Chu] had a tantrum as he was being placed in his car seat and then tried to hit [Mr Xue]. [Mr Xue] had no doubt that if [Chu] had behaved that way in [the SEAC], he would be beaten or hit by his grandmother. This had been his experience growing up in [the SEAC] and he knew from his regular return visits that physical discipline remained a part of day to day parenting.

[144] [Mr Xue] was questioned on the evidence that [Mrs Mei-Lien] may have described [Chu] as a *Huài zhŏng* child. He had no doubt that [Mrs Mei-Lien] had used the phrase with the [SEAC]'s social worker, as these words could not be mistaken for a comment about [Chu] having bad luck. The phrase was distinctive and unambiguous

and based on a belief mostly limited to poorly educated rural Chinese in China and [the SEAC] like [Mrs Mei-Lien].

[145] [Mrs Mei-Lien] may hold the belief because she so strongly disapproves of [Mr Xing] from whom [Chu] will have received "bad genes", or "bad seeds".[15] [Mr Xue] was particularly worried about the effect of [Mrs Mei-Lien] placing such a label on [Chu] given it was proposed she would have a significant role in his day to day care.

[146] In [the SEAC] and Chinese culture, it is expected that a grandparent will if necessary raise a grandchild no matter what the circumstances. [Mrs Mei-Lien]'s refusal to immediately accept [Chu] back into her care was a significant concern as was the lack of evidence of ongoing support from any wider family or the local community. The refusal was consistent with a belief in the ["bad seed"] superstition.

[147] He described [Chu's medical conditions – details deleted] and his concern that the medication required to treat these problems will not be easily available to [Ms Lien] in [region 1].

Evidence of [Emma Xue]

[148] [Ms Xue] left [the SEAC] [over 15] years ago and has been in New Zealand since [year deleted]. She returns to [the SEAC] with [Mr Xue] for [duration deleted] every year because her family still live there.

[149] [Ms Xue] shared the same concerns as [Mr Xue] for [Chu] returning to [the SEAC].

[150] She believed it was important that the Court understood why she and [Mr Xue] were worried about [Chu] returning to [the SEAC]. It was not because they wanted to continue parenting [Chu] but because the risks for him returning were too great. She and [Mr Xue] supported regular contact by Skype with [Ms Lien] and [Mr Xing],

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[15] [Mr Xue] was sure that if they worked with such families, the [SEAC] social worker and psychologist would be aware of such superstitions.

should [Chu] remain in New Zealand. They were also prepared to facilitate face to face contact between [Chu] and his parents in [the SEAC], subject to [Chu]'s safety being addressed.

[151] [Ms Xue] confirmed that she and [Mr Xue] currently live in a three-bedroom home where [Chu] has his own bedroom and the third bedroom is used for [personal details deleted].

THE LAW

[152] [Chu] is in the custody of the Chief Executive under s 101 of the Act.

[153] In all decisions made under the Act the Court must consider the Act's objectives and principles, particularly the paramountcy principle in section 6:

> **6 Welfare and interests of child or young person paramount**
>
> In all matters relating to the administration or application of this Act (other than Parts 4 and 5 and sections 351 to 360), the welfare and interests of the child or young person shall be the first and paramount consideration, having regard to the principles set out in sections 5 and 13.

[154] The principles to which the Court must have regard in determining the child's welfare and interests are set out in section 13.

> **13 Principles**
>
> (1) Every court or person exercising powers conferred by or under this Part, Part 3 or 3A, or sections 341 to 350, must adopt, as the first and paramount consideration, the welfare and interests of the relevant child or young person (as required by section 6).
>
> (2) In determining the welfare and interests of a child or young person, the court or person must be guided by the principle that children and young people must be protected from harm and have their rights upheld, and also the principles in section 5 as well as the following principles:
>
> (a) [Repealed]
>
> (b) the principle that the primary role in caring for and protecting a child or young person lies with the child's or young person's family, whanau, hapu, iwi, and family group, and that accordingly—

(i) a child's or young person's family, whanau, hapu, iwi, and family group should be supported, assisted, and protected as much as possible; and

(ii) intervention into family life should be the minimum necessary to ensure a child's or young person's safety and protection:

(c) the principle that it is desirable that a child or young person live in association with his or her family, whanau, hapu, iwi, and family group, and that his or her education, training, or employment be allowed to continue without interruption or disturbance:

(d) where a child or young person is considered to be in need of care or protection, the principle that, wherever practicable, the necessary assistance and support should be provided to enable the child or young person to be cared for and protected within his or her own family, whanau, hapu, iwi, and family group:

(e) the principle that a child or young person should be removed from his or her family, whanau, hapu, iwi, and family group only if there is a serious risk of harm to the child or young person:

(f) where a child or young person is removed from his or her family, whanau, hapu, iwi, and family group, the principles that,—

(i) wherever practicable, the child or young person should be returned to, and protected from harm within, that family, whanau, hapu, iwi, and family group; and

(ii) where the child or young person cannot immediately be returned to, and protected from harm within, his or her family, whanau, hapu, iwi, and family group, until the child or young person can be so returned and protected he or she should, wherever practicable, live in an appropriate family-like setting—

