

IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

I TE KŌTI MATUA O AOTEAROA
TE WHANGANUI-A-TARA ROHE

CIV 2021-485-556
[2022] NZHC 832

UNDER the Judicial Review Procedure Act 2016 and
Part 30 of the High Court Rules

IN THE MATTER OF an application for judicial review

BETWEEN GROUNDED KIWIS GROUP
INCORPORATED
Applicant

AND MINISTER OF HEALTH
First Respondent

MINISTER FOR COVID-19 RESPONSE
Second Respondent

CHIEF EXECUTIVE FOR THE MINISTRY
OF BUSINESS, INNOVATION AND
EMPLOYMENT
Third Respondent

Hearing: 14 and 15 February 2022

Counsel: P J Radich QC and L I van Dam for Applicant
A Boadita-Cormican, C A Griffin and I S Auld for Respondents

Judgment: 27 April 2022

JUDGMENT OF MALLON J

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INTRODUCTION AND SUMMARY

[1] Every New Zealand citizen has the right to enter New Zealand.¹ It is a fundamental freedom that in New Zealand can be limited by the state only if that limit is prescribed by law and demonstrably justified in a free and democratic society.²

[2] In response to the COVID-19 pandemic, restrictions were placed on overseas New Zealanders' right to enter their country. From 10 April 2020 until 28 February

¹ New Zealand Bill of Rights Act 1990 [BORA], s 18(2).

² Section 5.

2022 all arrivals, including New Zealand citizens, were required to enter Government-managed isolation facilities (MIQF) and to submit to medical testing. This was a key component of the Government's strategy involving a zero tolerance of cases of COVID-19 in the community (elimination strategy).

[3] For much of the period over which the restrictions were in place, demand for MIQF outstripped capacity. This meant that New Zealanders experienced difficulties and delays in the exercise of their right to return to their country. This proceeding concerns whether the restrictions were lawful as a justified limitation on the right to enter New Zealand in a free and democratic society.

[4] The proceeding is focused on the restrictions placed on New Zealand citizens over the period 1 September 2021 to 17 December 2021 (the **Relevant Period**).³ Those restrictions required that a person entering New Zealand have a voucher for a place in MIQF at which they were required to isolate.⁴ The voucher could be obtained prior to travelling to New Zealand via a virtual lobby (an online process) or by application to the Ministry of Business, Innovation and Employment (MBIE) (an offline process). During the period at issue and until 14 November 2021, the isolation period in a MIQF was 14 days. From 14 November 2021, the isolation period changed to seven days in MIQF, followed by isolation at home until receiving the result of a negative day 9 test.

[5] The applicant (**Grounded Kiwis**) was incorporated to advocate for New Zealand citizens and residents impacted by the restrictions. It does not challenge the Government's decision to pursue, in response to the COVID-19 risk, an elimination strategy for the period that it did. Nor for the most part does it challenge the Government's decision that entry into New Zealand be subject to a MIQ system. Its challenge concerns aspects of the system which it says operated as unjustified limits on the right to enter. It also challenges the way decisions were made for groups entering MIQ and the approach that was taken to applications for places in MIQ under one of the emergency categories.

³ This was to ensure that the case was able to proceed on an urgent basis. Grounded Kiwis' position remains that the MIQ system breached s 18(2) from an earlier time and it reserves its right to bring a claim for an earlier time.

⁴ There are other requirements that are not the subject of Grounded Kiwis' challenge.

[6] First, Grounded Kiwis submits that the requirement to have a voucher to enter MIQ and to isolate in MIQ for 14 days limited the right to enter in an unjustified way. The voucher system was a flow management tool that operated to limit the right to enter because the demand for a place in MIQ significantly exceeded the available places during the Relevant Period. Grounded Kiwis submits that a shorter period of isolation along with an updated and testing protocol should have been implemented at an earlier stage. It also says a self-isolation model should have been given conscientious consideration at an earlier stage. It says the MIQ requirements restricted the right to enter New Zealand in a way that was not proportionate following changes that permitted those who had contracted the virus in the community and their close contacts to self-isolate in October 2021. It says these requirements were also not proportionate when they denied New Zealand citizens entry for more than three months.

[7] Secondly, Grounded Kiwis submits that allocations for MIQ places that were made to groups through an offline process limited the right to enter New Zealand because those allocations removed places that could have been available to New Zealand citizens. It submits that, although this offline process began in September 2020, it was not prescribed by law until 20 November 2021. It also says that MBIE failed to publish criteria for them until 1 September 2021 and that the Chief Executive of MBIE unlawfully delegated decisions on them to a group of ministers. It also says that some group allocations did not serve a purpose sufficiently important to justify curtailing a citizen's right to enter.

[8] Thirdly, the online system through which a voucher in MIQ could be obtained during the Relevant Period, described as a virtual lobby, operated as a lottery. Grounded Kiwis submits this limited the right to enter New Zealand because of the low odds in the lottery and because it was wholly randomised. The length of time a person had been waiting to enter New Zealand was not factored in. Grounded Kiwis submits this was not ameliorated by the emergency allocations available through an offline process because there was no criterion based on the length of the time a person had been trying to return.

[9] Lastly, Grounded Kiwis submits that MBIE applied an unlawful approach to one of the emergency categories. It submits this was because MBIE wrongly interpreted the requirement that the application be made with 14 days of “intended departure” as “intended arrival”. It submits it was also because MBIE adopted such a high threshold to the requirement that a person have “no other option”, and failed to take into account a person’s financial position or physical or mental health, that the category was deprived of any meaning.

[10] Overall, Grounded Kiwis submits that, in the context of a chronic lack of MIQ capacity, decisions about MIQ were made through the single lens of public health risks. It submits that these decisions should have been with a bifocal lens that included the fundamental right of citizens to enter their country. It submits that failure to do so resulted in New Zealanders enduring substantial delays in returning and considerable suffering and that this was not justified.

[11] The respondents submit that the restrictions imposed on the right to enter New Zealand were justified as part of the Government’s public health response to the pandemic. They say that, faced with the most serious threat to public health that New Zealand has ever experienced, the Government put in place a multifaceted strategy involving a range of measures of which the MIQ system was a crucial part.

[12] The respondents say that no system for overseas arrivals that limited citizens’ right to enter the country in a lesser way would have been as effective at reducing the public health risk. They say that, far from a bifocal lens, citizens’ right to enter New Zealand was at the forefront of the MIQ system and it allowed many thousands of citizens to do so. They say the suite of public health measures implemented required sacrifices and forbearance, but they were made for the benefit of all New Zealanders. They have enabled New Zealanders to enjoy protection and the fulfilment of the right to the highest attainable standard of health during the pandemic. That in turn benefits returning New Zealanders.

[13] On the first of the specific matters challenged by Grounded Kiwis, the respondents submit a flow management system was an inherent and unavoidable part of any border managed quarantine system. They say the voucher requirement was

better than alternative systems at enabling health authorities to anticipate and meet the health and other needs of passengers. They say there was no alternative to a 14-day quarantine period prior to the change to a 7-day period that was less rights-limiting and that could have achieved the objective of preventing and limiting the public health risks in accordance with the Government's elimination strategy. They say a self-isolation model was not a reasonably available alternative until vaccination rates had increased. They say the requirements were proportionate to the public health risks and a delay of three months or more for a returning New Zealander does not necessarily render it disproportionate.

[14] On the group allocations, the respondents submit they were prescribed by law. They were citizenship-neutral and therefore available to, and mainly used by, New Zealanders and they mitigated some of the economic and social impacts of the COVID-19 response. The criteria were published throughout the Relevant Period and so the fact that they were not published prior to 1 September 2021 is irrelevant. Although the process for approving them did not align with what was prescribed, the respondents say the decisions were made by a group of Ministers who were appropriately placed to make those decisions.

[15] On the virtual lobby, the respondents submit that, within the confines of a necessarily limited supply of MIQ space, this system aided New Zealanders' right to return to the greatest extent possible. It did so by improving the performance issues of the online system it replaced. It successfully enabled many New Zealanders to return, including many of those who filed evidence for Grounded Kiwis. Although the virtual lobby did not have a priority system, the respondents say that emergency allocations were available to ensure that, outside the virtual lobby, New Zealanders with an urgent requirement to enter New Zealand could do so.

[16] Lastly, the respondents submit that officials correctly understood the "14 days of intended departure" requirement for emergency allocations. They say that evidence of any error about this in an individual case is not evidence of a system error. They also say that the "no other option" criterion was correctly applied. They say that this was an intentionally narrow category and was not intended as a general visa expiry category.

[17] I have determined that the requirement for arrivals to have a voucher in MIQF did not in and of itself amount to an unjustified infringement of New Zealanders' right to enter their country. The requirement to isolate in a MIQF for a period of 14 days (until 14 November 2021) and then for 7 days (from 14 November 2021) were reasonable and proportionate limits on the right to enter while those requirements were in place. Other options would not sufficiently have achieved the public health objectives the Government had legitimately determined to pursue.

[18] This was so even when, from mid-October 2021, those in the community who had the virus and their close contacts were not required to quarantine or isolate in a MIQF (subject to some exceptions) due to the severe constraints on MIQ availability at this time. Expert advice was that border arrivals as a cohort presented different public health risks to community cases and their contacts and a precautionary approach was appropriate while vaccination rates increased. In the meantime, following the High Court's decision in *Bolton v Chief Executive of the Ministry of Business, Innovation and Employment* in late October 2021, there was, at least in theory, greater potential scope for individuals to obtain permission to self-isolate.⁵ A pilot for a wider self-isolation model was also underway.

[19] Group applications were prescribed by law during the Relevant Period. It has not been established that group allocations as a category improperly curtailed New Zealanders' right to enter their country. However, individuals may have been facing unreasonable delays and there should have been a system to enable such individuals to be allocated a place as well. There were process errors in the way the group allocation system operated, although it is not suggested that these errors impacted upon overseas arrivals who were experiencing unreasonable delay.

[20] The virtual lobby was the main pathway through which overseas New Zealanders could exercise their right to enter their country. It was not an appropriate mechanism where demand significantly exceeded supply and those seeking to access that supply had a fundamental right that was potentially impacted to different degrees. The virtual lobby did not prioritise New Zealand citizens over

⁵ *Bolton v Chief Executive of the Ministry of Business, Innovation and Employment* [2021] NZHC 2897, [2021] 3 NZLR 425.

non-citizens and nor did it prioritise on need or the delay experienced by a citizen. The offline emergency process was too tightly constrained to address this deficiency. The respondents have not shown that a less rights impairing MIQ system was not reasonably available and that would have sufficiently achieved the Government's public health strategy during the Relevant Period.

[21] In particular, the respondents have not shown why an online system could not have prioritised New Zealand citizens over others or prioritised based on the time period that a person had been seeking to return. Nor have the respondents demonstrated that wider criteria for offline applications and a corresponding greater number of rooms allocated for those applications were not reasonably available alternatives to the system as it operated. The emergency allocation process as it operated was an inadequate method of seeking to ensure that New Zealanders could return if they were facing unreasonable delays or had a need to return that warranted priority. There appears to have been no proper system to gather information from overseas New Zealanders about this. This information would have enabled system changes to be considered to better give effect to the right of citizens to return while still meeting the Government's public health aims. It was inevitable that the system would operate unjustly in some individual cases because of this.

[22] While there is no bright-line test that restrictions preventing a person from being able to enter their country for a three-month period cannot be justified, the evidence indicates that at least some New Zealanders experienced unreasonable delays in exercising their right to enter. The MIQ system did not have an adequate mechanism for identifying them. Although MIQ was a critical component of the Government's elimination strategy that was highly successful in achieving positive health outcomes, the combination of the virtual lobby and the narrow emergency criteria operated in a way that meant New Zealanders' right to enter their country could be infringed in some instances in a manner that was not demonstrably justified in a free and democratic society.

[23] My reasons follow.

BACKGROUND FACTS

The pandemic

Introduction

[24] The term COVID-19 refers to coronavirus disease caused by severe acute respiratory syndrome coronavirus 2 (SARS-CoV-2). As is now well-known, it was first identified in December 2019 in Wuhan, China, and since then, it has spread globally to create the most significant pandemic event since the Spanish flu of 1918. As at 16 December 2021, there were 270,791,973 confirmed cases of COVID-19 and 5,318,216 deaths reported to the World Health Organisation (**WHO**). The true number of cases and deaths will be higher than the confirmed cases.⁶ A timeline of some of the key events from New Zealand’s perspective is set out in **Appendix one** to this judgment.

Variants

[25] As the pandemic has unfolded, new variants (genetic mutations) have emerged. Depending on those changes and their public health significance WHO classified them as “variants of interest” or “variants of concern”.⁷ Since the start of the pandemic until 26 November 2021, WHO has designated five variants of concern: Alpha, Beta, Gamma, Delta and Omicron.

[26] For present purposes, the Delta and Omicron variants are the most relevant. New Zealand had its first Delta community outbreak (initially centred in Auckland) in August 2021. New Zealand’s first case of Omicron was detected at the border on 16 December 2021 and there has since been a widespread community outbreak in the first few months of this year that, at the time of this judgment, continues.

⁶ The pandemic has continued on. As at 4 February 2022, WHO has recorded 380,321,615 confirmed cases of COVID-19, resulting in 5,698,741 deaths. Again, this is a figure likely to significantly understate the true number.

