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IN THE YOUTH COURT
AT WAITAKERE

I TE KŌTI TAIOHI
KI WAITĀKERE

CRI-2021-290-000004
[2021] NZYC 248

NEW ZEALAND POLICE
Prosecutor

v

[JV]
Child

Hearing: 15 June 2021

Appearances: S O'Connor for the Prosecutor.
B Donald, Youth Advocate.
S Panapa, Lay Advocate.

Judgment: 16 June 2021

JUDGMENT OF JUDGE A J FITZGERALD

CONTENTS

INTRODUCTION

[JV] and two courts

[1] [JV] is a 13 year old whose iwi affiliations on his mother's side are to [three iwi deleted]. On his father's side, he is of [Pasifika] ethnicity.

[2] [JV] is before the Youth Court because of a charge of aggravated burglary he has admitted. The offence occurred on [date 1] 2021 when [JV] was 12.

[3] [JV] is also before the Family Court because of that same offence as well as other offending that is not serious enough to bring before the Youth Court. The number, nature and magnitude of [JV]'s offending during late 2020 early 2021 was such that the police applied to the Family Court for a care and protection order. That application was filed at the Family Court on [date 2 – 4 days after date 1] 2021 which was also the day [JV] was first due to appear before the Youth Court for the aggravated burglary charge.

[4] A family group conference ("FGC"), held on 29 March 2021, considered both the Youth Court and Family Court proceedings for [JV] and agreed on identical plans, the key components of which are:

> Considerations pursuant to s 7AA regarding mana tamaiti, whakapapa, and whānaungatanga of Oranga Tamariki Act 1989.[1]
>
> - Mana tamariki: [JV] understands his identity as Māori, [and Pasifika] Rangatahi.
> - Whakapapa: [JV]'s maternal iwi is [three iwi deleted].
> - The paternal side is from [two Pacific nations deleted].
>
> OUTCOME REACHED AND PLAN FORMULATED:[2]
>
> 1. Placement: [JV] will live with his mother.
> 2. Options for [JV] to return to mainstream schooling will be explored.
> 3. Extra tuition through Kip McGrath or Number Works will be provided given [JV]'s learning difficulties.
> 4. [JV] will be involved in basketball and boxing.

[1] [This is the only content regarding cultural considerations for [JV]].
[2] [The following are abbrieviated versions of all of the other clauses of the plan].

5. Functional family therapy will be provided.
6. A mentor has been organised.
7. There are other children [JV] is not to have any contact with and a curfew he must obey.

[5] A Family Court Judge has already approved that plan as being compliant with s 130 of the Oranga Tamariki Act 1989 ("the Act"). However, a disposition order has not yet been made. The proposal is for a custody order under s 101 of the Act in favour of the Chief Executive of Oranga Tamariki but at this stage a s 78 interim custody order remains in force.

[6] The Youth Court plan was proposed to be for three months on the basis that the police would withdraw the charge if [JV] did not reoffend.

[7] When [JV] appeared before me in the Youth Court on 1 June 2021 I was not willing to accept that both the Youth Court and Family Court proceedings should remain on foot, nor was I satisfied that the plan was compliant with the provisions of the Act.

[8] However, none of the professionals present that day agreed with the views I expressed about the conduct of [JV]'s case, at least in part because everyone (including [JV]) wanted him to be granted EM bail the following week so he could go home to his mother.

[9] I therefore adjourned the proceedings until today for this hearing. That was firstly to have the Crown involved, given the long-established protocol that they must represent the police in all cases involving a child who is before the Youth Court. Secondly it would allow everyone time to present their submissions and for me to then decide what to do.

The issues

[10] This was one of four cases involving children before either the Auckland or Waitakere Youth Courts that I encountered within four days where the same key issues arose. Another similar case has come to my attention today at Waitakere.

[11] Common to all five cases is the question of whether it is appropriate for children who have offended to be dealt with in contemporaneous, parallel proceedings in both the Youth Court and Family Court as the police wish to do, so as to be able to use powers of arrest and detention if necessary whilst otherwise accepting that a care and protection approach should be taken.