(A) that, where appropriate, is in the same locality as that in which the child or young person was living; and

(B) in which the child's or young person's links with his or her family, whanau, hapu, iwi, and family group are maintained and strengthened; and

(iii) where the child or young person cannot be returned to, and protected from harm within, his or her family, whanau, hapu, iwi, and family group, the child or young person should live in a new family group, or (in the case of a young person) in an appropriate family-like setting, in which he or she can develop a sense of belonging, and in which his or her sense of continuity and his or her personal and cultural identity are maintained:

(g) where a child or young person cannot remain with, or be returned to, his or her family, whanau, hapu, iwi, and family group, the principle that, in determining the person in whose care the child or young person should be placed, priority should, where practicable, be given to a

person—

(i) who is a member of the child's or young person's hapu or iwi (with preference being given to hapu members), or, if that is not possible, who has the same tribal, racial, ethnic, or cultural background as the child or young person; and

(ii) who lives in the same locality as the child or young person:

(h) where a child or young person cannot remain with, or be returned to, his or her family, whanau, hapu, iwi, and family group, the principle that the child or young person should be given an opportunity to develop a significant psychological attachment to the person in whose care the child or young person is placed:

(i) where a child is considered to be in need of care or protection on the ground specified in section 14(1)(e), the principle set out in section 208(g).

[155] The duties of the Chief Executive are set out in s 7(1):

7 Duties of chief executive

(1) It is the duty of the chief executive to take such positive and prompt action and steps as will in the chief executive's opinion best ensure-

(a) That the objects of the Act are attained; and

(b) That those objects are attained in a manner that is consistent with the principles set out in sections 5 and 6 of this Act.

[156] The Court has power under s 101 to impose terms and conditions on a custody order.[16] In *Chief Executive of the Ministry of Social Development v DR* the High Court held that the Court has jurisdiction to impose a condition as to placement of a child to ensure the right outcome for the child in the child's welfare and interests.[17]

[157] Gilbert J was addressing an appeal by the Ministry from a Family Court decision that the Chief Executive's power of placement of a child under a s 101 custody order, was limited to local placements without the consent of the child's guardian. The Ministry had moved the children in that case from [the Bay of Plenty] to live with a maternal grandmother in [another city]. The Family Court Judge had

16 *Chief Executive of the Ministry of Social Development v DR* [2016] NZHC 24.
17 At [60] – [65].

granted an application to vary the order and imposed a condition that the children were not to leave the Bay of Plenty area.

[158] The High Court held that the Ministry's power of placement under s 101 was not geographically limited and while the Family Court Judge had power to impose conditions as to placement under s 101(2), his decision to restrict the geographical area of the placement in that case was wrong.

[159] It is the case for the Chief Executive that [Chu] can be transitioned into his mother's care in [the SEAC] under the existing s 101 custody order amended to approve a placement out of New Zealand (and s 110(2)(b) additional guardianship order) provided the Court finds that the plan filed in support of that outcome complies with the Act.

[160] The care and protection implications for [Chu] of leaving New Zealand and the Family Court jurisdiction are such that the Court cannot continue the current orders with such a condition, as once [Chu] leaves the orders have no legal effect. The Ministry is in practice seeking to discharge the custody and guardianship orders so that [Chu] can leave New Zealand. In *Chief Executive of Ministry of Social Development v CL* Judge Coyle held:[18]

> As a matter of public policy, therefore, it is my view that it would be entirely wrong for this Court to make orders which are unenforceable and made in relation to children who are now domiciled in a foreign jurisdiction.

[161] It is necessary to treat the application as an application to discharge the orders. In *MEN v SBN* Judge McKenzie was deciding whether orders should be discharged in similar circumstances. Her Honour adopted a three-stage test which she explained in the following way:[19]

> [17] However the test may be articulated, the common thread, unsurprisingly of decisions concerning whether or not to discharge orders under the CYP & F Act, is an analysis of whether care and protection concerns continue to exist. I consider that what needs to be answered is whether care and protection concerns remain, so that the child's welfare and best interests require continuation of the custody order. The focus must necessarily be on the ongoing presence or absence

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18 *MSD v C L* FC Oamaru FAM-2005-045-138, 25 November 2009 at [7]; *MSD v C L* FC Dunedin FAM-2002-012-164, 21 March 2011 at [7].

19 *MEN v SBN* FC Rotorua FAM-2001-019-230, 22 June 2009 at [17]-[19].

> of care and protection concerns, given that the gateway for making of disposition orders, such as a custody order under the CYP & F legislation, is dependent on findings that a child is in need of care and protection of one of the grounds set out in s 14. The corollary therefore must be that if it is likely that a child is no longer in need of care and protection, then the foundation for orders under the legislation crumbles.
>
> [18] The test, as I interpret it, seems to have three tiers:
>
> (a) Consider the original care and protection concerns;
>
> (b) Consider a child's current situation, including the presence or absence of care and protection concerns.
>
> (c) An assessment of the consequences for the child if protective orders are no longer in place.
>
> [19] The question of how the discretion ought to be exercised cannot be undertaken on a formulate basis. That is, that the analysis needs to be undertaken relating to a child's unique and individual needs and situation, rather than being measured against ideals, which is how, on one analysis, the principles set out in ss 5 and 13 could be seen.