⁷ Variants of interest have changes that affect the virus’ characteristics (for example, transmissibility, disease severity, or immune, diagnostic or therapeutic escape) and, putting it broadly, have impacts to suggest an emerging risk to global public health. Variants of concern meet the definition of variants of interest but also have demonstrated changes at a degree of public health significance involving increased transmissibility or a detrimental change in epidemiology, increased virulence or change in clinical disease presentation, or decreased effectiveness of public health and social measures or available diagnostics, vaccines or therapeutics.

Tests, treatment and vaccines

[27] There are several ways to test for COVID-19. They include:

- (a) Polymerase chain reaction (**PCR**) testing by nasopharyngeal or oropharyngeal swab that is processed in a laboratory.⁸ It is highly accurate and for much of the pandemic it has been the most commonly used test in New Zealand. It was used to test all arrivals at the border while they were in MIQ from June 2020.
- (b) PCR testing of a saliva sample (**saliva testing**). From April 2021 the Ministry of Health was satisfied that this could be used for surveillance testing of border workers and returnees. It was first used as a prototype in Canterbury to inform national rollout from 28 June 2021. The phased rollout to border workers commenced on 11 August 2021.
- (c) Rapid Antigen testing (**RAT**). These are individual test kits that do not require a laboratory to process. They can be self-administered and take 15 minutes to produce a result. They are less reliable than a PCR test. Their reliability is improved when a person is highly infectious. Pilots in Auckland metro hospitals (high-risk settings) ran from September to October 2021. A point-of-arrival pilot in Auckland commenced on 31 October 2021. A phased rollout of RATs commenced on 15 December 2021 when Aucklanders were permitted to leave their region. As is well-known, during the current Omicron outbreak their use has become widespread.

[28] When the COVID-19 virus emerged there were no known effective therapeutic treatments or vaccines available. The Pfizer/BioNTech vaccine was the first to receive emergency validation from WHO on 31 December 2020 and recommendation on 8 January 2021 from WHO's Strategic Advisory Group of Experts on Immunization.⁹

⁸ A PCR test is a molecular test technique that uses selective primers to "copy" segments of an RNA sequence.

⁹ The AstraZeneca/Oxford vaccine received emergency validation on 15 February 2021 and SAGE recommendation on 21 April 2021: World Health Organization "WHO lists additional COVID-19 vaccine for emergency use and issues interim policy recommendations" (Press release, 7 May 2021).

Between October 2020 and December 2020 the Government made contractual arrangements with Pfizer/BioNTech to purchase up to five million COVID-19 vaccines.¹⁰ Medsafe provisionally approved the Pfizer vaccine on 3 February 2021 and New Zealand began vaccinating border workers on 20 February 2021 followed by the families and household contacts of this workforce. The rest of the vaccine rollout occurred in stages during 2021.

The risk to public health

[29] Dr Ashley Bloomfield, the Director-General of Health, who has played a critical advisory role to the Government's response to the pandemic and has provided an affidavit for this proceeding, said it is hard to overstate the risk COVID-19 posed, and (as at the time of his affidavit sworn on 17 December 2021) continued to pose, to the public health of New Zealand. As the respondents put it in their submissions, the pandemic is arguably both the most serious threat to public health New Zealand has ever experienced and the most significant global disruption to lives and livelihoods since World War II.

[30] In response to the risk posed by the virus, one of the public health measures put in place by many countries was to require people to stay at home subject to limited exceptions. The most restrictive of New Zealand's stay at home orders was implemented under the Government's "Alert Level 4" and colloquially referred to as "lockdown". New Zealand first went into Alert Level 4 at 11.59 am on 25 March 2020.¹¹

[31] At that time, modelling work indicated that with substantial uncontrolled spread in New Zealand, 34 per cent of the population would be symptomatic, on the worst day there would be 1,450 to 1,700 patients requiring ICU hospital care which was around 10 times more than the capacity, estimated deaths would be at least 12,600–33,000 and the burden of hospitalisations and deaths would fall disproportionately on Māori and Pasifika communities and those aged over 60 years.

¹⁰ Other vaccine candidates were pursued during this period as well.

¹¹ Appendix one provides the details of when all or parts of New Zealand were subject to these orders.

[32] Stay at home orders were part of a suite of public health measures that New Zealand adopted at various points in the pandemic. Others included school closures, restrictions on public gatherings, testing and contact tracing, border controls, restrictions on internal movements, requirements to wear face coverings and vaccine policies.

[33] Dr Bloomfield confirmed that these public health measures were all geared towards reducing the incidence of infection, illness and death across New Zealand's population. This included seeking to ensure a reduction in illness and death from other diseases that would result if our hospital system became overwhelmed with COVID-19 cases (as occurred in other countries).

[34] Decisions about these public health measures had to be made in an evolving situation. As Dr Bloomfield described it, matters were "evolving fast and hugely significant judgement calls were being made quickly, usually on incomplete or very emergent information". The precautionary principle, where reasonable efforts to reduce risk need not await scientific certainty, applied. Dr Bloomfield described New Zealand's "aces" in responding to the pandemic as achieving high vaccination rates, and having vigorous testing and contact tracing and border controls. He said that giving up any of these measures too soon could have led to severe consequences.

[35] Dr Bloomfield said that "looking back" it was possible to see a number of points where there was a "step-change" in what was happening with the virus. Delta was significantly more transmissible than the original variant and became the dominant variant globally when it emerged. It "fundamentally changed the game" and put considerable pressure on New Zealand's public health response resources. The volume of contacts was six times the number of close contacts as that identified in association with all the previous community outbreaks in New Zealand.

[36] At the time of the Delta outbreak, New Zealand was in the midst of its Pfizer vaccine rollout to the eligible population. Two doses of the Pfizer vaccine were effective against infection, symptomatic disease and hospitalisation for Delta cases, but protection against Delta waned over time. This indicated the need for a third (booster) dose after several months. As at the end of the day on 15 December 2021,

94 per cent of eligible New Zealanders (aged 12 and up) had received a single dose of Pfizer's vaccine and 90 per cent were fully vaccinated.

[37] Omicron was designated as a variant of concern because it had characteristics (namely, the number of mutations in the spike protein) that gave rise to the potential for enhanced transmissibility and/or a degree of immune escape. There were also concerns concerning initial epidemiological reports from South Africa, including signals of an increased risk of reinfection. Many of its characteristics were unclear at the time of Dr Bloomfield's evidence.

[38] Dr Bloomfield's evidence was that a precautionary approach and agility have been critical features of New Zealand's response. He said New Zealand's response involved considered decision-making, built on science and evidence, and with the safety and wellbeing of New Zealanders as the paramount consideration. One measure of success in the public health response to date that he referred to was "excess mortality". In the 18-month period since January 2020, New Zealand recorded the sixth lowest figure. Dr Bloomfield said a cautious approach was appropriate because the potential health consequences of getting the balance wrong were "very serious indeed".

[39] A comparison was made with Scotland because it has a similar population and demographic to New Zealand. As at 30 November 2021, and despite implementing public health measures including several "lockdowns", it had experienced 724,983 cases and 9,562 deaths related to COVID-19. That was within the range indicated by the modelling referred to above if the virus had been allowed to spread substantially in New Zealand.

[40] Since Dr Bloomfield's affidavit, there has been continued uptake of the first and second doses of the Pfizer vaccination and a third booster shot has been rolled out to respond to the Omicron wave. This third shot is understood to reduce the risk that a person will become seriously unwell from contracting Omicron.¹² With the several thousands of daily cases of Omicron that New Zealand experienced, PCR testing and

¹² Vaccination rates have been regularly reported and the efficacy of the booster shot has been mentioned regularly in public announcements.

contact tracing were quickly overwhelmed and reported cases predominantly now come from RATs.¹³

NZ Government's policy

[41] From March 2020, New Zealand pursued an elimination strategy. This strategy is discussed in Dr Bloomfield's evidence as well as by Hon Chris Hipkins. Minister Hipkins was initially the Minister of Health but became the Minister for COVID-19 Response in November 2020 (**the Minister**). In the latter capacity he was responsible for all aspects of the Government's ongoing response to COVID-19, including matters relating to the MIQ system, border management, testing and contact tracing systems, and managing any resurgence of the virus.¹⁴

[42] The Minister's evidence explained that the elimination strategy did not have a goal of no new cases. Rather, it was a strategy of zero-tolerance towards new cases. It had four key components (referred to as "pillars") involving:

- (a) "Keep it out": this was about keeping COVID-19 out of the New Zealand community through border controls. It involved rigorous quarantine procedures and other measures at the border that prevented a person who arrived in New Zealand while infected with the virus from infecting a person in the community and "seeding" an outbreak.
- (b) "Prepare for it": this involved putting in place public health measures in the absence of community transmission to ensure early detection of any community outbreaks, to allow for rapid contact tracing and isolation, and to slow the spread of the virus in the event an outbreak was seeded. More recently, it also included vaccination to build up personal and population immunity.

¹³ Daily cases were above 20,000 in February but are now less than 10,000. Total deaths are presently in the mid-600s.

¹⁴ Before that, between 19 June 2020 and 6 November 2020, Hon Megan Woods was responsible for the MIQ system while responsibility for imposing requirements on people to be isolated and quarantined rested with Hon Chris Hipkins as Minister of Health.

- (c) “Stamp it out”: this involved testing, contact tracing, quarantine, isolation and case management to eliminate COVID-19 as quickly and efficiently as possible from the community. It also involved population-wide social distancing requirements to prevent the spread of the virus, while outbreaks were contained and eliminated.
- (d) “Manage the impact”: this included efforts to strengthen the public health system.

[43] The Minister said the policy objective was to have public measures at the border that reduced the likelihood of a community outbreak being seeded from overseas to as close to zero as possible. The Delta outbreak challenged the elimination strategy but the Government continued its attempts to “stamp out” the outbreak in areas outside of Auckland while vaccination rates increased. The Delta outbreak led to a transition to a new strategy, in October 2021, of managing and attempting to contain the outbreak. Strict border controls were maintained to prevent further outbreaks from seeding, including in areas outside of Auckland and in previously unaffected populations, and to prevent the arrival of new variants of concern. The Minister’s evidence was that the Government’s tolerance for the risk of an outbreak being seeded by a person arriving in New Zealand from overseas was very low. As at 21 December 2021 (when the Minister’s evidence was sworn), this continued to be the case throughout the Delta outbreak centred in Auckland.

[44] It was envisaged that, as vaccination uptake allowed, the strategy would rely more on vaccination to slow the spread of the virus rather than relying so heavily on border controls, travel restrictions and social distancing measures, while also seeking to avoid outbreaks of new variants of concern. Consistent with this approach, New Zealand citizens are now able to return without being required to enter MIQ and vaccinated returnees are also not required to self-isolate.

MIQ

Introduction

[45] In late February and March 2020, while cases of COVID-19 overseas were rising and countries were taking measures to address this, countries including New Zealand were making decisions about their borders. The significance of the decision is well captured in a Cabinet paper on 12 March 2020 that said:

We are reaching a critical decision point for our border. Implementing border restrictions at a very large scale could make the difference in our long term economic pathway. There is a tipping point, where your decisions at the border will either put New Zealand on a trajectory that: a. manages the public health risk effectively (containing clusters of outbreak in New Zealand), while supporting the economy to bounce back rapidly ... or b. isolates New Zealand from the world and results in a shock to our economy which has deep and long lasting adverse impacts, including on wellbeing ...

[46] Initially, New Zealand had placed travel bans on arrivals from specific countries. From 14 March 2021, most arrivals were required to self-isolate. The decision was then made to close our borders to everyone but New Zealanders (with some limited exceptions) from 11.59 pm on 19 March 2020. A Cabinet paper dated 19 March 2020 recommending tighter border controls explained the issues associated with requiring tourists to self-isolate as follows:

Over the last few days, we have seen multiple instances of non-compliance from visitors in particular. There have been increasing and credible reports from the hospitality, accommodation and conservation sectors that visitors are not complying with self-isolation requirements, and have no intention of doing so. Existing phone lines are receiving a growing volume of calls reporting non-compliance by people perceived to be visitors. Spot checks by Police since 17 March 2020 have also revealed that recent arrivals to New Zealand do not have a clear understanding of self-isolation requirements.

[47] The measures in place from 10 April 2020 included a requirement for all arrivals by air¹⁵ to isolate (that is, be separated if they had a confirmed diagnosis of the disease) or quarantine (that is, be separated because they would potentially develop the disease) in a MIQF.¹⁶ This requirement remained in place for the balance of 2020 and throughout 2021 (including during the Relevant Period). The quarantine period

¹⁵ There are some complexities with maritime arrivals. These are not the focus of the proceeding so the Minister's evidence does not discuss them.

¹⁶ Dr Bloomfield noted that we have tended to use "self-isolation" as the term when a person is self-quarantining at home to distinguish this from quarantining in a MIQF.

was 14 days until 14 November 2021, at which time it changed to seven days along with a period of self-isolation while awaiting the result of day 9 test. On 23 December 2021 the period in MIQ was amended to 10 days.