[12] Also common to all five cases is the child being dealt with by different judges, in different courts, on different days, with different lawyers for exactly the same thing; alleged or proven offending as a child. In two cases where the proceedings have progressed as far as formulating a plan (this being one), there is the added feature of having identical plans (or at least nearly so) in both courts for exactly the same reason; proven offending as a child.

[13] All but one of the five cases involve exactly the same charge being before both Courts, albeit with additional offending relied on in the Family Court proceedings because that offending was not serious enough to bring to the Youth Court.

[14] Four of the five cases involve the police commencing the proceedings in both the Youth Court and Family Court either at the same time (as was the case here), or in close proximity, which is a practice I had not encountered before but which raises important legal issues in relation to the pushback as I will explain shortly.

[15] Each case has its own unique features and so separate decisions are required. However, the following legal issues were common to all and so I set them out in full before turning to what I believe is the correct approach in each case. In this case that will include the adequacy of the plan.

CHILDREN WHO COME TO THE ATTENTION OF POLICE

The age of criminal responsibility.

[16] The age of criminal responsibility in New Zealand is 10, but 10 and 11 year olds can only be charged with murder or manslaughter.

[17] Until 2010, the only way 12 and 13 year old children accused of offending could be dealt with by a court was for the police to apply to the Family Court to have the case dealt with as a care and protection issue under Part 2 of the Act.

[18] Amendments to the Act in 2010 enabled the police to charge and bring some 12 and 13 year old children before the Youth Court, under part 4 of the Act, but only those facing a charge carrying a maximum penalty of 14 or more years imprisonment[3] or a child who is a previous offender.[4]

The pushback

[19] However, if a 12 or 13 year old child is charged and brought before the Youth Court, the Act enables the Court to refer the matter back to the prosecutor to consider making an application to the Family Court to have the case dealt with on a care and protection basis rather that continuing with it as a criminal proceeding before the Youth Court.[5] The ability for the Court to refer the matter back to the prosecutor in that way is referred to as "the pushback."

[20] When the pushback is exercised, the Court is able at any time to discharge the charge under s 282 of the Act[6] but, importantly, if not discharged earlier the charge is deemed discharged when the prosecutor's application first comes before a Family Court Judge.[7] That deeming provision provides the Court with no residual discretion. It is very clear that Parliament intended that the matter either be in the Youth Court or in the Family Court, rather than both simultaneously; the scheme of the Act did not contemplate child offenders being dealt with in two different courts at once for essentially the same thing.

[21] Although most counsel have referred to these cases as involving the pushback, that is not so because the police have already applied to the Family Court for a care and protection order, relying on s 14(1)(e) grounds, including the same charge or

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[3] Section 272(1)(a).
[4] Section 272(1)(c) and (1A).
[5] Section 280A(2).
[6] Section 282. This is a complete and unconditional discharge; the charge is deemed never to have been laid.
[7] Section 280A(3).

charges they have laid in the Youth Court. In some of the cases other offending that is not serious enough to bring before the Youth Court was also relied upon.

[22] As a result, there is nothing for me to pushback because the proceedings are already on foot in the Family Court. Although they have come before a Family Court Judge, the deeming provision does not apply because the Family Court involvement did not come as a result of the pushback. There might be a good case to argue that the charge in the Youth Court should be discharged under s 282, given the statutory scheme (although that has not been argued), but it cannot simply be deemed discharged.

Youth justice principles

[23] One of the most significant features of the youth justice principles of the Act is the emphasis on not instituting criminal proceedings against a child if there is an alternative way of dealing with the matter.[8] Another is that such proceedings not be instituted in order to provide any assistance or service needed to advance the well-being of the child or whānau, hapū and iwi.[9]

[24] As a result of those principles, approximately 80 percent of young people who come to police attention are not charged and brought to court. The percentage is likely to be similar for children. Instead they are dealt with in the community by the police taking alternative action. The Youth Court therefore only tends to deal with very serious offending or repeat offending that is serious enough to justify court involvement.

[25] It follows therefore, in my view, that Youth Court proceedings should not normally remain before that court when there is an alternative way of dealing with the matter and should never continue in order to provide assistance or services needed to advance wellbeing.