[162] In reaching its decision, the Court is obliged to consider [Chu]'s welfare and interests in the context of his relationships with all members of his "family group". For [Chu], these relationships include his biological family in [the SEAC], particularly his parents, and his caregivers in New Zealand.[20]

[163] In *B v Department of Social Welfare* Tipping J made the following observation about the Act:[21]

> The Act reflects the way in which the New Zealand Parliament has given effect to UNCROC. We must not be thought to be downplaying the importance which biological ties have in the principles underlying this area of the law. Ordinarily the interests and welfare of children are best served by their being in the custody of their biological parents, or at least one of them; that is to do no more than state the obvious and to recognise the fundamental role of the biological family in our society.

[164] This case is also authority for the proposition that a child's welfare and interests may require a child not to be in the care of the child's parents.

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20 Oranga Tamariki Act 1989, s 2.

21 *B v Department of Social Welfare* (1998) 16 FRNZ 522 (CA) at [525]. The case was under the Children, Young Persons, and Their Families Act 1989 but the relevant provisions were the same.

[165] In *T v Chief Executive of the Department of Child Youth and Family Services* Gendall J stated:[22]

> Blood ties are important and may end up being decisive, but there will be cases where, because of particular circumstances, the wishes of a natural parent to have custody of his or her child will be subordinated to others because the child's welfare so requires it.

[166] When assessing the interests of the child, the starting point will often be a consideration of the child's biological ties. However, as observed by Asher J in *A v Ministry of Social Development* it is important to consider the importance of attachments that child has formed with his caregivers.[23]

> … psychological attachments are also significant. They must both be weighed in considering the interests of the child. Neither is entitled to any presumptive superiority when it comes to assessing the welfare of the child.

[167] The following principles in s 5 are particularly relevant to this case:

> (d) The principle that decisions affecting a child or young person should, wherever practicable, be made and implemented within a time-frame appropriate to the child's or young person's sense of time.
>
> (g) The principle that decisions affecting a child or young person should be made by adopting a holistic approach that takes into consideration, without limitation, the child's or young person's age, identity, cultural connections, education and health.

[168] For any child, but particularly a young child like [Chu], the former principle requires the Chief Executive to make and implement decisions consistent with the age and stage of development of the child in his particular circumstances. By use of the term "holistic", the latter principle requires a broad perspective to be taken.

[169] As with all decisions for children in State care, the plan and goals require constant and rigorous review. In his closing submissions, Dr Cooke refers to the following paragraphs of his paper, *Responsibility of Chief Executive in removing children – concept of responsibility* which he submits are relevant to [Chu]:[24]

> [66] The "responsibility" of the Chief Executive is multi-faceted and extends beyond any strict legal responsibility derived from custodial status, but with that status being the fundamental starting point. That notion of "responsibility" in this context reflects the statutory paradigm that in turn reflects social and political

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22 *T v Chief Executive of the Department of Child Youth and Family Services* [2007] NZFLR 143 (HC) at [27].

23 *A v Ministry of Social Development* [2009] NZFLR 32 (HC) at [32].

24 Dr Allan Cooke "Responsibility of Chief Executive in removing children – concept of responsibility" (2015) 8 NZLFJ 101.

> mores. In certain instances State intervention in the life of a child and his or her family occurs and in some further instances, the child is removed from his or her parents and in further instances, birth familial relationship severed. Where this occurs it is often the case that me familial relationships are created or bought about for the child.
>
> [71] It is the duty of the Chief Executive to achieve good outcomes – and avoid bad ones – within the framework of the law and, within that, of policy supported by relevant literature. The responsibility which flows from the position of Chief Executive captures the need to undertake the statutory role in a properly "responsible" way: to comply with prescribed statutory duties; to exercise statutory powers and discretions in such a way as to effect good outcomes; and to be held legally and morally liable for poor outcomes and/or any breaches of statutory duties.

[170] New Zealand ratified the United Nations Convention on the Rights of the Child on 13 March 1993 ("the Convention"). The Court must consider the international obligations arising from the Convention in interpreting the Act. The Chief Executive must have regard to these obligations in exercise of her statutory obligations to [Chu].

[171] It is necessary in applying the Convention not to apply a particular article in isolation as, other than the principle in article 3 that the best interests of the child must be a primary consideration, no one principle is more important than another.

[172] The right of a child to have his voice heard and participate in proceedings is not as relevant for [Chu] given his young age, but the following Articles are particularly relevant to the Court's decision:

> Article 3 - confirms that in all actions concerning children, the best interests of the child must be a primary consideration.
>
> Article 8 - recognises the need for a child to be able to maintain relationships with family and preserve both "identity" and "family relations".
>
> Article 9.1 - recognises that children need to sometimes be removed from families by the State, but such actions must be in accordance with the law and necessary for the interests of the child.
>
> Article 19.1 - creates an obligation to protect children from abuse and take protective measures, including the establishment of social programmes to provide necessary supports for the child and those providing care.

> Article 20 - acknowledges children may be permanently removed from their parents and confirms the duty and responsibility the State has towards such children. It emphasises that when a child is removed, special consideration is to be paid to the desirability of continuity and upbringing and to the child's ethnic and cultural background, and where removal has occurred, children are entitled to special protection and assistance from the State.