[48] From early on, it was also recognised that New Zealand would need to reconnect with the world at some point and that it would be necessary to have measures that balanced the need for continued flows of people and goods across the border with risk. From about June 2020, work began on a long-term strategy about this.¹⁷ A first step in opening the border was pursuing quarantine-free travel (**QFT**) with low-risk countries. The initial focus was on Australia, Cook Islands, Niue and Tokelau. QFT with Australia commenced in April 2021 but was short-lived due to multiple community outbreaks of COVID-19 in that country. These outbreaks led to on and off pauses in QFT with particular states of Australia but ultimately an indefinite suspension of the QFT arrangement on 23 July 2021.

[49] After the experience with Australia (including that genome sequencing linked the outbreak of the Delta variant in Auckland to the New South Wales (**NSW**) Delta outbreak), the focus shifted to achieving sufficiently high vaccination rates so that greater risk of border incursions would be acceptable. For returning New Zealanders, this point was reached in stages in February and March 2022 when they were no longer required to enter MIQ.¹⁸

[50] A timeline of the key events relating to MIQ is **Appendix two** to this judgment.¹⁹

Capacity and scale

[51] The MIQ system was set up under urgency during a time of national emergency. Initially, in March 2020 when most people were permitted to self-isolate,

¹⁷ This was termed the “Reconnecting New Zealanders” strategy.

¹⁸ This was part of the “Reconnecting New Zealanders” strategy, which depended on the development of the elimination strategy and advice from the Skegg and Roche advisory groups. Cabinet agreed to a risk-based approach on 9 August 2021 and steps to operationalise the reconnecting strategy.

¹⁹ In addition to the affidavits and the Joint Bundle of Documents (comprising approximately 4,927 pages, all of which I have read), the respondents’ detailed chronology has assisted with this and the chronology that is Appendix one.

only one hotel was commissioned. With the move to mandatory isolation or quarantine in managed facilities in April 2020, 15 additional hotels were commissioned. By July 2020 there were 32 facilities and, by late November 2021 there were 33 facilities.²⁰

[52] The 33 facilities equated to 6,368 contracted rooms. That did not equate to rooms available for overseas returnees. Rooms were set aside for operational needs (staff accommodation, testing and equipment rooms) and contingencies. Rooms taken out for maintenance and ventilation issues also reduced capacity.²¹ Cohorting, introduced from May 2021, also reduced capacity.²² Quarantining infected community cases and their close contacts in MIQFs also reduced availability for overseas arrivals.

[53] As MIQ expanded and developed, the budget increased. For the 2021/2022 year, the operating budget was just under \$1 billion. This was only a little less than the 2021/2022 budget to vaccinate every person in New Zealand. As at December 2021, there were 5,563 full time equivalent people working in MIQFs. This included 1,200 New Zealand Defence Force personnel, 238 police officers, 156 aviation security staff, with border workers, hotel staff, general security and health workers making up the balance. In addition, 767 MBIE staff worked directly in the MIQ area supporting the Government's policy objectives.

[54] From around June and over subsequent months, MBIE carried out exploratory work, as directed by Cabinet, on further suitable facilities and potential alternatives to the MIQ system. The options canvassed during this period included campervans, communal accommodation, cruise ships, smaller accommodation providers such as motels, establishing bespoke facilities for certain groups (such as for sports events), serviced apartment buildings, and a temporary accommodation village in the South Island that had previously been used for workers that became available for purchase.

²⁰ The 33rd facility was brought on in part to pick up the loss of capacity that would arise when one of the Wellington facilities was to be decommissioned due to issues with it.

²¹ For example, only 50 per cent of contracted rooms at a Wellington facility were usable because of poor ventilation.

²² This involved a MIQF receiving international arrivals within 96 hours of each other and then locking down to new arrivals until the original cohort had completed their 14-day isolation period.

[55] By February 2021 all these avenues were not recommended. Bespoke facilities were not pursued because of the concern that they would divert workforce needed at other facilities. The idea of a sports-based facility in Queenstown was also rejected because of this, as well as on costs grounds, and because it was not located close to a hospital. The accommodation village was not recommended by MIBE officials because the rooms were basic and not up to the standard of the existing MIQFs, there was not funding to purchase the village and bespoke logistic and operational requirements would need to be established and take time. Other options had similar issues and some would involve compliance issues.

[56] In August and September 2021, at a time of considerable demand on MIQ (discussed further below), at the Minister's request officials were providing advice about whether further facilities could be commissioned. The initial advice given on 3 August 2021 was that three hotels (of many considered) were most suitable but there was not the workforce to support them and, without an adequate workforce, that would increase the risk of COVID-19 entering the community. By September 2021 funding was being sought for two of these facilities. In the end, only one of these was feasible. The other option, in Rotorua, had challenges due to the lack of an available workforce in the area and consistent iwi opposition to it.

[57] The Minister explained in his evidence that the Government was not willing to compromise on standards as this would increase the risk of a community outbreak.²³ When the various alternatives to MIQ were being considered, Auckland had experienced a community outbreak that had led to an "Alert Level 3" lockdown for Auckland in August 2020. Further, a significant outbreak had occurred in Victoria, Australia between June and September 2020 and a subsequent Victorian Government inquiry identified that it had been seeded by lapses in protocols by private security guards in quarantine hotels.

²³ Kathryn Rush, a Principal Advisor at MBIE, set out the "must have" criteria for a MIQF in her evidence. This included proximity to a hospital and lab testing, an appropriate earthquake safety rating, access to onsite fresh air and exercise, perimeter control and ventilation.

[58] With an essentially finite MIQ capacity of the standard and with the support considered necessary, the issue was how to allocate that capacity between competing demands.

Allocation of MIQ places

[59] From April 2020 until 2 November 2020, anyone lawfully able to enter New Zealand needed only to secure a flight. On arrival they would be transported to a MIQF. Initially, only New Zealand citizens or resident visa holders were lawfully able to enter. Ministers allowed case-by-case exceptions for critical workers or for humanitarian reasons, but the bar was set very high. By September 2020, the classes of workers who could be designated essential workers expanded and were assessed against criteria set by a group of Ministers delegated this task. Exceptions for groups were also to be made, again subject to criteria.

[60] From 2 November 2020 everyone was required to have a confirmed place in a MIQF before they could enter the country. A confirmed place was obtained by securing a voucher. The voucher could be obtained via an online system (**MIAS**) (initially operating on a first come, first served basis and subsequently the virtual lobby system) or an offline system. The offline system was for essential workers, group allocations and other time-sensitive travel where applicants could not obtain a place via the online system. This is discussed further below.

[61] The number of rooms available via the online and offline systems changed over time. As at 25 August 2021 (that is, leading into the Relevant Period), a briefing from MBIE to the Minister advised that approximately 25 per cent of MIQ spaces were allocated manually with the following breakdown: MIAS (4,500 rooms); emergency (700 rooms); other time-sensitive travel (200 rooms); and group allocations (800 rooms, but currently temporarily increased to 1,000 rooms).²⁴

²⁴ This breakdown is a bit unclear because the paper also refers to 1,000 rooms for QFT. From other briefing papers to the Minister I understand that the group allocation of (temporarily) 1,000 rooms was (or included) rooms set aside for New Zealanders returning from Australia when QFT was paused and then suspended. I am unclear whether this included rooms that were also set aside for other contingencies.

[62] The 4,500 MIAS rooms appears to be inclusive of the manual (offline) allocations because the respondents' submissions say that MIQ operational capacity was 4,500 rooms per fortnight for much of 2021 and then reduced to 4,000 rooms per fortnight. If that is correct, then as at 25 August 2021 the number of rooms allocated through the online system was around 2,600 per fortnight (but less any rooms being used for community Delta cases or other contingencies). This number is broadly consistent with Grounded Kiwis' analysis. Grounded Kiwis refers to a later briefing to the Minister that sets out the allocation of rooms from mid-August 2021. That number was around 2,100 rooms per fortnight because 570 rooms per fortnight were being used to quarantine community cases in the Delta outbreak.²⁵

[63] Evidence for the respondents does not set out how many rooms per fortnight were available for the Relevant Period. The evidence is provided in terms of operational capacity over a 33-day period as at 17 December 2021.²⁶ The evidence does say that at this time the fixed room caps for offline allocations were: time-sensitive travel (200 rooms); emergency allocations (800 rooms); group allocations (800 rooms) and healthcare workers (300 rooms).²⁷ From an operational capacity of 4,000 rooms per fortnight,²⁸ that would indicate 2,100 rooms per fortnight were allocated via the online system (subject to any additional rooms set aside for contingencies). This is consistent with Grounded Kiwis' view based on information on MIQ's website as at 20 December 2021.

Managing demand (prior to the Relevant Period)

[64] When the decision was made in April 2020 that everyone was to enter MIQ, demand was expected to be low for several months. This was because travel restrictions in many countries limited commercial airline routes. By June and July 2020, demand had reached the point where it was necessary to commission additional MIQFs. By the end of July, when 32 MIQFs had been commissioned, officials expected demand for MIQ spaces to continue to increase and to outstrip

²⁵ Their analysis refers to an annexure to a briefing paper. The annexure is not included in the Joint Bundle of Documents.

²⁶ Kathryn Rush said there were 7,000–9,000 rooms in MIAS per 33 days as at 17 December 2021.

²⁷ Unused rooms in these caps were released back into MIAS.

²⁸ As per the respondents' submissions.

supply in the short term. At this time international air travel services had begun to increase as other countries relaxed border controls.

[65] As there was limited capacity to commission new facilities and alternative quarantine arrangements under consideration were not available, it was necessary to have a flow management system. Initially the flow management system involved caps on the number of passengers that airlines could transport to New Zealand.²⁹ This was set up quickly because of the urgent need to ensure that the capacity of MIQ was not overwhelmed. However, under this system it became apparent that MIQ capacity was underutilised because airlines were not meeting their assigned quotas.

[66] MIAS was an online system developed through July to September 2020, with the pilot in October, and the system going live in early November 2020. The system provided information that enabled MIQ to have more accurate information about arrivals that enabled better utilisation rates and allowed MIQ staff to better match people to suitable facilities. It was a first come, first served model. Officials advised that the system did not include a prioritisation function and that it would be necessary to have some places allocated offline. It was also envisaged that work would be carried out to enable some prioritisation through MIAS.

[67] By 13 October 2020 officials were predicting that the target utilisation of MIQ (90 per cent) was expected to be reached by mid-December 2020. The uptick in demand from late November was expected to come from New Zealanders wanting to return for Christmas as well as a large cohort of New Zealanders resident in the UK, USA and Australia who would be looking to return due to the expiration of visas and lack of financial support (the UK furlough scheme was being phased out in October and the wage subsidy was being gradually phased out in Australia). There was also a large cohort of New Zealand Government personnel and their families deployed offshore who were due to return at the end of the year, having completed their assignments.

[68] By 5 November 2020 officials briefed the Minister that “due to unprecedented demand” MIQ was operating at near full capacity. This was thought to be due to an

²⁹ The same system the Australian Government used.

awareness campaign about MIAS and the global epidemiology outlook (resulting in a significant increase in airline ticket uptake, with some airlines having oversold their quota and experiencing fewer “no shows”³⁰).

[69] On 22 December 2020, the Cabinet Business Committee agreed to “improvements” to the allocation of MIQ space. These included having a target of 10 per cent of rooms (up from seven per cent of arrivals over recent months) used by critical workers and ring-fencing of 75 per cent of rooms for use by New Zealanders “to protect their legal right to return home”.³¹ It was also proposed that a “transparent legal basis for prioritising and allocating rooms to people entitled to enter and whose entry was time-critical” would be established.

[70] In February 2021 officials advised there was “very high demand” for MIAS vouchers, with availability “extremely limited” and rooms fully allocated until the end of March. By the end of February 2021 MIAS vouchers were fully booked through to the end of May. Officials advised that a final contingent of vouchers would be released over the April/May period but officials expected these to be fully booked within 24 hours of release.

[71] In March 2021 officials advised that demand for places in MIQF exceeded capacity and it was “highly likely that demand for MIQ space will continue to outstrip supply”.

[72] A potential solution to this was QFT with Australia. While this had been under consideration for some time, there was a range of complications with getting it underway.³² It was eventually able to be put in place in April 2021. At the time, officials expected this arrangement would free up 1,000 to 1,300 rooms a fortnight. Over 5,000 MIQ vouchers for arrivals from Australia were cancelled over the booking period from April to September 2021 by travellers or officials because they would no longer be needed with the QFT arrangement.

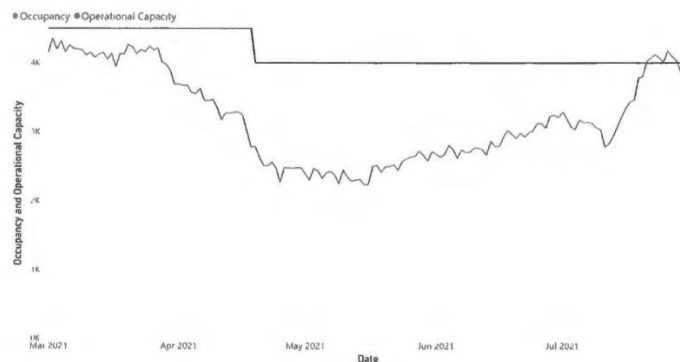
³⁰ People purchasing tickets but not turning up for their flight.

³¹ It was envisaged that these proposals could be implemented through amendments to the Air Border Order issued under the COVID-19 Public Health Response Act discussed later in this judgment.

³² This is discussed in the Minister’s evidence.