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[8] Section 208(2)(a).
[9] Section 208(2)(b).

[26] The statutory scheme is very clear; the combined effect of what Parliament provided when the power to pushback is exercised, and the first two youth justice principles I have mentioned, count strongly against ongoing Youth Court involvement when the alternative option in the Family Court is available and on foot.

[27] Indeed, the plans provided for the two Courts in this case are identical and entirely focused on well-being issues; there is nothing in them whatsoever regarding victims or what [JV] should do to be held accountable. The only difference is the existence of bail conditions that enable the police to arrest and detain him if he misbehaves.

Children's rights

[28] The statutory scheme I have described is consistent with the rights each of these children have been guaranteed under the United Nations Convention on the Rights of the Child ("the CRC")[10] which strongly favour not using criminal justice processes wherever possible. The amendments to the Act that came into force on 1 July 2019 require that such rights must be respected and upheld[11] which should mean what it says. In the present context, Article 40 of the CRC is especially relevant.

[29] On 18 September 2019 the UN issued its latest general comment on children's rights in the child justice system ("the UNGC")[12]. General Comments are issued from time to time by the UN to give guidance to member nations, such as ours, on the approach we should be taking to respect and uphold children's rights under the CRC. The previous one was in 2007 and so it was especially helpful that the latest UNGC came out so soon after the 2019 amendments to the Act.

[30] The introduction to the UNGC includes the following:

> 2. Children differ from adults in their physical and psychological development. Such differences constitute the basis for the recognition of lesser culpability, and for a

[10] United Nations Convention on the Rights of the Child 1577 UNTS 3 (opened for signature 20 November 1989, entered into force 2 September 1990) [CRC].
[11] Section 5(1)(b)(i).
[12] *Committee on the Rights of the Child General comment No. 24 (2019) on children's rights in the child justice system* UN Doc CRC/C/GC/24 (18 September 2019).

separate system with a differentiated, individualized approach. Exposure to the criminal justice system has been demonstrated to cause harm to children, limiting their chances of becoming responsible adults.

3. The committee acknowledges that the preservation of public safety is a legitimate aim of the justice system, including the child justice system. However, States parties should serve this aim subject to their obligations to respect and implement the principles of child justice as enshrined in the Convention on the rights of the child. As the Convention clearly states in Article 40, every child alleged as, accused of or recognised as having infringed criminal law should always be treated in a manner consistent with the promotion of the child's sense of dignity and worth. Evidence shows that the prevalence of crime committed by children tends to decrease after the adoption of systems in line with these principles.

[31] Further on, under the heading "**Age and Child Justice Systems; minimum age of criminal responsibility**" are the following comments:

21. Under article 40(3) of the Convention, States parties are required to establish a minimum age of criminal responsibility, but the article does not specify the age. Over 50 States parties have raised the minimum age following ratification of the Convention, and the most common minimum age of criminal responsibility internationally is 14. …

22. Documented evidence in the fields of child development and neuroscience indicates that maturity and the capacity for abstract reasoning is still evolving in children aged 12 to 13 years due to the fact that their frontal cortex is still developing. Therefore, they are unlikely to understand the impact of their actions or comprehend criminal proceedings. They are also affected by their entry into adolescence. As the committee notes in its general comment No. 20 (2016) on the implementation of the rights of the child during adolescence, adolescence is a unique defining stage of human development characterised by rapid brain development, and this affects risk taking, certain kinds of decision making and their ability to control impulses. States parties are encouraged to take note of recent scientific findings, and to increase their minimum age accordingly, to at least 14 years of age. Moreover, the developmental and neuroscience evidence indicates that adolescent brains continue to mature even beyond the teenage years, affecting certain kinds of decision making. Therefore, the committee commends States parties that have a higher minimum age, for instance 15 or 16 years of age, and urges States parties not to reduce the minimum age of criminal responsibility under any circumstances, in accordance with Article 41 of the Convention.

[32] Another theme in the UNGC that is related to this, is promoting the use of diversion with regard to Article 40.