[173] Any requirement of this Court that [Chu] not be removed from New Zealand is not binding on the Minister of Immigration. For [Chu] to remain in New Zealand, an application is required to the Minister under the Immigration Act 2009 for exercise of his discretion to grant a visa on humanitarian grounds. In his consideration of the application, the Minister is obliged to take the obligations under the Convention into account.[25]

ANALYSIS

[174] [Chu] was [under 12 months] old when he was placed in the care of the Ministry. He was a vulnerable child because of the unique nature of his situation. It should have been immediately apparent to the Ministry that unless within a brief period, he could be safely returned to family members in [the SEAC], the planning for his care would need to be made with advice from a child psychologist and require regular review.

[175] The obligation of the State to protect its vulnerable children has been part of the common law for centuries and is reflected in the role of the Ministry under the Act. [Chu] must be treated as any other child subject to orders under the Act. The consequences of a decision that [Chu] remain in New Zealand under the current orders when he is living here in breach of the Immigration Act is a matter for the Minister of Immigration and not the Family Court.

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[25] *Tavita v Minister of Immigration* [1994] 2 NZLR 257; (1993) 11 FRNZ 508; 1 HRNZ 30; [1994] NZFLR 97 (CA). See also *Ye v Minister of Immigration* [2009] NZSC 76; [2010] 1 NZLR 104.

[176] This case should never have required nine days of hearing over an eleven month period. Responsibility for the length of hearing lies with the Ministry. It is acknowledged by their counsel:[26]

> [23] … actions taken by the Ministry in 2014-2016 were not well supported by a quality social worker assessment, did not sufficiently take into account the cultural context of [Chu] and his family, did not provide the opportunity for [Chu] to have quality engagement with either parent and lacked the necessary rigour in regard to enquiries made on [Chu]'s behalf to Immigration New Zealand, wider family, the [SEAC]'s officials and social services.
>
> [28] … these missed earlier opportunities have contributed to making the current task of transitioning [Chu] back to his mother's care more difficult...

[177] It remains the position of the Ministry that notwithstanding the failure in social work practice, any care and protection issues for [Chu] – physically or psychologically – from returning to the care of his mother in [the SEAC], have been addressed and it is in his welfare and interests to return.

[178] I do not agree that the failure in social work practice was confined to the 2014 – 2016 period. The failures continued until the end of the hearing and included:

(a) Inadequate analysis of the risks for [Chu] of returning to [the SEAC].

(b) The failure to properly consider whether continued care by his caregivers may be in his welfare and interests. When in 2014, it was established that no family member was prepared to care for [Chu], it became clear that by the time either of his parents were paroled, [Chu] would have formed important relationships with his caregivers after being in foster care for nearly three years.

(c) Managing the file throughout the period on the presumption that [Chu] was returning to [the SEAC], notwithstanding substantial evidence justifying a full review of this plan.[27]

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26 Closing submissions of counsel for the Chief Executive dated 15 November 2017.

27 The plan until mid-2016 was in fact that both parents would return to [the SEAC] with [Chu]. When it became apparent that [Ms Lien] had changed her mind about reconciling with [Mr Xing] on release from prison, the only parent the Ministry considered for care of [Chu] was his mother.

[179] Deficiencies in the preparation and implementation of plans began after [Chu] was uplifted from his parents in [month deleted] 2014 and include:

(a) The Ministry failed to ensure that [Chu] maintained frequent and quality contact with both his parents immediately after he was removed from their care. The Ministry has never explained why it was more than three months before [Chu] saw either of his parents.

(b) The Court will never know whether [Chu]'s grandmother would have been prepared to take [Chu] in 2014 had she known that by failing to do so there was a likelihood that he would never be able to return to [the SEAC] due to the importance of the relationships he had formed with his caregivers during the three years his parents were in prison.

(c) There should have been a review of the plan following the failure to place [Chu] in the mother and child unit at the [location 1] Women's Corrections Facility in 2014. I have not received an adequate explanation for the failure to place [Chu] in the unit. Nor is there evidence of adequate or any consideration of the consequences for [Chu] of not being able to live with his mother when she would not be eligible for parole for nearly three years.

(d) When the psychologist recommended that contact between [Chu] and his mother in prison increase, it took five months to occur and then only by a minimal amount, to two hours fortnightly with each parent. There were major implications for the ability of [Chu] to maintain and/or develop his relationship with his mother without her son in her care in prison. Yet for 2 ½ years [Chu] only had a brief monthly visit with either parent.

(e) The implications for [Chu]'s care and protection were minimised by [Mr Delano] yet he accepted [Ms Lien] needed parenting skills of the highest degree to care for [Chu]. There were concerns identified in the Tuituia Report, and from observations of the social worker and the

psychologist, of [Ms Lien]'s difficulty in developing a secure relationship with [Chu].

(f) It appears there was no discussion with [Mr Xing] about the early concerns held about [Ms Lien]'s parenting ability. Yet [Mr Xing] claimed that he was the primary parent for the first ten weeks of [Chu]'s life. This claim is supported by the contrast in the early contact sessions [Chu] had with his mother compared to those with his father. While [Ms Lien] continued to struggle to establish a secure relationship with [Chu], his relationship with [Mr Xing] was positive from the beginning. At the time of the first visit, [Chu] had not seen his father for nearly five months.