[73] Initially, QFT appeared to be successful in managing demand for MIQ. In April 2021 officials advised that the uptake of vouchers through MIAS releases for the April to July period had been slower than for previous releases but it was too soon to identify a demand trend.

[74] Kathryn Rush, a Principal Advisor with MBIE involved in MIQ since its inception, provided the Court with the following graph that showed utilisation of operational capacity for the period 1 March to 31 July 2021.



[75] However, utilisation rate does not correlate directly with demand. Evidence from Theodora Livas, a policy manager at MBIE, clarified that the graph does not show when rooms for travel on each day within the period of the graph were made available to book. This is also not clear from other evidence before the Court. However, it does seem that rooms were released in a graduated fashion rather than being made available all at once.³³ Also at this time, the evidence filed by Grounded Kiwis (discussed further below) indicates that users were having difficulties with MIAS.³⁴ Amongst those difficulties was matching places in MIQ with flights.³⁵

[76] Ms Livas also explained that the graph does not identify the impact that undertaking additional maintenance on MIQF had on capacity over this period. She

³³ For example, a briefing from MBIE to the Minister on 24 March 2021 discussed a new system in which voucher releases on MIAS would be released for time periods up to six months in advance (compared with the previous three month period) but MBIE would not be releasing all vouchers available for the period online at once.

³⁴ For example, RO said that she began trying to obtain a voucher in June 2021 and “was desperate to obtain an MIQ spot for any time that was possible and plan my life around that”. See Appendix four.

³⁵ For example, SD created an account on MIAS in June 2021. He had to cancel places because they did not match with available flights for those dates. It may be that he was seeking a place in July or August when, in Ms Rush’s words, the occupancy rate was “extremely high”.

said that over April, May and June 2021, MIQ undertook responsive remediation of ventilation systems in some facilities, as well as accelerating regularly scheduled maintenance (to reduce maintenance in later, higher demand periods). This utilised some of the unused capacity. She said this was enabled by the reduced demand for rooms over this period. However, it is not clear when the decisions to accelerate maintenance were made. This means it is also not clear how much notice those seeking to return had, in order to make potential use of the availability of places in MIQ, before they became unavailable because of maintenance work.³⁶

[77] Those matters aside, it is fair to say that this graph provides support for the Minister’s evidence that “there have been times when MIQ has had surplus capacity” at least during the period shown in the graph. However, that period appears to have been the only period when that was so after the move from the airline quota system to the MIAS system.

[78] The documents show that officials advised the Minister in May 2021 that over late 2020 and early 2021 demand for MIQ places consistently exceeded supply and from January to March 2021 there were frequently no rooms available in MIAS. Officials further advised that a new trend of falling demand had emerged over the second quarter of 2021, driven by the start of QFT with Australia, stable immigration flows and a general reduction in booking demand. It was during this time period that the Minister said at a press conference (referred to below) that now would be a good opportunity for those who want to come back to New Zealand to do so.

[79] This position was, however, short-lived. Almost from the outset, the QFT arrangement was beset with problems. There were five community incursions in Australia during the period QFT was in place. Not only was that a significant drain on the overall COVID-19 response (particularly for the Public Health team at the Ministry of Health), when QFT was paused there were large numbers of New Zealanders in Australia needing to get back to New Zealand who no longer had vouchers for MIQ to do so.

³⁶ Some maintenance was identified as necessary shortly before QFT commenced. An MBIE briefing on 14 April 2021 advised the Minister that in “recent days” risks at two Auckland facilities meant that new returnees would not be placed in them until the issues had been resolved. This would have “implications on how many new bookings we can accommodate on MIAS”.

[80] This period coincided with public criticism of the MIAS system. For example, a *RNZ* article on 9 July 2021 reported that tech-savvy New Zealanders were locking others out of MIQ spots by using computer codes, rooms were disappearing in seconds, dates were released randomly at any time of the day or night and there was no queue, some people were paying freelance computer programmers to monitor the site for them amongst other things, and people were saying that it was close to impossible to get home.

[81] The difficulty in securing vouchers in MIQ increased with a decision to arrange managed return flights from NSW, which was in lockdown because of community cases of Delta. Officials advised the Minister on 11 July 2021 that these were to begin on 13 July 2021. MBIE advised that 1,000 MIQ rooms could be made available for these flights. Two hundred of these would be manually allocated under an urgent or exceptional quota and the balance would be available through booking directly with the airline. These rooms would come from 500 rooms that had been set aside for contingencies (including a QFT contingency) and cohorting underutilisation.

[82] Officials' advice at this time included that these managed flights would be occurring when there was "no availability" on MIAS. The remaining vouchers for August, numbering around 400, that were due to be released on MIAS would be withheld to remain within safe operating parameters and to rebuild the contingency rooms.

[83] The competition for places on MIAS at this time was discussed in a further briefing to the Minister on 14 July as follows:

MIQ is experiencing increased demand pressure for spaces in MIQ, particularly on MIAS. While there was significant availability of MIAS vouchers following the introduction of QFT through until May 2021, MIQ has been running at full capacity since early July 2021, and no vouchers are currently available online. When vouchers are released, they are being rapidly booked – 3,317 released on 7 July were fully booked within 2 hours. While there may continue to be seasonal lulls, we expect that demand will outstrip supply for much of the coming year, particularly around November – January.

[84] The briefing also advised that there would be further "downward pressure on supply" over the next six months due to work on strengthening the ventilation system. A few days later, on 16 July 2021, officials were proposing "ring-fencing" of rooms

in MIAS to give New Zealanders priority access to MIQ ahead of the summer period when demand was again likely to peak.

[85] The strain on MIQ places continued for the rest of July and August 2021. The 1,000 allocated places for NSW returnees had been insufficient. Officials were especially concerned that the demand from New Zealanders in Australia for the urgent or exceptional quota had been filled and there were people whose applications had or would meet that quota's criteria who had been unable to obtain a place. On 17 July 2021 officials proposed allocating more MIQ rooms for them (the options being 530 rooms from 28 July or 600 rooms from 2 August).

[86] The upshot was that between 13 July and 7 August 2021, 1,523 MIQ rooms were made available to support about 2,102 people to return from NSW and no vouchers had been released on MIAS for others since 7 July.

[87] During this period, on 25 July 2021, a member of Grounded Kiwis made a complaint to the Human Rights Commission that the MIAS voucher system discriminated against people with disabilities because the system relied on being the fastest person to interact with it. On 30 July 2021 Ms Birt, the chair of Grounded Kiwis, opened her petition. The petition request was as follows:

That the House of Representatives urge the government to change MIQ to create an equitable booking system, increase capacity, and consider alternatives to 14 day MIQ requirement for vaccinated returnees, to enable all Kiwis to return, consistent with the Bill of Rights Act.

[88] The stated reason for the petition was that "Kiwis abroad feel they have been abandoned and believe the MIQ system is broken, often fully booked for months with extremely limited spots taken in seconds".³⁷

[89] A further MBIE briefing to the Minister, on 12 August 2020, advised that about 400 vouchers that were not needed for NSW were released on MIAS in small batches in August but were all "snapped up" within five minutes of release. Officials considered that this indicated that any further voucher releases would be in similarly

³⁷ The petition had a closing date of 30 September 2021. It received 22,888 signatures.

high demand. Officials advised that the demand on the MIAS website continued to increase as did complaints about a lack of voucher availability.

[90] The briefing provided the following table showing the increase in activity on the MIAS website from May 2021 to 10 August 2021:

Timeframe	Number of unique users per day (average over timeframe)
1 – 7 May	5,139
1 – 7 June	4,944
1 – 7 July	15,047
27 July – 3 August	19,194
4 – 10 August	19,772

[91] The briefing also advised that complex cases were emerging across all states in Australia. These covered people who were not eligible for the managed return flights because they were resident in Australia; those who travelled after the pause on QFT was announced on 22 June 2021 but who now needed to return home; and others who had sudden events, such as the death of a relative or a medical diagnosis. There were also those who had been making arrangements for a planned relocation to New Zealand thinking that the lockdowns would end quickly and were now stuck. People were being referred to MFAT and it had noticed that callers with compassionate grounds for return were becoming increasingly angry and desperate because there was no way home for them at present.

[92] For those stuck in Australia and wanting to return, the plan was to require them to access and secure a voucher in MIAS, the same as any traveller from any other part of the world. It was recognised that this would increase demand for MIQ spaces in a period where MBIE was experiencing “very high demand from the rest of the world”. Prior to QFT, travel from Australia made up approximately 25 per cent of MIAS bookings. MBIE expected this demand to be similar if the suspension of QFT was extended beyond the end of September.

[93] However, to provide those seeking to return from Australia a better prospect of securing MIAS vouchers for September, officials proposed to release some of the

vouchers on dates that coincided with flights from Australia to New Zealand.³⁸ The vouchers would be released for September over several days during mid to late August. Vouchers would also be released for October. Work was underway on a technical solution (a virtual “lobby” or “waiting room”) to manage levels of “extreme” demand on the site. However, this solution was not expected to be ready to be deployed until early September. As a result, officials said “there may be points during this voucher release where the website is unable to manage demand”.

[94] On 13 and 14 August 2021 Grounded Kiwis wrote to the Prime Minister about the dysfunction of the MIQ system, the flaws in the emergency allocation system and the lack of concern by the Government for its citizens overseas that this system conveyed. A *RNZ* article on 16 August 2021 raised concerns about the system and questions around how group allocations for sports teams were being made. Grounded Kiwis had begun making OIA requests. In response to one of those requests, MBIE said the current situation was an issue of demand versus supply and in periods of high demand many people would miss out regardless of the system used.

[95] On 20 August 2021 MBIE proposed changes to the emergency allocation criteria that included a new category for people who had suffered the bereavement of a close family member and needed to travel to be with their family or assist with the management of the deceased’s affairs, or needed to travel to accompany the body of the deceased back to New Zealand. It was anticipated that this could be managed within the then current 350 rooms set aside for emergency allocations. The Minister asked for this to be implemented earlier than October if possible.

[96] On 24 August 2021 MBIE briefed the Minister on a virtual lobby pilot for the MIAS website. Officials said that “as a result of ... excess demand, the current MIAS website model is no longer fit-for-purpose, and requires changes to enable it to effectively manage the flow of users at peak times”. The pilot was to be for the next large release of MIQ rooms. Officials proposed that ring-fencing in MIAS to ensure New Zealanders had priority access to a majority of MIQ rooms, previously agreed to,

³⁸ The BORA implications of this were considered. I have not set out the reason why this approach was viewed as justified in case it was intended to claim privilege over this advice as it has been elsewhere.

be deferred until sometime in September. This was to ensure clear communication to the public on the virtual lobby.

[97] The Minister had directed officials to provide advice on alternative ways of managing MIQ allocations over the high demand summer period, including an option to prioritise New Zealanders who had been overseas for an extended period. MBIE provided advice on this on 25 August 2021 with three options, the first two of which the Minister indicated he would like officials to progress:

- (a) Expanding the emergency allocation criteria so that New Zealanders who left New Zealand prior to 25 March 2020 could be eligible if they could demonstrate they were within three months of their visa ending. MBIE would monitor whether the current allocation of 350 rooms per fortnight remained adequate to meet demand if this criteria was adopted.³⁹
- (b) A web-based allocation system for citizens or permanent residents who last left New Zealand prior to 25 March 2020. This would require hiring additional staff as the MIAS development team was under significant pressure, but applications could open in November 2021 for travel in December to February.
- (c) Manually prioritising all bookings. This was not recommended as it would be very resource-intensive and require a high level of subjective judgement.

[98] In providing this advice, officials acknowledged that demand for vouchers was “significantly exceeding supply”, and even higher demand was expected over the upcoming November–February period, along with potential supply pressures from the ventilation review work programme. In response to these pressures, in addition to the new virtual lobby process and the recent emergency allocation criteria change, MBIE

³⁹ The 350 room allocation contrasts with other advice that there were 700 rooms set aside for emergency allocation at this time.

was reviewing the time-sensitive travel allocation to make sure it remained fit-for-purpose and the next group allocations would not be made until April to August 2022.

[99] On the same day, 25 August 2021, MBIE provided an urgent briefing to the Minister stating it was necessary that a current MIQF be designated as a second quarantine facility as a result of Delta community outbreak in Auckland. The briefing advised that MIQ was experiencing “extreme pressures across the network” due to accommodating the final tranche of NSW managed returns, the current community outbreak, the forecast intake of people from Afghanistan arriving sooner and being larger than expected, and the potential flow-on workforce impacts of MIQ staff testing positive. The briefing advised that MIQ had “almost no ability to respond to any further concurrent events”.

[100] The briefing advised that steps were being taking to try and conserve quarantine space and free up MIQ capacity. These steps included not releasing any vouchers from 22–26 August while MBIE worked to stabilise the network, working with industry to agree to defer a cohort of workers from Vanuatu scheduled for 24 August (freeing up 150 rooms) and potentially the next cohort of workers from Samoa scheduled for 10 September, deferring the first planned red flight from Australia scheduled for 1 September to 5 September, and deferring ventilation remedial work until mid-September.⁴⁰

[101] Despite these steps, officials advised the Minister that he would likely have to make “significant decisions on options for managing the severe demand for MIQ capacity over the coming fortnight”. These options could involve cancelling vouchers, not releasing any more vouchers for September, changing the community outbreak settings so that only acute cases went into MIQ, and suspending cohorting.