13. Under Article 40(3)(b) of the Convention, States parties are required to promote the establishment of measures for dealing with children without resorting to judicial proceedings, whenever appropriate. In practice, the measures generally fall into two categories;

a. Measures for referring children away from the judicial system, any time prior to or during the relevant proceedings (diversion);

b. Measures in the context of judicial proceedings.

14. The Committee reminds States parties that, in applying measures under both categories of intervention, utmost care should be taken to ensure that the child's human rights and legal safeguards are fully respected and protected.

Interventions that avoid resorting to judicial proceedings

15 Measures dealing with children that avoid resorting to judicial proceedings have been introduced into many systems around the world and are generally referred to as diversion. Diversion involves referral of matters away from the formal criminal justice system, usually to programmes or activities. In addition to avoiding stigmatisation and criminal records, this approach yields good results for children, is congruent with public safety and has proved to be cost effective.

16 Diversion should be the preferred manner of dealing with children in the majority of cases. States Parties should continually extend the range of offences for which diversion is possible, including serious offences where appropriate. Opportunities for diversion should be available from as early as possible after contact with the system, and at various stages throughout the process.

[33] Also potentially relevant in [JV]'s case is the following, given that it is believed he might have FASD:

Children lacking criminal responsibility for reasons related to developmental delays or neurodevelopment disorders or abilities.

28. Children with developmental delays or neurodevelopmental disorders or disabilities (for example, autism spectrum disorders, fetal alcohol spectrum disorders or acquired brain injuries) should not be in the child justice system at all, even if they have reached the minimum age of criminal responsibility. If not automatically excluded, such children should be individually assessed.

[34] From this we can draw at least the following:

a. If [JV]'s rights under the CRC are respected and upheld, he would not remain before the Youth Court with a criminal justice approach taken to this case which has been demonstrated to cause harm to children.

b. Evidence shows that risk of offending tends to decrease when alternative approaches are adopted.

c. By virtue of his age alone, [JV] is vulnerable given that his frontal cortex is still developing and the possibility he has FASD potentially adds another layer of vulnerability.

d. We should be looking to divert children away from court processes wherever possible, even for serious offending where appropriate.

e. The interests of public safety are better served by adopting such an approach. In fact, if [JV] has FASD the use of powers of arrest and detention and other punitive aspects of the youth justice process is only likely to make things worse not better. The public interest surely requires that we take the time and care to properly identify what the best methods of reducing risk are and use them.

[35] Given the statutory scheme, the requirement to respect and uphold [JV]'s rights under the CRC and the UN's guidance on how we should be doing that, and the extant Family Court proceedings which are also based on concern for his offending, there is no justification for continuing parallel Youth Court proceedings, with identical plans. The charge in the Youth Court will therefore be discharged under s 282 of the Act.

THE CARE AND PROTECTION AND YOUTH JUSTICE INTERFACE

Crossover kids

[36] Children and young people caught up in both the care and protection and youth justice systems are often referred to as "crossover kids". In a decision last year, *Police/Oranga Tamariki v* [*LV*], I explained that a subset of that group are those who have dual status; that is, charges before the Youth Court as well as care and protection proceedings before the Family Court which signifies high level care and protection concerns.[13]

[37] For reasons I have just given, 12 and 13 year old children who can come before both courts on account of offending, are not and should not be dual status in relation

[13] *Police/Oranga Tamariki v [LV]* [2020] NZYC 117 at [11].

to the very same thing they have been brought to court for by the police – concern about their offending. To do so, especially if it is only for the purpose of using youth justice powers and facilities of arrest and detention, is another form of the criminalisation of care and protection I referred to in [*LV*].[14]