(g) [Mr Delano]'s only contact with [Ms Lien] was in prison. From his observation of [Ms Lien] and [Chu] in the limited setting of the prison environment, [Mr Delano] concluded [Ms Lien] had the skills to parent [Chu] on a fulltime basis. [Ms Lien] struggled to understand the parenting programme in which she engaged while in prison.

(h) [Mr Delano] did not undertake an assessment of [Ms Lien]'s parenting of her [other children].

(i) The nature of the relationship [Chu] has developed with his current and previous caregivers was not considered in the plans. The Ministry was obliged to balance these relationships with those [Chu] had with his parents because [Mr Xue] and [Ms Xue] are part of his "family group".

(j) In several documents produced in evidence last year, the Ministry social worker was critical of [Mr Xue] and [Ms Xue] and their commitment to support [Chu]'s transition from their care to the care of [Ms Lien]. [Ms Zan] even suggested to [Ms Lien] that the caregivers wanted to adopt [Chu].[28]

[28] This statement to [Ms Lien] understandably made her suspicious of the caregivers.

[180] The current care and protection risks for [Chu] have not been adequately addressed as:

(a) There is no evidence of the outcome of enquiries with Interpol on the risk of retribution from the drug gang. Nor was the Department of Social Welfare in [region 1] asked to comment on this issue. [Mr Delano]'s belief that as [Ms Lien] and [Mr Xing] are now separated there will be minimal or no risk, is not supported by any evidence other than [Ms Lien]'s belief which cannot be relied on.

(b) The Ministry was concerned about [Mrs Mei-Lien] saying [Chu] was a *Huài zhŏng* child as [Mr Boyd] raised the concern with [Mr Xue] and [Ms Xue] in 2016. I accept the evidence of [Mr Xue] that [Mrs Mei-Lien] must have used the phrase, as the words are distinctive and could not be confused with a comment about [Chu] having "bad luck" or "ill luck".[29] [Mr Xue] was not challenged on this evidence or his description of the extremely serious care and protection risks arising for [Chu] as a *Huài zhŏng* child living in his grandmother's home.

(c) Rather than properly investigating this risk, [Ms Zan] denied the comment was made although she was not a party to the conversation. I reject that contention as:

    (a) The Ministry social worker who had the phone call with [Mrs Mei-Lien] believed she had used the phrase to describe [Chu];

    (b) [Mr Xing]'s reaction when told by [Mr Boyd] that [Mrs Mei-Lien] had said the words was alarming. [Mr Xing] knows [Ms Lien]'s mother and his response showed he had no doubt [Mrs Mei-Lien] could believe in such a superstition;

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[29] Exactly what was said in the telephone conversation may have been clarified by the file note of the call on the Ministry file but this was not produced. Evidence of the likelihood of [Mrs Mei-Lien] holding the belief, and the degree of risk if she did, may have been available from the Department of Social Welfare but was not requested.

(c) [Mrs Mei-Lien] justified her denial of using the phrase in the telephone conversation, by suggesting the meeting with the [SEAC] social worker had not taken place because [Mrs Mei-Lien] does not speak [language deleted]. [Ms Zan] accepted this explanation, suggesting [Mrs Lien] could easily have confused this visit with the visit from the [Foundation].

(d) [Ms Zan] avoided raising this and other contentious issues with [Mrs Mei-Lien]. Such discussions should have occurred because [Mrs Mei-Lien] was to be a caregiver for [Chu]. Another example is [Ms Zan]'s failure to raise [Mrs Mei-Lien]'s use of physical discipline in person with her when she and [Mr Delano] visited [Mrs Mei-Lien]'s home last September.

(e) [Ms Zan] uncritically accepted the explanation [Ms Lien] and [Mrs Mei-Lien] planned to give to others about [Chu]'s absence from [the SEAC] for nearly four years. It is absurd to suggest other family members, school staff and neighbours would believe that [Chu] was "studying" overseas during this period. It is also highly unlikely that the real reason for [Ms Lien]'s absence would not become known very soon after [Chu] returned.

(f) [Ms Zan] had no doubt that if others became aware [Ms Lien] had been imprisoned for serious criminal offending in New Zealand not only [Chu] but all [Ms Lien]'s family would be rejected by the community.

(g) If [Chu] is rejected by his family, he will be placed in an orphanage and potentially made available for adoption by strangers.

(h) The risks for [Chu] of rejection by his family given the consequences for him were not adequately assessed by the Ministry.

[181] In his oral evidence [Mr Delano] acknowledged the psychological risks for [Chu] if he returned to [the SEAC]. He conceded any inadequacies in his report and

the adverse implications for [Chu] of the Ministry's poor social work practice on this file.

[182] The difficulty I have with his evidence, however, is that throughout the hearing [Mr Delano] saw his role as limited to assisting the Ministry in development of an optimum transition plan for [Chu]'s return to [the SEAC]. He did not see the role as giving independent expert psychological advice on the merits of the plan itself.