[102] The pressure on MIQ places led to further work on whether additional MIQ facilities could be commissioned. The advice was received on 27 August 2021. On 31 August 2021 the Minister agreed to progressing an additional Christchurch facility immediately (to “go live” with this in mid-November). He also directed MBIE to

⁴⁰ Green flights did not require MIQ. Red flights were for flights from NSW where the situation was deteriorating. MIQ was required for those arrivals.

progress work on a Rotorua proposal (which MBIE had recommended against and, following the further work, continued to recommend against).

[103] By 31 August 2021 there continued to be a pause on the availability of vouchers on MIAS. Ms Birt wrote a letter complaining about this pause and contending that it was a limitation of her right to return to New Zealand. She noted that a temporary pause had been announced by MBIE on 23 August because of the current community outbreak. This was to be “for a few days” but eight days later MIAS was still on pause with no confirmed date for when it would reopen. The initial reply from MBIE was that the outbreak was a constantly evolving situation and that those who needed to travel urgently could still apply for an emergency allocation.

The Relevant Period (the virtual lobby)

[104] On 1 September 2021 MBIE provided an update advising that, due to the community outbreak, the Government had decided to extend the pause on the release of rooms on MIAS “for the immediate future”. On the same day questions were raised in the House about the position of Grounded Kiwis.

[105] By 10 September 2021 the plan was to release MIQ rooms online on 20 September 2021. This was discussed in an MBIE briefing to the Minister that noted that the last major release of rooms on MIAS was on 7 July 2021, although emergency allocations for urgent travel had remained open. Officials said this had been necessary to enable a response to “a series of crisis situations”, but the ongoing pause in releasing MIQ rooms had “impeded the ability of New Zealanders (and critical workers) to enter New Zealand, creating an escalating risk of judicial review and significant frustration for New Zealanders overseas”.

[106] Officials advised that the proposal to resume releasing rooms arose from the easing of demand for MIQ rooms with the peak from community cases appearing to have passed. It would be used to pilot the new virtual lobby. The virtual lobby was

expected to improve the experience of MIAS users⁴¹ but would not address the fundamental problem that demand far exceeded supply. Officials said that further advice would be provided in October about whether the current voucher release framework remained fit-for-purpose in light of lessons learnt from the community response.

[107] The Minister agreed to the resumption of rooms via MIAS as proposed by officials. He asked to be kept in the loop ahead of all future voucher releases and also wanted more advice on the pressure regarding emergency allocations and, in particular, whether the number of rooms allocated for this purpose needed to be increased.

[108] Grounded Kiwis conducted a survey of individuals who had used the online system following the first virtual lobby on 20 September 2021. Responses were received from 902 people. Of these, 883 entered the lobby, 213 proceeded through to the booking system and 98 secured a voucher. This equated to a success rate of 11 per cent. This success rate was broadly consistent with the MIQ data showing that 31,900 individuals entered the lobby and 3,200 rooms were booked.

[109] On 23 September 2021 Grounded Kiwis wrote to MBIE, providing feedback on technical issues with the virtual lobby. The letter went on to say:

The equity issues of using a lottery style system for what is a fundamental right of citizens, the insufficient MIQ supply to meet demand, and the failure to consider alternatives to MIQ, continue to cause immense concern, and were noted in a significant number of comments from respondents. We have not touched on those points in this letter, which we have confined to the scope of technical and systemic issues with the virtual lobby.

[110] Some of the comments from the survey respondents included:⁴²

⁴¹ Ms Rush confirmed in her evidence that the experience with the previous system and its impacts was the driver behind the move to the virtual lobby. She said the lobby was intended as improvement because it would: (a) tell users when rooms would be released (compared with the former first come, first served model, which would crash with a significant load); (b) be transparent and fair because “no person is better placed than another in seeking a MIQ allocation”; and (c) remove the need for users to sit and constantly refresh as users would only need to engage for two hours at a publicised time each week to have the opportunity to secure a room.

⁴² On 27 September 2021 MBIE replied to Grounded Kiwis thanking it for the feedback and advising that some changes had been made and further changes would be considered.

Randomised allocation is not fair nor humane ... There has to be prioritisation and also consideration of fully vaccinated people.

...

Absolute abuse of human rights.

...

There should be 1,000 spaces minimum, the NZ Govt is playing lottery with our lives.

...

I [don't] need a lottery system to go back to my home. Home isolation is good enough.

...

They need more MIQ spots. Thousands of Kiwis want to get home and are STRANDED.

...

The concept is completely ludicrous. To have a lottery system when dealing with people's lives is inhumane.

...

My issues are: this is an unfair system, a breach of human rights and a abhorrent way to treat New Zealand citizens. It's doing nothing more than delaying the inevitable and destroying families. How does a government turn its back on its own people and then have the audacity to pontificate we should all "be kind"! Where is the government and this systems "kind"?

...

I can't get into my country which is my BIRTH RIGHT.

...

It's ridiculous I have to win the lottery to enter my own country ... I was 19,000 this time, next time I could be 25,000. Shame!!!

...

It's so unfair and inhumane how they're managing this.

...

[T]here needs to be priority – someone who has been trying for months to go home could have randomly missed out and someone who decided last week to leave and come back on a holiday could have got a spot. [A]lso let fully vaxxed people do isolation at home to take the stress off MIQ.

[111] Further rooms were released over the next few months. Demand outstripped supply throughout this period as the following table demonstrates.⁴³

Date	People in queue	Rooms available
20/9/21	31,900	3,200 (for September to December)
28/9/21	31,319	3,718 (for October to December)
5/10/21	28,406	3,739 (for October to January)
12/10/21	24,987	2,972 (for November to January)
21/10/21	21,368	2,103 (for December and January)
2/11/21	17,665	3,747 (for December to February)
9/11/21	16,277	4,039 (for November to February)
18/11/21	16,278	4,230 (for November to February)

The Relevant Period (other steps to manage the demand)

[112] In a briefing on 30 September 2021, MBIE advised the Minister that it was likely that more than half the demand seen in the 20 September release would still not be able to be met during 2021. Forecasting indicated that “pressure on MIQ was expected to remain very high until at least February”.

[113] In the 30 September 2021 briefing, MBIE noted that the Minister had previously agreed to implement the ring-fencing of rooms on MIAS to ensure New Zealanders would have priority access to a majority of MIQ rooms. MBIE was looking to activate ring-fencing during early October 2021 in consultation with the Minister. This would guarantee New Zealanders access to 70 per cent of MIQ vouchers. Currently, 79 per cent of MIQ vouchers were held by New Zealand citizens and residents. MBIE also recommended against an intended move to permit a wider range of temporary visa holders to travel to New Zealand before the end of 2021.⁴⁴ This was because it would only add to the number of travellers, including New Zealand citizens seeking to exercise their right to return to New Zealand but unable to secure MIQ rooms.

⁴³ This does not include the lobby rounds following the Minister’s announcement on 24 November 2021 that from mid-January 2022 New Zealanders would no longer need to use managed isolation facilities.

⁴⁴ In July 2021 Cabinet agreed in principle to establish a border exception for partners and dependents of all onshore temporary work visa holders.

[114] On 8 October 2021 MBIE sought the Minister’s agreement to restrict MIAS bookings to those with a legal right to enter New Zealand. MBIE advised that this requirement could be introduced in December 2021. The reason for this proposal was that approximately 15 per cent of vouchers were held by those who did not yet have the legal right to enter New Zealand at the time they booked and led to “no-shows”. Officials estimated that the right of entry requirement could reduce the number of no shows by around 50 people per month. Officials noted that current demand for MIQ significantly exceeded supply and “[w]hen New Zealand citizens and non-citizens with visas are facing delays to enter the country, it is reasonable to restrict the booking ability of people without the right to enter the country”. The Minister agreed with the proposal.

[115] On 11 October 2021 MBIE briefed the Minister that MIQ capacity was likely to be exhausted by 13 October 2021 due to the community outbreak. MBIE had paused voucher releases for the rest of October and reduced the number of vouchers to be released for November.⁴⁵ If MIQ continued to accommodate community cases, alternative levers to manage predicted volumes needed to be considered, all of which had trade-offs including public health risk and further reducing MIQ’s operating reserve.

[116] It was proposed that any existing returnees that met low risk indicators could be directed to complete their isolation at home. A similar set of criteria could be developed for community cases. Additionally, there might be cohorts or categories of people arriving in New Zealand who could be diverted from MIQ and supported to self-isolate. There were two cohorts of Antarcticans requiring over 250 rooms in Christchurch on 11 and 18 October. Other travellers might be from low risk destinations in the Pacific and from low risk states and territories in Australia, such as those from Western Australia.

[117] Officials advised that further modelling would be necessary to understand the volume of people who might fall into these groups. The numbers might not make a

⁴⁵ The next lobby release was 12 October. MBIE planned to release no further vouchers for October and only 150 for November. This would mean holding back approximately 1,100 vouchers for November, until more was known about the need for capacity to support the community outbreak.

significant difference to overall capacity and could also result in significant commentary and further pressure about the options for opening New Zealand's borders and for QFT. Any of the options would have equity implications and the implications under the New Zealand Bill of Rights Act 1990 (**BORA**) would need to be considered further.⁴⁶

[118] Following this advice, on 12 October 2021:

- (a) The Minister directed that isolation of close contacts deemed to be low risk should be at home rather than MIQ and this should be put in place immediately. Positive cases that were asymptomatic and could isolate safely at home should be encouraged to do so and this should be implemented as soon as possible.
- (b) The Minister asked for a Cabinet paper prepared for “next Monday” (18 October) proposing that those travelling from all Australian states, except NSW and Victoria, bypass MIQ as long as they were fully vaccinated, have a negative pre-departure test, and self-isolate for 14 days on return in Auckland. The paper should also suggest other low risk travellers who could be treated this way. It should also include advice on how to treat those who then wanted to travel on to other parts of New Zealand.
- (c) The Minister also asked for an urgent assessment of short stay MIQ options that could be quickly implemented. For example, MIQ could be reduced to seven days for those coming from lower risk locations who were fully vaccinated and in cohorts where there have been no positive cases.
- (d) The Minister also agreed with deferring maintenance as required.

⁴⁶ BORA, above n 1.

[119] On 19 October the Director General of Health announced that large numbers of people with COVID-19 were now being allowed to isolate at home, rather than in managed isolation or quarantine facilities.

[120] On the same day, MBIE provided a further briefing about changing the period of managed isolation for border arrivals from 14 days to 9 or 10 days, with a test on day 6/7 (to allow time for the day 9/10 test to be processed). This shift would have an impact on capacity available. If implemented on 1 November 2021, it would mean that 1,614 border arrivals would be eligible for release, although it would not be possible for all of them to be released that day. A change in length of stay would also likely reduce the number of emergency allocation applications. MBIE said there had been a “significant increase” in these applications recently and the proposed changes would allow MBIE to better manage this backlog.

[121] On 22 and 28 October, and 4 and 5 November 2021 the Ministry of Health provided briefings to the Prime Minister, Minister Hipkins and other ministers on two issues: (a) reducing the time spent in managed isolation to seven days with three days in self-isolation, commencing 14 November 2021; and (b) expanding one-way QFT for RSE workers to other eligible travellers from Samoa, Tonga and Vanuatu, as well as Tokelau from 8 November 2021.

[122] This advice ultimately refined to having a day 5/6 PCR test (in addition to the existing day 0/1 and day 3 tests). A RAT would be used only when the result of the day 5/6 test had not been received prior to an individual’s scheduled release on day 7. Assuming a negative day 5/6 PCR test or RAT test on day 7, the person would self-isolate at home and be required to have a day 9 PCR test. If that test was negative they would no longer need to self-isolate. The self-isolation period would be “light touch and high trust” but would not be available to those who were not in a position to self-isolate.

[123] Officials advised that the proposal would give rise to minimal additional risk to the community in view of developments in the science of COVID-19 transmission, infectious periods, and testing approaches, particularly around the Delta variant. It also recognised high levels of vaccination in arrivals (upwards of 75 per cent of people

over the age of 12 reported that they were at least partially vaccinated) and requirements for pre-departure testing for travellers from most countries. The approach would ensure that managed isolation continued to be justifiable and proportionate to the risk of COVID-19. It would free up rooms for community cases rather than enable increased border arrivals. However, if community cases stabilised, then it may lead to increased rooms being available for border arrivals.

[124] As a result of this advice, a reduced seven-day period in managed isolation was implemented to take effect on 14 November 2021.⁴⁷ This change was published on MBIE’s website on 28 October 2021. On 5 November MBIE announced that the next room release would be on 9 November for approximately 4,000 rooms across November, December, January and February.

[125] At around the same time, changes were being made to the criteria for emergency allocations. This was discussed in a 24 October 2021 MBIE briefing to the Minister that proposed two changes. The briefing was against the background of the numbers seeking vouchers in the most recent virtual lobby (on 21 October 2021 – see above) and the numbers seeking emergency allocations in September and October – 398 applications were approved and 163 were declined in the period 1–17 October; and 508 applications were approved and 497 were declined in September.

[126] One of the proposed changes was to clarify “category 2c”, which was for people “unable to legally remain in their current location and [who had] no other option but to return to New Zealand”. MBIE had received an increasing number of applications from people who had undertaken discretionary travel under short-term visas and had then applied under this category to return. MBIE proposed that the category require an applicant to have received a detainment or deportation notice or to have had their visa unexpectedly revoked or shortened due to circumstances outside their control.