[38] Twelve and 13 year old "child offenders" are a unique category of the crossover and are the quintessential embodiment of the interface between the youth justice and care and protection provisions of the Act. This is evident in various ways, for example;

a. If they are brought before the Family Court for alleged offending, any hearing of the allegations is essentially a criminal trial in all respects including the application of the criminal standard of proof beyond reasonable doubt.[15] Any FGC directed regarding them must be convened by a youth justice coordinator rather than a care and protection one.[16] Bail-like conditions can be imposed such as place of residence, requiring engagement in educational, cultural, recreational or other programmes, non-association with specified people and such other conditions the court thinks fit to reduce the likelihood of further offending such as a curfew.[17] In addition to the standard disposition orders that are available in all care and protection cases including to come up if called upon, there are specific orders provided for child offenders such as admonishment, reparation for emotional harm or loss or damage to property, return of property and forfeiture to the Crown.[18]

b. On the other hand, if a child is brought before the Youth Court there is the ability to use the pushback referred to already. While in the Youth Court there is the ability to refer the matter to a youth justice FGC co-ordinator for the pushback issue to be considered. There is also the ability to direct a youth justice FGC and urge the FGC to receive

[14] See at [104] - [115].
[15] Section 198.
[16] Section 18(3) and 247(a).
[17] Sections 91, 92 and 96.
[18] Sections 83 and 84.

information and advice on care and protection matters and make or formulate decisions, recommendations and plans.[19]

[39] As I will explain shortly there has always been a very clear interface between the care and protection and the youth justice parts of the Act but in practice that has never been properly implemented to the very great cost of many children and young people who are the subject of proceedings. As was mentioned in [*LV*] in the context of crossover kids and those with dual status generally, this deeply entrenched practice of keeping care and protection and youth justice completely separate comes at a high cost to the children and young people concerned.

[40] However, it is 12 and 13 year old "child offenders" such as [JV] who straddle both parts of the Act, who require a well-co-ordinated response more than anyone. As if their vulnerability and the concerning risk factors alone are not reason enough to ensure that occurs, there is another reason that demands it.

Prevalence

[41] From 2014/15 to 2019/20, **97%** of the 12 and 13 year old children referred for a youth justice FGC had been the subject of reports of concern to Oranga Tamariki regarding their care and protection.[20] (Emphasis added)

[42] This is an especially vulnerable group; the trauma they have experienced as a result of the abuse, ill-treatment and neglect they have suffered is unquestionably a factor influencing the behaviours that have brought them to police attention. Some of that behaviour is very serious and not only raises concerns regarding their well-being but also public safety concerns. Parliament has clearly had these important and sometimes competing priorities in mind when drafting the relevant provisions of the Oranga Tamariki Act.

[43] Like the rest of the 97%, [JV] does not experience the things that have brought him into the youth justice system, and the things that have brought him into the care

[19] Section 261.
[20] *Youth Justice Indicators Summary Report* (Ministry of Justice, December 2020) at 6.

and protection system as two separate things. Nor do his whānau. Those causes are all rolled up in his life together and need a well-coordinated, comprehensive response in line with the provisions of the Act and the relevant articles of the CRC. He is a child with high and complex needs that his mother has been struggling to meet. As he has grown older that struggle has become more difficult and his troublesome behaviour has now led to police involvement. So, what happens when he is drawn into the court system?

Nonsense

[44] [JV] and his whānau have been drawn into an uncoordinated, dysfunctional process involving an unnecessary and inappropriate doubling up of professionals which is nonsense; it simply makes no sense.

[45] How can it possibly be that [JV] and his whānau keep coming before different judges in different courts on different days with different lawyers but identical plans for exactly the same reason? The answer is a deeply imbedded practice on the part of everyone exercising powers under the Act which is based on an erroneous interpretation of the Act that has endured for over thirty years now.

[46] Since the Act came into force in 1989 there has been a view taken by many that the care and protection and youth justice parts of the Act are utterly separate with no interface at all. There are many disturbing consequences of this attitude in practice. One is care and protection involvement ending when a young person enters the youth justice system with the shocking consequences I described in [*LV*].[21] There are many more that are just as disturbing but need not be detailed here.

[47] What is happening to [JV] and his whānau here is another example of that mindset; not just on the part of the police but clearly everyone exercising powers given how far through the process this case has managed to get. The checks and balances built into the Act to avoid this sort of thing happening have failed because everyone has bought into the same process.

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[21] See at [107] – [115].