[183] [Mr Delano] should not have accepted the limited brief the Ministry gave him for the January report. [Mr Delano] provided a report which suggested [Chu]'s transition to his mother's care should occur over several weeks. This was not possible because [Ms Lien] was due to be deported [shortly after] the report being completed (he had only begun weekly contact with his mother the month prior to the report's completion).

[184] The Ministry was in effect inviting the Court to ignore the report's recommendations for the transition, as the plan for the Court last January was for an immediate reunification. [Mr Delano] did not know that his recommendations could not be followed because [Ms Lien] was to be immediately deported and he did not appear to be familiar with the file at this stage.

[185] In his evidence at the November hearing, [Mr Delano] again sought to justify his failure to adequately balance the risks and interests to [Chu] of either returning to [the SEAC] or remaining in New Zealand. He continued to see his brief as achieving an optimal transition, rather than assessing the merits of [Chu] returning to the care of his mother compared to him remaining with [Mr Xue] and [Ms Xue].[30]

[186] It is my view that [Mr Delano]'s obligations to [Chu] as a clinical psychologist required him to seek an amended brief to address all the options for [Chu]'s care, placing the welfare and interests of the child first rather than proceeding on a presumption of return.

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30 The psychologist did however say that should that transition not happen within a few months of the November hearing it would be much more difficult to safely achieve.

[187] I do not agree with [Mr Delano] that because [Chu] has a secure attachment with his caregivers and that he otherwise presents as a normal [under 5]-year-old child, [Chu] has the resilience to transition into the care of his mother as proposed. The following risks have not been adequately addressed:

(a) The research provided by [Mr Delano] about children transitioning to a different culture and language was not based on that transition being from educated caregivers with good parenting skills to a mother and grandmother with little or no education or knowledge of the life [Chu] had experienced in New Zealand.

(b) It was clear from [Ms Lien]'s work hours that [Chu] would spend most of his time in the care of his grandmother during the working week. Yet there was little focus on [Mrs Mei-Lien]'s parenting skills and limited assessment of [Ms Lien]'s skills.

(c) There is a significant likelihood that [Mrs Mei-Lien] would resort to physical discipline of [Chu] if he "acted out" because of his distress. It was not pointed out to [Mrs Mei-Lien] that physical discipline is neither legal in New Zealand nor a method of discipline used by his caregivers. As physical discipline is legal in [the SEAC] it is hard to see [Mrs Mei-Lien] changing her approach or learning other discipline methods.

[188] The Ministry identified significant risks for [Chu], especially early in the case when [Mr Boyd] was the social worker, including:

(a) The potential of retribution against [Chu]'s parents from the drug gang based on evidence that [Mr Xing] was in debt and that money lenders were pursuing him. It is a logical step to conclude that this may have been why the parties agreed to be drug couriers.

(b) I accept the evidence of [Mr Xue] that such "creditors" are ruthless in pursuit of a debt. This may explain why [Ms Lien] did not think it was safe for [Chu] to return to [the SEAC] with her last January. With good social work practice, the issue would have been addressed separately

with [Ms Lien] and [Mr Xing] before any decision was made that [Chu] should leave New Zealand.

(c) In his first report [Mr Boyd] recorded his concern that the Ministry had not been able to contact colleagues in the Department of Social Welfare. It was accepted by the Ministry early in the case that [the SEAC] does not have the comprehensive social welfare structure in place found in New Zealand and other more affluent countries. It was then surprising that both [Ms Zan] and [Mr Delano] were so confident of the comprehensive support available to [Chu] and his mother and grandmother following a return to [the SEAC].

(d) A letter was produced from the Department of Social Welfare confirming support would be available to the family for two years but no details of the nature of support were provided. [Mr Delano] and [Ms Zan] do not appear to have discussed the current transition plan to any extent with the South East Asian country's social worker and psychologist. Any assistance will be given in accordance with the practice of the Department of Social Welfare and subject to the resources it has available to it. The Court has no evidence of these thresholds or funding.

(e) It was only at the conclusion of [Mr Delano]'s evidence I became aware that while the social worker and psychologist had assisted [Ms Zan] and him on their visit, they were not consulted on the details of the plan and had not met [Mrs Mei-Lien] or [Ms Lien].

(f) The plan depends upon [Ms Zan] and [Mrs Mei-Lien] cooperating with the local social worker and psychologist. Co-operation includes allowing these professionals and [Mr Xue] or [Ms Xue], to come to their home and to be available and committed to visiting the local Department office. Furthermore, [Ms Lien] is working long hours during the working week and even if she is willing to do so, she may not be able to easily meet with the social worker or psychologist to receive assistance with her parenting of [Chu].

[189] [Mr Delano] relied on [Ms Zan]'s assessment of risks and [Ms Zan] acted as interpreter for [Mr Delano]'s meetings with both [Ms Lien] and [Mrs Mei-Lien]. I have found that [Ms Zan] has minimised and ignored significant risks for [Chu]. She has continued to hold the view that a transition will be successful, in the face of evidence to the contrary. The Court cannot rely on her evidence that there are no care and protection risks for [Chu] in his mother's care or her assessments of [Mrs Mei-Lien] and [Ms Lien] as caregivers of [Chu].