[127] The other proposed change was to introduce a new emergency allocation “category 4” for New Zealand citizens who had been overseas since before 3 November 2020, who had been unsuccessful in their attempts to secure a MIAS

⁴⁷ Meaning that those who had already spent seven days at that date would be eligible for release.

voucher through the “regular” release process and whose visa to remain in their current location had expired or would do so in the next 60 days.⁴⁸ MBIE’s rationale for this category was that people who had left before 3 November 2020 would have had limited ability to anticipate the impacts of finite MIQ capacity on their flexibility to return.

[128] The advice noted that current demand for MIQ currently significantly exceeded supply. MBIE said that the 700 rooms per month currently set aside for emergency allocations had “proved adequate”⁴⁹ but an increase of up to 800 rooms per month should be permitted, if needed, to accommodate additional demand. If this proved insufficient, then the existing emergency allocation categories 1, 2 and 3 would be prioritised over the new category 4, ensuring that applications under the existing criteria were not impacted. While the changes could be implemented on 22 November, MIQ capacity overall was currently under significant pressure due to the community outbreak, and the introduction of the new category might need to be delayed until December 2021.

[129] On 8 November 2021 MBIE briefed the Minister on a proposal to expand emergency allocation categories (visiting a close relative with a terminal illness or end-stage disease) to include life-threatening medical events (including accidents) from 22 November 2021. Based on previous applications, officials expected that the increase in approvals from the expanded criteria would be fewer than 10 people per month. MBIE said that approvals for emergency allocations had been “trending upwards” with 384 applications approved in the fortnight ending 24 October (up from 301 for the previous fortnight). Officials would continue to monitor whether the 800 rooms per month previously agreed to remained sufficient.

[130] After this, the focus of the advice about MIQ in November and December 2021 was on the Government’s Reconnecting New Zealanders strategy. This was the proposal that provided three pathways (low, medium and high risk) for entry into New Zealand that had been worked on since June 2020. On 15 November 2021 Cabinet

⁴⁸ As discussed earlier, the regular release process had been on hold between 7 July and 20 September 2021.

⁴⁹ It is unclear on what basis that view was reached.

endorsed an approach that would open the medium risk pathway to fully vaccinated New Zealand citizens and residence-class visa holders from Australia from 11.59 pm on 16 January 2022 (step one), expand, with staging as required, the medium risk pathway to fully vaccinated New Zealand citizens and residence-class visa holders by 31 March 2022 (step two), and expand the medium risk pathway to fully vaccinated foreign nationals (subject to further advice on immigration visa processing capacity and advice on the ongoing need for volume controls) by 31 May 2022 (step three).⁵⁰

[131] During this period, officials recognised that the relative risk of transmission was lower from border returnees than it was for domestic community transmission. However, there remained concern about the “seeding” of new clusters in areas that did not have cases and the need to be able to cope with overall numbers of positive cases. I discuss this later in this judgment.

Summary of measures to address demand

[132] In summary, the key changes considered to respond to the overall trend of increasing demand were:⁵¹

- (a) Increasing MIQ capacity and considering other kinds of facilities: in addition to the increase in capacity that led to 32 MIQFs by August 2020 and a further MIQF available from 30 November 2021, other options were considered but were all ultimately rejected by early 2021. These included bespoke arrangements for groups, other non-hotel kinds of accommodation and the possible purchase of an accommodation village.
- (b) Flow management systems: initially a quota system with airlines (April to Nov 2020), then the first come, first served online and the offline process (Nov 2020 to Aug 2021) and then virtual lobby and the offline process (Aug 2021 to Feb 2022).

⁵⁰ These dates were subsequently delayed due to the Omicron variant.

⁵¹ The respondents refer also to the decision to charge fees to arrivals staying fewer than 90 days (subject to exceptions) as a demand management tool. It was introduced in August 2020 but the papers at the time indicate that its principal purpose was because the cost of running the MIQ system was unsustainable.

- (c) QFT with Australia: this initially freed up capacity in the April to June 2021 period but, when it was halted, caused great pressure on MIQ that intensified with quarantining Delta community cases and contacts and accommodating Afghan refugees.
- (d) Pausing or reducing release of rooms on MIAS under the first come, first served system (7 July 2021–20 September 2021) and under the virtual lobby system (October 2021). Following the 7 July to 20 September pause on the release of rooms, there were large numbers in the virtual lobby with low prospects of success.
- (e) Adjusting the timing of group allocations as well as the offline criteria and the number of rooms available for them: some group allocations were deferred in August 2021 until 2022; the criteria for emergency allocations was sometimes expanded (September and November 2021) and sometimes clarified or tightened (November 2021); and rooms increased to 350 per fortnight (17 February 2021) from 150, then to 700 per month at or around 25 August 2021 and then to 800 per month on 24 October 2021.
- (f) Ring-fencing: proposed in November 2020, July 2021, August 2021, September 2021 and again in October 2021 but not implemented except (in effect) in relation to managed flights from Australia in July and August 2021.
- (g) Immigration settings: in September 2020 not proceeding with an earlier in principle decision to broaden the border settings for partners and dependents of temporary work visa holders.
- (h) Reducing the period of quarantine: implemented in November 2021.
- (i) A longer-term plan to reconnect New Zealand with the world in 2022 with low/medium/high pathways: not implemented in 2020 and 2021

except the QFT arrangements with Australia (short-lived) and some Pacific Island countries (as set out in the timeline at Appendix two).

Offline allocations

Background

[133] When the borders closed, Cabinet agreed to high-level parameters for case-by-case exceptions. This was reflected in immigration instructions that allowed approved exceptions to be granted visas.

Emergency allocations

[134] With the move to a first come, first served MIAS, it was recognised that this system might not properly accommodate individuals who warranted priority because of urgent humanitarian reasons. It was also recognised that MIAS would not be able to distinguish between New Zealanders and non-New Zealanders or on the basis of need or urgency.

[135] An offline emergency allocation process was established. From the outset it was envisaged that “most air travellers should be able to secure their place in a [MIQF] via the online system” but “there will be some who find there are no places available when they need to travel”. It was envisaged that the offline system would be available only for those with a “genuine need” as opposed to those who could travel to New Zealand through MIAS with a bit of forward planning.

[136] The emergency allocation was established for this purpose and to ensure that New Zealanders did not face unreasonable delays. Assessors would make case-by-case assessments, taking into account factors including whether the applicant was a New Zealander, the reason for the travel, whether the request was time-sensitive and the applicant’s vulnerability. As discussed above, the criteria changed over time, including during the Relevant Period. The criteria in place over the Relevant Period is set out in **Appendix three**.

Time-sensitive allocations

[137] Time-sensitive applications were another kind of offline allocation process. They replaced the critical worker exemptions that were granted in the early months of the pandemic. When the MIAS system became operational, officials advised the Minister that it had received many ad hoc requests for MIQ places for workers who had secured visa approval as critical workers. On some of these occasions, facilitating timely entry would have had significant benefits to New Zealand. In many cases they were not eligible under the emergency allocation criteria.

[138] This led to a new offline allocation process for “time-sensitive” workers who would provide critical benefits or prevent major loss to New Zealand with criteria determined by the Minister from about March 2021. The criteria were published on the MBIE website. The criteria that applied during the Relevant Period is included in **Appendix three**. The criteria were set “extremely high” and applicants were advised that there was no guarantee that they would obtain a MIQ allocation even if they met the criteria as there were “limited vouchers available in each travel period”. International film production crews are an example of workers approved under the time-sensitive allocation.

Group allocations

[139] Group allocations arose out of a Cabinet decision in September 2020 to allow class exceptions to New Zealand’s closed border, in addition to exceptions for critical workers, where the class met economic, social, cultural or academic benefits that had national significance for New Zealand. Examples of group allocations that were made included New Zealand and international sports teams, seasonal employment workers and New Zealanders attending the Expo 2020 Dubai. The published criteria during the Relevant Period is included in **Appendix three**.

Grounded Kiwis

Introduction

[140] It might be thought by some or even many that New Zealand citizens overseas during the pandemic made their choice to be overseas. They might think that either

these citizens should have come home when they had the chance to do so at the start of the pandemic, or, if they left New Zealand during the pandemic, that they should not have done so. I set out the advice given to overseas New Zealanders or those intending to travel overseas before discussing the situation that New Zealand citizens found themselves in after that advice was given and which has led to this proceeding.

The call to come home

[141] In the early days of the pandemic, as concerns were rising, countries were closing their borders and the availability of commercial flights was rapidly declining, many countries including New Zealand were advising their nationals travelling overseas to return home while commercial options remained available.

[142] The advice to New Zealanders included:

- (a) the Rt Hon Winston Peters, Minister of MFAT, addressing the media at Parliament on 18 March 2020, that New Zealanders who were overseas should “start coming home now” and that “Plan A is to get them home now on commercial flights whilst they still exist”;
- (b) MFAT issuing a Safe Travel Notice on 19 March 2020 urging New Zealanders travelling overseas to consider returning home as soon as possible, and issuing a “do not travel” advisory for those planning on leaving the country that remained in place (except for countries included in QFT) until it was removed on 4 March 2022; and
- (c) a further public announcement from Minister Peters on 24 March 2020 that “we have been warning New Zealanders offshore that the window for flying home is closing” and that “we are reaching a point where the best option for most New Zealanders offshore is to shelter in place”.

[143] When this advice was given officials estimated that there were around 80,000 New Zealanders temporarily overseas and a further 800,000 who resided permanently overseas. MFAT was urging overseas New Zealanders to register on SafeTravel (enabling direct contact with them) and the number registering was “surging”. The

data from SafeTravel indicated that overseas New Zealanders were concentrated in Australia, the United Kingdom and the United States, but spread throughout the world in Asia, Europe, the Pacific, Africa, South America and the Caribbean.

[144] New Zealand overseas missions and MFAT’s Consular Division were receiving increasing numbers of calls from New Zealanders. In Wellington, MFAT was receiving more than 100 calls a day. While in the week of 12 March 2020 most of the calls were seeking travel advice, by 19 March 2020 most were asking for Government assistance with repatriation. These calls were from all over the world but at that time current “hotspots” were Morocco, South America (Peru and Chile) and Europe. MFAT was considering innovative measures to assist them to return.

[145] Thousands of New Zealanders returned at this time. Just over 6,700 passengers returned on 19 March 2020 alone. By 29 March 2020, 20,000 New Zealanders had returned. It was recognised by MFAT that a large number of New Zealanders resident overseas in developed countries with advanced health systems would be likely to “shelter in place”. It is evident from the evidence before the Court that many did so.

[146] After these calls to come home, overseas New Zealanders (both those that had decided in those early days to stay where they were, and those who travelled overseas for various reasons once overseas borders began loosening restrictions and commercial flights began to increase) were able to return if they could secure a place in MIQ.

[147] When QFT with Australia commenced, a public statement was made on 6 April 2021 that:

[QFT] will not be what it was pre-COVID-19, and those undertaking travel will do so under the guidance of “flyer beware”. People will need to plan for the possibility of having travel disrupted if there is an outbreak.

[148] The only other public advice before the Court that encouraged overseas New Zealanders to return occurred on 12 May 2021 at a press conference⁵² when Minister Hipkins said there were 20,000 rooms in MIQ available over the coming

⁵² Press conferences fronted by the Prime Minister, the Minister of Finance, the Minister of Health or public servants, including Dr Bloomfield, were a regular feature during 2020 and 2021.

months and “now is a good time for those New Zealand citizens and permanent residents around the world who want to come back to New Zealand ... [to take] up the opportunity to come back”.

Grounded Kiwis' evidence

[149] Ms Birt, the chair of Grounded Kiwis, moved to London with her husband in January 2020 where she is employed as a lawyer with a global media company. Her affidavit evidence to this Court explained that Grounded Kiwis came about following her increasing concern, from mid-July 2021, at the inability of New Zealanders to obtain a place in MIQ and return home. This had become a frequent conversation with other New Zealanders in London.

[150] On 3 August 2021 Grounded Kiwis launched a Facebook page and other social media channels. As at 23 December 2021 the Facebook page had over 8,700 members. The core function of the group was to represent the interests of those who were impacted by the MIQ system. Amongst other activities and advocacy, in mid-August 2021, concerned with the lack of publicly-available data about demand for the MIQ system, how long people had been delayed in returning, and the impact it was having on their lives, Grounded Kiwis conducted a survey.

[151] The respondents criticise the survey as unreliable and hearsay. However, it has not been necessary to get into the detail of the information produced from the survey where those concerns might be relevant. It is sufficient to say the following. Almost 2,000 people responded including significant numbers from the United States and the United Kingdom. The survey asked questions about where people were, how many were vaccinated, the purpose of travel, how long people's travel plans had been delayed, whether they had applied for and been declined for emergency allocations, and what impacts delay was having for them. It contained quotes from affected people about these impacts.

[152] The information in the survey seems largely not information that MBIE or any other government agency was collating at any stage during 2020 and 2021. MBIE has not produced evidence that it held all of this kind of information. It did, however, have data about the number of people who had registered on MIAS who had not received

allocations. In response to an Official Information Act (**OIA**) request from Grounded Kiwis, MBIE said that:

- (a) the number of people registered on the MIQ online portal who did not have an allocation (or voucher) as at 28 July 2021 was 88,041;
- (b) the average days between registering and when the voucher was last sent was 48.6 days and the median was 19.6 days (this was the average for all months since MIAS has been operating prior to July 2021);
- (c) the number of people who registered on the system before 28 April 2021 and who did not have an allocation as at 28 July 2021 was 58,672; and
- (d) the number of people who registered before 28 February 2021 and who did not have allocations as at 28 July 2021 was 37,287.