Crossover lists

[48] It is important to mention that the opportunity to co-ordinate what was going on was available in every one of the five cases I have mentioned because the Waitakere and Auckland Youth Courts both have "crossover lists" that enable such co-ordination. Time in these lists has always been available for cases involving children, whether they are brought before the Youth Court under s 272 or to the Family Court relying on s 14(1)(e). For 10 years in Auckland there has been a crossover list every fortnight and in Waitakere once a month for about eight years. However, for those lists to provide the much-needed coordination required for a case like [JV]'s, everyone involved needs to be willing to support them and that is not consistently the case. For whatever reason it did not happen in these 5 cases.

Two parts of one Act

[49] It is of tremendous significance that the Act governs the youth justice system, the Youth Court's place in it as well as the law governing children in need of care and protection. That is not accidental and is very important.

[50] Both parts of the Act share the same general purposes and principles[22] which, amongst other things, include seeing children holistically.[23] The duties on Judges and lawyers to explain what is going on to children and others, and to encourage children's participation is the same.[24] The characteristics and qualities required of Judges, lawyers and others to work in the Courts are the same. The type of court the Act describes is much the same. The centrally important function of the FGC is the same. Both parts of the Act have identical provisions for such things as the appointment of Lay Advocates,[25] obtaining specialist reports[26] and cultural and community reports.[27] There are then numerous provisions that provide a very clear interface between two the parts. For example, reporting and notifications of concern,[28] FGCs to deal with

[22] Sections 4 and 5.
[23] Section 5(1)(b)(vi).
[24] Sections 10 and 11.
[25] Sections 163 and 326.
[26] Sections 178 and 333.
[27] Sections 187 and 336.
[28] Sections 15, 17, 18, 19 and 280.

both youth justice and care and protection issues and make recommendations and plans[29] and FGCs to consider the exercise of the pushback.[30]

[51] There is something else of enormous importance that the two parts share, and that is the children and young people themselves. I have already explained that 97% of the 12 and 13 year old children are "crossover kids." For young people aged 14, 15, 16 and 17, the percentage is 88.[31] Therefore, across all ages the percentage is 92.5; that is more than nine out of every 10. And yet in practice, more often than not, we ignore that and end up with perverse outcomes like the one we have here for [JV].

THE WAY FORWARD

[JV] and one court

[52] From now on there will be one judge in one court (and that will be the Family Court) with one lawyer and one social worker and a much-improved plan for [JV].

What are [JV], and his whānau entitled to expect?

[53] What [JV] and his whānau are entitled to expect as a result of being drawn into court proceedings is:

a. We will promote his well-being, and that of his whanau, his hapū and his iwi. We cannot talk about [JV]'s wellbeing without in the same breath including his whānau and his hapū and his iwi. Equally we cannot devise an appropriate plan for his care and protection without involving his hapū and his iwi as well as whānau. I will return to this vitally important issue shortly.

b. The promotion of their wellbeing will be achieved by,

[29] Section 261.
[30] Section 280A.
[31] *Youth Justice Indicators Summary Report* (Ministry of Justice, December 2020) at 6.

(i) Establishing, promoting or coordinating services that are designed to affirm [JV]'s mana, are centred on his rights, promote his best interests, advance his well-being, address his needs, and provide for his participation in decision making that affects him. There has been no coordination here so far but that will now change and removing the duplication is a good start.

Co-ordination can involve dealing with such things as the hearings of denied charges or dealing with fitness issues, (as happened here), in the Youth Court given the better availability of time, and ability to get specialist reports promptly, but there is never a need for the type of duplication that has gone on.

(ii) Advancing positive long-term health, educational, social, economic or other outcomes. As I will explain in a moment, far more is required to make the current plan adequate in that regard.

(iii) What we do must be culturally appropriate and competently provided. The only gesture towards recognising and addressing [JV]'s cultural needs is the mention of his mother's iwi affiliations and his father's ethnicity set out in [4] above. That is not good enough.

(iv) We have to assist whānau, hapū and iwi to both prevent young people from suffering harm, abuse, neglect, ill-treatment and also from offending or reoffending. That requires far more than just providing Functional Family Therapy in a case such as this.