[190] The evidence of [Ms Stanislaw] did not assist me as she had the same mindset as [Ms Zan] in the way she managed this case as team leader. I cannot imagine the concerns for [Chu] in this case would have been ignored or minimised – as they have been for [Chu] – if all parties lived in New Zealand. [Ms Stanislaw] was obliged to fully and frankly explain to the Court exactly what steps the Ministry took with Corrections but she did not do so.

[191] I adopt the test in *MEN v SBN* in my determination.[31]

The original care and protection concerns for [Chu]

[192] The care and protection concerns for [Chu] when he was uplifted from his parents were:

(a) At the age of [under 12 months] he was separated from both his parents.

(b) His parents had committed a serious criminal offence which raised questions about their ability to care for [Chu] after their release from prison.

(c) Prolonged separation of [Chu] from meaningful contact with his parents due to the length of their sentence would affect his relationship with them.

(d) It was not known whether there were family members in [the SEAC] in whose care [Chu] could safely be placed until his parents were released from prison.

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31 *MEN v SBN*, above n 19, at [17].

[193] The following further care and protection risks became apparent:

(a) The nature and extent of risk of retribution to either or both of [Chu]'s parents or [Chu] from the drug gang which engaged [Mr Xing] and [Ms Lien] as drug couriers, remained unknown.

(b) [Chu] could not be returned to [the SEAC] before release of his parents from prison because no member of either extended family was prepared to care for him. If he was returned to [the SEAC], he would be placed in a State orphanage.

(c) The reasons [Chu]'s maternal grandmother gave for not being prepared to take [Chu] raised questions about [Chu]'s physical and psychological safety should he live with her at any time in the future.

(d) Questions were raised in the Tuituia report – and from observations of other social workers – about the quality of relationship between [Chu] and his mother.

(e) [Ms Lien]'s failure to provide details of family members in [the SEAC] for inquiries to be made about [Chu]'s possible return to family in [the SEAC].

(f) The inability to engage with the Department of Social Welfare or obtain information from Interpol or [the SEAC]'s police about the risk of retribution.

(g) The increasingly close relationships [Chu] was developing with his caregivers and the effect on him of these relationships being severed if he was returned to [the SEAC].

[Chu]'s current situation including the presence or absence of care and protection concerns

[194] There are no care and protection concerns for [Chu] living with [Mr Xue] and [Ms Xue].

An assessment of the consequences for the child if protective orders are no longer in place

[195] Care and protection concerns remain for [Chu] if he returns to [the SEAC] in accordance with the current plan:

(a) The risks for [Chu] of drug gang retribution have not been assessed.

(b) The likelihood that the three-month transition plan may not be able to be implemented, and if it is not, [Chu] may:

(a) Be placed in his mother's home before he is ready for that transition; or

(b) Placed in an orphanage because the Department of Social Welfare determines the care and protection risks for [Chu] remaining with his mother are too great.

(c) The inability of New Zealand social workers to intervene and remove [Chu] from the care of his mother or the Department of Social Welfare once [Chu] is in [the SEAC].

(d) The lack of evidence about the extent to which the Department of Social Welfare Act social workers are able to support the proposed transition plan or give ongoing support over the following two years.[32]

(e) The effect on [Chu] of the likely severance of his secure attachments with [Mr Xue] and [Ms Xue] after he has been transitioned into the care of [Ms Lien].

(f) The ability of [Ms Lien] and [Mrs Mei-Lien] to care for [Chu] with their work commitments. Evidence of [Ms Lien]'s work hours and whether she can reduce them was meant to be available well before the November hearing but has not been provided.

(g) The ability of [Ms Lien] to parent a child who is likely to be distressed and exhibiting oppositional behaviour, only has a very limited understanding of her language, does not have an attachment relationship with her, and whose parenting skills have only been

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32 A report from the local Department of Social Welfare may have addressed the following issues:
(a) Risks of retribution.
(b) Assessment of the mother and grandmother's parenting abilities and their willingness to engage with the Department on parenting issues.
(c) The potential risks for [Chu] of the insistence of [Ms Lien] and [Mrs Mei-Lien] that [Ms Lien]'s offending not be known to any other members of the family, school or community, especially with the inevitable visits from the social worker and or psychologist to the family home (could the visits be after hours because of [Ms Lien]'s work hours).
(d) The extent to which [Mrs Mei-Lien] may see [Chu] as a ["bad seed"] and if so, the consequences for him.
(e) The likelihood that the Department would uplift [Chu] from his maternal family in the absence of compelling evidence to do so and a refusal to cooperate with Department social workers may not be a sufficient basis for that level of concern. The Court simply has no information on the way in which a [South East Asian] social worker would assess the threshold.

assessed in a limited environment (and with questions raised about those skills).

(h) The ability of the primary weekday caregiver, [Mrs Mei-Lien], to understand his likely distress, and communicate with a child who does not speak or understand her language. [Mrs Mei-Lien] admits she uses physical discipline with [Chu's siblings].

(i) [Chu] coping at preschool and school when his teachers have no information about his background in New Zealand and the reasons for any oppositional behaviour, or problems socialising at school.

(j) The potential for the local community to become aware of [Ms Lien]'s imprisonment in New Zealand and the rejection of [Chu] and his family by the community.