[153] However, the response also advised that the above figures might not accurately represent the number of people who were waiting for an MIQ voucher once a registration was made by a user. This was because individuals could not delete the registration themselves. This meant that, if their circumstances changed and they no longer wished to come to New Zealand, their registration would remain in the system despite an allocation not being actively sought. Additionally, people may have made more than one registration, which meant the MIAS data may have contained duplicates.

[154] MBIE also had data relating to emergency allocations that it provided in response to another OIA request from Grounded Kiwis. This is discussed later.

[155] In addition to obtaining this information, Grounded Kiwis has filed affidavits from 22 individuals providing examples of the experience New Zealand citizens have had in trying to return home. This information is summarised in **Appendix four**. The examples show a range of New Zealanders who had been overseas since before the pandemic as well as those who travelled out of New Zealand at some point in the last

two years. They show a range of reasons for their travel. Universally, they show the difficulty they experienced in trying to obtain a place in MIQ. Several of them also tried to obtain an emergency allocation without success. In most cases, the difficulties experienced caused significant distress. Some suffered serious health consequences. Some experienced financial distress as well.

[156] I discuss some of the affidavits but for now, I set out two examples to provide a sense of the difficulties citizens faced in trying to return and the impact upon them.

[157] The first example is a New Zealand citizen (AS) who had been living in the UK since 2001. She began looking to return to New Zealand for Christmas 2020 to spend time with her family and to support her mother who had dementia. On 18 November 2020 she was able to secure a MIQ place for 12 January 2021. However, on 6 January 2021 the airline cancelled her flight. Between January and July 2021, she made over 600 attempts to secure a voucher through the MIAS online system, all of which were unsuccessful. She made three attempts in the virtual lobby. The first two were on 11 and 19 October 2021 (where she was 26,074 and 15,156 in the queue respectively). Her last attempt was the seventh lobby where her position was 13,269. She did not apply for an emergency allocation because she believed she was ineligible. She has suffered “unbelievable stress and grief”. She has needed professional help for her mental health and stress.

[158] The second example is a New Zealand citizen (HW), who is a mother of two teenaged daughters and who usually lives in New Zealand. She travelled to the UK to support her younger brother, who was struggling to cope following the death of their father in October 2020. She planned to return to New Zealand in about three months but began seeking a place in MIQ when the UK went into lockdown in November 2020. She checked the MIQ website multiple times every day to try to come to home.

[159] When the UK lockdown eased in February 2021, she continued to try to secure a space in MIQ, setting an alarm in the middle of the night in case the time difference was hindering her chances. Her daughters and mother were also checking the page. They could not find a spot. In her words, “my mental health started deteriorating quite

badly, I started having panic attacks and severe anxiety. For the first time in my life, I had become depressed”.

[160] When QFT opened with Australia, she booked a flight to Sydney where she planned to quarantine then travel to New Zealand without needing to use MIQ. The first flight she was able to find was in November 2021. While that was still some time away, it gave her some hope. Then QFT closed and she “spiralled again” knowing she could not get back. She wrote to the Prime Minister and received a reply from Minister Hipkins’ office on 10 August 2021 which advised her to keep checking the allocations page.

[161] In August 2021 her flight to Sydney was cancelled. She kept checking for MIQ spaces in New Zealand but then the system was stopped for a period. Once the virtual lobby was announced, she entered the first six lobbies. She came 15,000, 23,000, 21,000, 17,000, 17,600 and 13,600 in the queue. As at December 2021 she had not secured a place.

[162] She was currently staying with her uncle in England and was unemployed. She had missed her daughter’s high school ball and her 18th birthday. Both her daughters were struggling without their mother. She had been unable to pay rent on her house in New Zealand that is owned by her mother who was struggling with the mortgage payments. She has a blind dog who was 13-years old and who she knew was pining for her. She was struggling to cope and has received professional help for her anxiety and difficulties with sleeping.

The procedural history of the claim

[163] Grounded Kiwis commenced this proceeding on 8 October 2021. It was granted a priority hearing. Initially, it was to be heard on 25 and 26 January 2022 at which time the previously announced start of MIQ-free travel had been delayed to the end of February 2022.⁵³ On the respondents’ application, the hearing was adjourned to 14 and 15 February 2022 to allow them time to respond to unanticipated arguments raised by Grounded Kiwis. On 3 and 28 February 2022 the Government made further

⁵³ The earliest date counsel considered the proceeding could be ready to be heard.

announcements that brought an end to MIQ for vaccinated returning New Zealanders. Subsequently, that was also the case for non-vaccinated returning New Zealanders.

[164] The Government’s announcements removing the requirement for MIQ meant that determining the proceeding was no longer so urgent. The respondents contended that it also meant the proceeding was moot. For reasons discussed later (under “Relief”) I have considered that, despite the changes to the border, it remains important to determine the proceeding.

THE RIGHT TO ENTER

The content of the right

[165] BORA affirms the fundamental rights and freedoms it sets out.⁵⁴ Those rights and freedoms “may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society”.⁵⁵

[166] They include the right to freedom, which is in the following terms:⁵⁶

18 Freedom of movement

- (1) Everyone lawfully in New Zealand has the right to freedom of movement and residence in New Zealand.
- (2) Every New Zealand citizen has the right to enter New Zealand.
- (3) Everyone has the right to leave New Zealand.
- (4) No one who is not a New Zealand citizen and who is lawfully in New Zealand shall be required to leave New Zealand except under a decision taken on grounds prescribed by law.

⁵⁴ BORA, s 2.

⁵⁵ Section 5.

⁵⁶ Under BORA, the s 18 right falls within the collection of other democratic and civil rights and supplements the basic civil liberties of every person.

[167] This “right to mobility” is recognised as a fundamental right in the International Covenant on Civil and Political Rights (ICCPR),⁵⁷ and elsewhere.⁵⁸ It has its “origins in the cataclysmic rights violations of WWII”.⁵⁹

[168] The right to return to one’s country “recognizes the special relationship of a person to that country”⁶⁰ and is a “among the most cherished rights of citizenship”.⁶¹ Without the right to enter one’s country, “the ‘right to have rights’ cannot be fully exercised”.⁶² It supplements the basic civil liberties of every person⁶³ and its denial can affect other rights.⁶⁴ It is therefore one of the most basic rights.⁶⁵

[169] Of the comparable rights under the Canadian Charter to enter and return to one’s country of citizenship,⁶⁶ the Supreme Court of Canada has said that its “central thrust ... is against exile and banishment, the purpose of which is the exclusion of membership in the national community”.⁶⁷ However, it has “expansive breadth” and is to be interpreted generously.⁶⁸ It has been said that it encompasses the right to enter as one and when one pleases.⁶⁹ Or to put it another way, “we ascertain at least one

⁵⁷ BORA affirms New Zealand’s commitment to the ICCPR. International Covenant on Civil and Political Rights 999 UNTS 171 (entered into force 23 March 1976), art 12.4.

⁵⁸ For example, Canada, South Africa, Ireland, Germany and in other international instruments such as the European Convention on Human Rights and Fundamental Freedoms 213 UNTS 222 (entered into force 3 September 1953). See Andrew Butler and Petra Butler *The New Zealand Bill of Rights Act: A Commentary* (2nd ed, Lexis Nexis, Wellington, 2015) at 16.2.

⁵⁹ *Divito v Canada* 2013 SCC 47, [2013] 3 SCR 157 at [21].

⁶⁰ United Nations Human Rights Committee *CCPR General Comment No 27: Article 12 (Freedom of Movement)* 76 CCCPR/C/21/Rev1/Add9 (2 November 1999) at 19.

⁶¹ *Divito v Canada*, above n 59, at [1].

⁶² At [21].

⁶³ Butler and Butler, above n 58, at 16.46, illustrate this point with reference to freedom of movement within New Zealand complementing the right to freedom of expression and freedom of assembly and association.

⁶⁴ For example, s 12 of BORA gives everyone aged 18 years or more the right to vote. However, under s 80(1)(a) of the Electoral Act 1993, a person can only vote when overseas if they have visited New Zealand in the last three years. Social welfare payments such as superannuation and veterans’ pension also have “ordinarily resident” in New Zealand requirements.

⁶⁵ Butler and Butler, above n 58, at 16.1.1.

⁶⁶ Canadian Charter of Rights and Freedoms, s 6(1) provides: “Every citizen of Canada has the right to enter, remain in and leave Canada”.

⁶⁷ *United States of America v Cotroni* [1989] 1 SCR 1469 at 1482, in *Spencer v Canada (Health)* 2021 FC 621 at [70].

⁶⁸ *Divito v Canada*, above n 59, at [28] and [55]. See also *Fitzgerald v R* [2021] NZSC 131, [2021] 1 NZLR 551 at [111] that BORA is to be given a generous interpretation and one that renders the rights practical and effective.

⁶⁹ *United States of America v Cotroni*, above n 67, at 1504 per Wilson J (dissenting); compared with *Spencer v Canada (Health)*, above n 67, at [72]–[73]. Canadian judges have taken different views about whether a minimal infringement of the right is an infringement at all (see, for example, *Spencer v Canada*, above n 67, at [212]) or is an infringement but is more easily justified (see, for example, the minority in *Divito v Canada*, above n 59, at [54] and [68]).

part of the world to which every human being, not an outlaw, can claim the right of entry when he thinks fit”.⁷⁰

A justified limit

[170] BORA applies to acts of the legislature, executive and judiciary and by any person or body in the performance of any public function, power, or duty conferred or imposed on them in, by or pursuant to law.⁷¹ This means BORA applies to the MIQ arrangements that are at issue here. To the extent they impose limits on the right to freedom of movement, they must meet the “such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society” requirement.

[171] The parties accept that whether this test is satisfied should be approached in accordance with the methodology (also referred to as a framework) set out in *Hansen v R*.⁷² This means that the Crown bears the onus of showing that a limiting measure:

- (a) is prescribed by law;
- (b) serves a purpose sufficiently important to justify curtailment of the right or freedom;
- (c) is rationally connected with the purpose; and
- (d) is in due proportion to the importance of the objective.

Deference

[172] Whether the MIQ measures at issue here imposed an unjustified limit on the s 18 right is a legal question for the Court.⁷³

⁷⁰ *Potter v Minahan* (1908) 7 CLR 277 (HCA) at 289 and 304–305, cited in *Newman v Minister for Health and Aged Care* [2021] FCA 517 at [69]–[74].

⁷¹ BORA, s 3.

⁷² *Hansen v R* [2007] NZSC 7, [2007] 3 NZLR 1 at [101] and [104]. This is a framework and other approaches may sometimes be appropriate. See *Four Aviation Security Service Employees v Minister of Covid-19 Response* [2021] NZHC 3012 at [39] and [57]–[58]; and *Yardley v Minister for Workplace Relations and Safety* [2022] NZHC 291 at [65].

⁷³ *Four Aviation Security Service Employees v Minister of Covid-19 Response*, above n 72, at [83]–[85].

[173] In answering that question, however, it may be appropriate to give some weight to the Minister’s judgment on how the balance is appropriately struck between the rights of individuals and the needs of society depending on the circumstances.⁷⁴ This may be appropriate for reasons of institutional competence (if the matter involves complex social or other issues appropriately dealt with by the executive) and particularly if the decision was reached following a good process in which careful consideration was given to the competing matters including the human rights involved.⁷⁵ There may also be forensic limits on what the Court can determine in a judicial review proceeding where the evidence is by affidavit and involves contested scientific or other expert evidence that is not the subject of cross-examination.⁷⁶

[174] There is also room for the precautionary principle to operate.⁷⁷ That is a “foundational approach to decision-making under uncertainty, that points to the importance of acting on the best available information to protect the health” of New Zealanders.⁷⁸ Nevertheless, the Crown retains the burden of showing that limiting measures on the s 18(2) right to enter are reasonable and demonstrably justified, and the Court has the responsibility of determining that and is not to “shirk” from it.⁷⁹ The rigour that this test requires is illustrated in the cases.⁸⁰

[175] This proceeding does not challenge the Government’s elimination strategy. As it was put by Cooke J in *Four Aviation Security Service Employees*, there is room for different policies in the COVID-19 response and the duly elected representatives

⁷⁴ *Hansen v R*, above n 72, at [108] and [111]; *Child Poverty Action Group Inc v Attorney-General* [2013] NZCA 402, [2013] 3 NZLR 729 at [91]; *Ministry of Health v Atkinson* [2012] NZCA 184, [2012] 3 NZLR 456 at [172]; and *Attorney-General v Idea Services Ltd* [2012] NZHC 3229, [2013] 2 NZLR 512 at [196]–[198].

⁷⁵ *Child Poverty Action Group Inc v Attorney-General*, above n 74, at [79]–[82] and [91]–[92].

⁷⁶ *New Health New Zealand Inc v South Taranaki District Council* [2018] NZSC 59, [2018] 1 NZLR 948 at [121]–[122]; and *Four Aviation Security Employees v Minister for Covid-19 Response*, above n 72, at [84]–[85].