(v) We must ensure [JV] has a safe, stable and loving home and support to address his needs.

(vi) A practical commitment to the Treaty of Waitangi is required in the way described in the Act as well as recognising mana tamati,

whakapapa and the practice of whanaungatanga. I address this issue in detail in the section below headed "Section 7AA and te Tiriti o Waitangi."

(vii) We must maintain and strengthen the relationship between [JV] and his whānau, his hapū and his iwi.

c. [JV]'s well-being and best interests must be the first and paramount considerations from now on given that his matters are proceeding under the care and protection provisions.

[54] From all of the people who exercise powers under the Act, [JV] and his whānau, hapū and iwi should expect:

a. That [JV] will be encouraged and assisted to participate in the proceedings and express his views which should be taken into account. In that regard he has a communication assistant whose involvement will continue now in the Family Court.

b. We will keep his well-being at the centre of decision making that affects him and in particular:

(i) His rights under the CRC will be respected and upheld and he will at all times be treated with dignity and respect and protected from harm. On the evidence available at the moment, [JV] does not have a disability but that may change when the FASD assessment is done. It may then be that the Convention on the Rights of Persons with Disabilities[32] will be relevant too.

(ii) His mana will be protected by recognising his whakapapa and the whanaungatanga responsibilities of whānau, hapū and iwi.

[32] United Nations Convention on the Rights of Persons with Disabilities 2515 UNTS 3 (opened for signature 30 March 2006, entered into force 3 May 2008 [CRPD].

(iii) Decision-making will occur, and things will be implemented promptly, and in a timeframe appropriate to his age and development.

(iv) A holistic approach will be taken that sees [JV] as a whole person which includes, but is not limited to his:

a. developmental potential; and
b. educational and health needs; and
c. whakapapa; and
d. cultural identity; and
e. gender identity; and
f. sexual orientation; and
g. disability (if any); and
h. age.

Section 7AA and te Tiriti o Waitangi

[55] [JV]'s plan begins with the heading, "Considerations pursuant to s 7AA regarding mana tamaiti, whakapapa and whanaungatanga of Oranga Tamariki Act" but the only content in the plan about such issues are the three bullet points referred to in [4] above. Section 7AA requires far more than that.

[56] A purpose of the Act is to provide a practical commitment to te Tiriti in the way described in the Act. That is primarily by the duties imposed on the Chief Executive of Oranga Tamariki in s 7AA to recognise and provide a practical commitment to the principles of te Tiriti. However, given the importance of te Tiriti as our nation's founding document, recognising and providing a practical commitment to its principles should be forefront in the minds of everyone exercising power under the Act. I think lawyers and judges for example should be checking plans for compliance, and if it is believed that the Chief Executive has not adequately discharged his duty in this respect, the opportunity to address that must occur.

[57] It is important too that s 7AA requires that the commitment to the principles of te Tiriti be practical. It must actually mean something real in the lives of the children concerned and their whānau, hapū and iwi.

[58] In [*LV*], I referred to four principles that must apply in all cases under the Act, starting with active protection.[33] In its recent report, the Waitangi Tribunal said the following in relation to this important principle:[34]

> Active protection requires a clear understanding of what the guarantee of tino rangatiratanga over kainga means, and careful consideration of what would now promote its maintenance and restoration. Active protection means recognising that Māori parents struggling in poverty have an equal right as citizens to meet their children's needs as do the better-off in society. Active protection means recognising that the vast majority of whānau in contact with Oranga Tamariki are not out to harm their tamariki, but they may have ongoing needs that place stress on the whānau. These included factors such as poverty, poor housing, poor mental health, substance abuse, intimate partner violence, or children with high needs. Growing inequality and the disparities in child protection, education, justice, and health that result are not the inevitable outcomes of individual choice. They are substantially the outcomes of legislation, policy, and economic settings about which a society has choices. Active protection requires substantive changes designed to address these structural conditions.
>
> Active protection does not mean intervening forcefully in the lives of whānau only when the cumulative effect of stress meets the threshold for State rescue of a child or children. Active protection certainly does not mean intervening forcefully in the lives of whānau in ways that are arbitrary or inconsistent, all the result of poor practice, or reflect institutional or personal racism.