(k) The rejection of [Chu] by his maternal family because he is a *Huài zhŏng* child.

[196] [Chu] returning to [the SEAC] raises serious care and protection issues which have not been adequately addressed by the Ministry.

[197] The Ministry relies on support from the Department of Social Welfare despite evidence of the Ministry's own witnesses and [Mr Xue] that there are serious concerns about the Department's effectiveness.

[198] There is no other support for [Chu] as [Ms Lien] and [Mrs Mei-Lien] are determined that the reason why [Chu] had to remain in New Zealand is kept confidential. It is hard to envisage this will occur when a young pre-schooler who does not speak the local language suddenly appears in a small community. No family member, neighbour or school teacher will have the information to understand why [Chu] may be extremely distressed.

[199] Yet the chilling consequences for [Chu] of the truth getting out are only one of the risks for him of returning to [the SEAC]. He faces a similar risk if he is rejected by the family because he is a *Huài zhŏng* child.

[200] The care and protection risks for [Chu] returning to [the SEAC] are too great. The risk to [Chu]'s welfare and interests from severance of his secure relationships

with [Mr Xue] and [Ms Xue] is also serious. I do not believe [Ms Lien] and [Mrs Mei-Lien] have the insight or ability to develop the security of relationship with [Chu] which [Mr Delano] says is necessary.

[201] I do not question the love [Chu]'s parents and grandmother have for him. My decision must however consider all the consequences for [Chu] of his parents' decision to involve him in their criminal offending.

[202] I could not consider [Mr Xing] as a primary caregiver for [Chu] because he is not in the position to look after his son, nor has he asked to do so.

[203] I am confident that [Mr Xue] and [Ms Xue] will facilitate whatever indirect contact is appropriate for [Chu] with his family in [the SEAC]. If [Chu]'s safety can be guaranteed, they will also consider face-to-face meetings in the future. The appropriate nature of contact will however require further consideration by the Court.

[204] During the hearing, I expressed my concern to counsel for [details deleted].

[205] I found the evidence of [Mr Xue] very helpful and while he had an interest in the outcome of the case, I accept he was genuine in asserting that he was not seeking to retain [Chu] in his care as he appreciated the role he and [Ms Xue] had as foster caregivers for the Ministry. His evidence was given in a careful, considered manner and on several occasions when he could have exaggerated the risk for [Chu], he did not do so. This evidence was given by someone who has expertise as a social worker with children and an intimate knowledge of both the [SEAC]'s society and the life of [ethnicity deleted] in that culture.

[206] The Ministry witnesses, other than [Mr Delano], appeared to view an outcome other than [Chu]'s return to [the SEAC], as a breach [Chu]'s rights as a [citizen of that country] and an implied criticism of the [SEAC]'s government's commitment to its citizens. This approach showed a misunderstanding of the Convention and the purposes of the Act.

[207] [Mr Delano] had a difficult role in the case. He had obligations to the Court as an expert and to the Ministry as an employee. While I have been critical of his reports

and his failure to seek amended briefs from the Ministry, his oral evidence was given in a balanced and independent manner.

Outcome

[208] I decline the Ministry's application.

[209] I grant Mr Goldsbury's application that a condition is added to the s 101 order that [Chu] is not to be removed from his current caregivers until further order of the Court.

[210] Further orders and directions are required to ensure a prompt application is made to the Minister of Immigration for exercise of his discretion to allow [Chu] to remain in New Zealand on humanitarian grounds.

[211] I have not made more specific orders or directions in this judgment as I wish to give counsel the opportunity to consider any further application, including an application to place [Chu] under the guardianship of the Court.

[212] I do not have jurisdiction to make such an order in the absence of an application. There are in my view advantages for [Chu] being under the guardianship of the Court as:

(a) It was the view of [Mr Atkins] that if [Chu] was under the Court's guardianship an application would have a greater chance of success.

(b) The Court's obligations to [Chu] and his immigration status extend beyond any potentially successful application for a temporary visa.

(c) The concerns I have raised about the way in which the Ministry has managed this case mean that the application needs to be made with close oversight by the Court. This concern was increased when [Mr Atkins] failed to include fundamental concerns for [Chu] leaving New

Zealand when he gave his opinion on what the Minister may see as important in considering such an application.[33]

(d) It may be appropriate that the Ministry is appointed as an agent. I do not favour the New Zealand Immigration Service having this role.

[213] I make the following directions:

(a) The case is adjourned for a one-hour hearing at 3.45pm on 11 May 2018 in the Papakura Family Court.

(b) The applications of [Mr Xue] and [Ms Xue] are adjourned to that date.

(c) A plan and report are to be filed by 23 April 2018.

(d) If any party or Mr Goldsbury makes application for a guardianship order under s 31 of the Care of Children Act 2004 then the application is to be filed by 23 April 2018.

(e) Any responses and memoranda are to be filed by 4 May 2018.

[214] The hearing will then consider any application for guardianship; further conditions required to the orders; the applications of the caregivers; costs and contribution to the costs of lawyer for the child; and any other matter arising out of this judgment.

[215] Leave is reserved to seek further clarification of these orders and directions.

A G Mahon
Family Court Judge

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[33] See above at [82].