[59] Those comments are especially relevant here. [JV] has been living primarily with his mother and occasionally with an Aunt; he tends to wander between the houses which are overcrowded. He hangs out with others his age who are in similar situations and they get into trouble and some of it is serious. His mother cannot control him and that will not only be due to his severe conduct disorder but the fact that she has her hands full; [JV] is [in the middle] of eight children. Some of the older siblings are also in trouble with police and before courts. [JV] has been out of school for about 18 months. He might have ADHD and FASD, but the assessments could not be completed. He was found "fit to plead" but requires a communication assistant to follow what is happening in court and other processes related to the wider proceedings. His needs are therefore many and complex. However, he has interests, talents and qualities to be nurtured. His interests include social media and sports especially [sports deleted]. He is good at taking care of his siblings, and others in the whanau, indicating that he has a caring heart.

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[33] See at [82]

[34] Waitangi Tribunal *He Pāharakeke, He Rito Whakakīkingi Whāuarua Oranga Tamariki Urgent Enquiry* (Wai 2915,2021) at 20.

[60] The practical commitment to the principle of active protection here requires that the issues of poverty, overcrowding, the need for support and respite care and services for any of the children with high needs must be adequately addressed. This will require including things in plans that might not have been there previously, and may have cost implications, but that will have been anticipated when the legislative changes were made. Properly compliant plans will necessarily look very different to those we have been used to in the past. The plan set out at [4] above does not adequately address those issues for [JV], his mother and the whanau and it must.

[61] Next is the principle of partnership. I am told that Oranga Tamariki have strategic partnerships with all three iwi [JV] belongs to; [three iwi deleted], and yet an invitation was not sent to any of those iwi to attend [JV]'s FGCs nor to have they had any other involvement in this case yet. Surely the primary purpose of such partnerships is for the Treaty partners to start working together in the spirit of true partnership out of the concern for tamariki who are in need of care and protection and those who come to the attention of police.

[62] The purposes of the Act I referred to earlier, require that we promote the wellbeing of [JV], his whanau, his hapū and his iwi. As I said before you cannot talk of [JV]'s wellbeing without in the same breath including his whānau, hapū and iwi. Equally we cannot devise compliant plans without including his whanau, hapū and iwi. We have to assist them in preventing [JV] from getting into further trouble and from suffering harm. We have to maintain and strengthen those vital cultural links. I believe that should start by FGC coordinators sending invitations to hapū and iwi in every case, as well as whanau of course, and where there is a strategic partnership I cannot understand why that is not yet happening.

[63] I am now directing that there be another FGC primarily to revisit the plan set out above at [4]. I expect iwi will be invited and others, such as hapū if known. I urge the FGC to prepare a new plan by direct reference to ss 4, 4A, 5 and 7AA in particular and what I have said above regarding the principles of te Tiriti being made real in practice. I would also like the FGC to revisit the issue of what order should be made to support the new plan. There is already agreement about [JV] living with his mother and I suggest the approach that would be more in keeping with the statutory scheme

would be to devise a very strong and supportive plan, significantly bolstering the support that [JV] and his mother receive, with a s 91 support order instead of the s 101 custody order. That too would allow the bail-like conditions the police are after in the way I described earlier.

RESULT

Orders and directions

[64] The charge in the Youth Court of aggravated burglary will be discharged under s 282 of the Act at the next court date, 13 July 2021.

[65] I direct another FGC. Following discussions that will be under s 281B on the basis that the s 261 approach is adopted and the type of plan I have described being put together and an appropriate disposition order made.

[66] A copy of this judgement is to be put on [JV]'s Family Court file and provided to parties and counsel in both proceedings.

[67] The current orders in place in both proceedings continue to 13 July 2021. The appointment time that day is 11.45

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Judge AJ Fitzgerald
District Court Judge

Date of authentication: 16/06/2021
In an electronic form, authenticated pursuant to Rule 2.2(2)(b) Criminal Procedure Rules 2012.