⁷⁷ *Yardley v Minister for Workplace Relations and Safety*, above n 72, at [64].

⁷⁸ At [94], citing *Spencer v Canada*, above n 67, at [113]–[114].

⁷⁹ *Child Poverty Action Group Inc v Attorney-General*, above n 74, at [92]; and *Ministry of Health v Atkinson*, above n 74, at [174].

⁸⁰ See, for example, *Make it 16 Inc v Attorney-General* [2021] NZCA 681. That case was about limiting voting to those aged 18 years or more. Not only was it necessary to ask why Parliament had made the choice it did, but relevant questions for the Court were why 16 and 17-year-olds were deemed children and not adults, what the social advantage of limiting the voting age to 18 years or more was, whether any such social advantage outweighed the harm to the protected right, and whether extending the franchise to 16 and 17-year-olds would be harmful or have benefits. This was referred to in *Yardley v Minister for Workplace Relations and Safety*, above n 72, at [63].

decided that this strategy was the one to pursue.⁸¹ This forms the background to the legal question that is before this Court.

Case examples and commentary

[176] Butler and Butler, writers of a leading New Zealand text on BORA issues, suggest that the extent to which freedom of movement can be limited depends in part on the particular right of free movement that is being limited. They consider that a limit on the s 18(2) right would only be justified in very limited circumstances. They give a serious public health concern, such as the outbreak of SARS, as an example of what would justify that limit. In contrast, they suggest that a limit on the right to move freely within New Zealand can be more readily justified by public health, public order or national security reasons. They give the example of the requirement to undergo a driving test as a reasonable limit on this right.⁸²

[177] However, these are just examples and the details matter. For example, Butler and Butler suggest that a driving test may not be a reasonable limit on the right to freedom of movement if the test is near impossible to pass or, if it takes an unreasonably long time to be able to sit the test because of an underfunded testing regime.⁸³ They certainly do not suggest that the COVID-19 pandemic will justify a limit on the right to enter New Zealand indefinitely.⁸⁴

[178] The United Nations General Comment on the ICCPR right to mobility discusses how bureaucratic barriers to the exercise of the right has been a major source of concern.⁸⁵ These have included lack of access to information regarding requirements and unreasonable delays in the issue of passports and travel documents.

⁸¹ *Four Aviation Security Employees v Minister of COVID-19 Response*, above n 72, at [8].

⁸² Butler and Butler, above n 58, at 16.6.5.

⁸³ At 16.6.5. As will be discussed later, a right to enter New Zealand limited by the requirement to enter MIQ that is justified initially might not be justified if it results in delay for an unreasonable period.

⁸⁴ The relevance of the time period over which the limit applies is illustrated by *Gonzalez del Rio v Peru (Communication)* HRC No 263/1987 (28 October 1992) at [5.3]: The Human Rights Commission considered that pending judicial proceedings may justify restrictions on a person's right to leave his or her country but if the judicial proceedings were unduly delayed then they would be no longer justified. In that case the applicant's freedom to leave Peru had been suspended for seven years and it remained uncertain how much longer the suspension would last. This was considered to violate the applicant's right to leave their country.

⁸⁵ United Nations Human Rights Committee, above n 60, at [17].

Of the right of a person to return to their country the Committee considered “there are few, if any, circumstances in which a deprivation of the right to enter one’s own country could be reasonable”.⁸⁶

[179] More recently the Human Rights Committee has said that states must take effective measures to protect the right to life and health of all individuals within their territory in the face of the COVID-19 pandemic. Measures that derogate from other rights must be “strictly required by the exigencies of the public health situation” and their “predominate objective must be the restoration of a state of normalcy” where rights are fully respected. Derogations, as far as possible, must be “limited in duration, geographical coverage and material scope”, proportional and should be replaced with “less restrictive measures” that allow activities to be conducted.⁸⁷

[180] Of reports of some countries denying entry to their nationals during the COVID-19 pandemic, commentators have referred to this guidance and said:⁸⁸

It is difficult to conceive of any circumstance where it could plausibly be said that the exigencies of the COVID-19 pandemic require a State Party to interfere with the right of an individual to enter his or her own country when that individual can be screened on entry, monitored closely for 14 days after arrival and, if necessary, isolated and quarantined for a period of time.

[181] Similarly, another commentator argues:⁸⁹

States should impose proportionate entry restrictions in accordance with human rights law and provide assistance where necessary to protect the right to return. Since the right to return is a fundamental human right, states, particularly during the COVID-19 pandemic, should unconditionally guarantee that they will receive their nationals abroad, thus avoiding forced stays in foreign states.

⁸⁶ At [21].

⁸⁷ United Nations Human Rights Committee *Statement on derogations from the Covenant in connection with the COVID-19 Pandemic* CCPR/C/128/2 (24 April 2020) at 2.

⁸⁸ Rutsel Martha and Stephen Bailey “The right to enter his or her own country” (23 June 2020) EJIL:Talk! <www.ejiltalk.org>.

⁸⁹ Guofu Liu “COVID-19 and the Human Rights of Nationals Abroad” (2020) 114 AJIL Unbound 317 at 318.

[182] And similarly:⁹⁰

In the case of returning nationals ... the danger of transmission has to be weighed against a very clear stance by human rights in favour of the ability to re-enter their own country. This is a freedom that cannot be denied lightly.

[183] Another commentator has argued that it is highly questionable whether an order prohibiting Canadians from boarding a plane if they showed symptoms of COVID-19 would be a reasonable limit that passed the proportionality test.⁹¹ This was because those doing the screening did not have the expertise to distinguish between COVID-19 symptoms and the similar symptoms caused by colds, flu, allergies and other respiratory diseases. Moreover, the minimal impairment test was unlikely to be satisfied as it was unclear why Canada could not do what the United States had done, namely having symptomatic passengers assigned to containment areas on the plane. The commentator argued that courts should require “very cogent scientific and public health evidence to justify any restrictions on the mobility rights”.⁹²

[184] It has also been suggested that the lawfulness of restrictions in New Zealand and Australia on their citizens’ right to return caused by limited quarantine capacity are doubtful.⁹³ Of the Australian caps it has been said:⁹⁴

We have learned that governments give priority to ‘Australia’ – understood as a land mass and its citizens (and perhaps permanent residents) – over ‘Australians’, understood as a people who might be found anywhere from Melbourne to Minsk.

[185] This commentary suggests that the right to return is not to be lightly interfered with and should be the minimal impairment that is necessary in kind and in extent. However, this commentary is at a fairly general level. It does not, for example, delve

⁹⁰ Frédéric Mégret “Homeward Bound? Global Mobility and the Role of the State of Nationality During the Pandemic” (2020) 114 AJIL Unbound 322 at 323: Distinguishing between travel restrictions on nationals and on foreigners.

⁹¹ Errol Patrick Mendes “Restrictions on Mobility Rights of Canadians During the Pandemic; the Critical Need for Proper Scientific and Public Health Rationales” (2020) 41 Nat’l J Const L 57 at 61. See also Yves Le Bouthillier and Delphine Nakache “The Right of Citizens Abroad to Return During a Pandemic” in Colleen M Flood and others (eds) *The Law, Policy and Ethics of Covid-19* (University of Ottawa Press, Ottawa, 2020) 299.

⁹² Mendes, above n 91, at 60.

⁹³ Jo Shaw “Citizenship and COVID-19: Syndemic Effects” (2021) 22 German LJ 1635 at 1649.

⁹⁴ Leanne Weber “Mobility without membership: Do we need special passports for vulnerable groups?” (19 January 2022) Global Citizenship Observatory <<https://globalcit.eu/>>.

into the questions of whether the right to return was entitled to more weight when the pandemic was first emerging and overseas nationals were stuck elsewhere through no fault of their own as compared with, say, nationals resident overseas wanting to return for a holiday in the summer.

[186] There are some examples, though not many, of how the courts have responded to mobility restrictions in the context of the COVID-19 pandemic. Both Canadian and Australian courts have upheld the restrictions, although these cases have not involved the extent of restrictions on the right of a citizen to enter their country as here. They are nevertheless helpful because of their recognition of the strong public health reasons for the travel restrictions and, in one of the cases, the detailed analysis of the justification for them on the evidence.

[187] One of these cases is *Spencer v Canada*.⁹⁵ It concerned a challenge to Canada's requirements for returning citizens that applied only to returnees arriving by air.⁹⁶ The arrangements required a short period in Government-approved accommodation or a quarantine facility while awaiting a COVID-19 test and then self-isolation at home if the test was negative.⁹⁷

[188] One of the grounds on which these arrangements were challenged was that it constituted an arbitrary impediment to the right of returning air travellers to freely enter Canada. It was argued that there were reasonable alternatives to prevent the introduction and spread of COVID-19.⁹⁸ However, these alternatives were not

⁹⁵ *Spencer v Canada*, above n 67.

⁹⁶ Canada's long land border with the United States means that many arrivals are by land. The fact that the arrangements did not apply to land travellers was not discriminatory because it was "rooted in scientific data" that indicated a higher percentage of asymptomatic air travellers tested positive for COVID-19 than was the case for land travellers. See at [77].

⁹⁷ They were required to submit to a test upon their arrival and then stay at either government-approved accommodation (at their cost) or a designated quarantine facility (at no cost) for 72 hours while they awaited the results of that test. Once they received the results of the test they were required either to "quarantine" (if the test was negative) or "isolate" (if the test was positive) in accordance with an isolation or quarantine plan, either at their home or other suitable place of quarantine for a period of 14 days. Those who did not have a suitable quarantine or isolation plan were required to isolate or quarantine at a designated quarantine facility. It was also possible to voluntarily choose to take that route.

⁹⁸ For example, one of the plaintiffs argued that these arrangements were unnecessary for him because he was not infected with COVID-19, had not had any contact with anyone infected with the virus, had tested negative prior to departing for Canada, and had the means and ability to self-quarantine for 14 days at home.

discussed because the Court found that the arrangements were not a limit on the right to enter. This was because the arrangements required brief periods of quarantine or isolation “within” Canada.

[189] Another argument was that the arrangements impacted on the ability of Canadians to move in and out of the country based on their own choice.⁹⁹ The Court considered that the fact that some travellers might voluntarily alter their preferred times of travel to avoid the arrangements was not an infringement of their right to leave and enter Canada.¹⁰⁰

[190] In dismissing the claim, the Court went on to make some concluding observations.¹⁰¹ Specifically, it considered that stronger border controls, including a longer period of quarantine at the border, would be available without infringing the right to enter.¹⁰² The Court went on to say:¹⁰³

I recognize that those who have second residences abroad or other good reasons to travel may not welcome such measures, particularly if they are required to pay for some of them. However, like times of war and other crises, pandemics call for sacrifices to save lives and avoid broad base suffering.

[191] Another of the Canadian cases is *Taylor v Newfoundland and Labrador*.¹⁰⁴ The Chief Medical Officer of Newfoundland and Labrador had issued measures that limited entry into the province to its residents, asymptomatic workers, and others in extenuating circumstances, but subject to a requirement to self-isolate for 14 days. Ms Taylor, who lived elsewhere in Canada, sought an exemption so that she could travel to attend her mother’s funeral. She was initially declined an exemption but her request for a reconsideration was granted eight days later.

⁹⁹ The submission was based on the view of Wilson J in *Cotroni* that the Charter right was “designed to protect a Canadian citizen’s freedom of movement in and out of the country according to his own choice”. The Court was of the view that Wilson J’s view had not been endorsed in *Cotroni* or subsequently: at [72]–[73].

¹⁰⁰ At [74].

¹⁰¹ At [308]–[311].

¹⁰² This would save more lives and alleviate considerable suffering (especially for those who would otherwise be hospitalised or experience symptoms over an extended period of time). It would also avoid the perception of some (including the applicants in that case) that weaker and less uniformly applied measures were unfair and did not contribute meaningfully to preventing the entry and spread of COVID-19 and variants of concern.

¹⁰³ At [311].

¹⁰⁴ *Taylor v Newfoundland and Labrador* 2020 NLSC 125.

[192] One of Ms Taylor's grounds of challenge was that the travel restrictions violated her right to freedom of movement guaranteed by the Charter.¹⁰⁵ The Court concluded that the infringement of Ms Taylor's mobility rights was justified on the evidence as a reasonable measure to support the spread of COVID-19 in the province. While the right of Canadian citizens to move freely throughout the country was not a right to be taken lightly, here the infringement was fleeting.¹⁰⁶

[193] Of interest, because of its parallels with the affidavits filed here, was the following evidence:

- (a) Public health goals were rarely achieved through single actions or simple tools. A range of mechanisms may be employed. The central objective of public health practice was to intervene early and effectively mitigate or prevent the effects of harmful agents. When the desired outcome was achieved (for example, a lower level of disease), these public health interventions often appeared to the lay observer to be overdone.¹⁰⁷
- (b) In the context of a public health emergency with emergent and rapidly evolving situations, the time available for seeking out and analysing evidence shrank. The more urgent the situation, and the less evidence, the more that best judgment must be exercised. This approach was illustrative of the precautionary principle, acting to prevent anticipated harm before confirmatory evidence was available.¹⁰⁸
- (c) The novelty of the virus (with no vaccine or treatments confirmed as being effective) and that it produced much more severe, complicated and protracted conditions than influenza, increased the complexity of the public health decision-making. The risk of exponential spread of the virus meant the speed with which control interventions were

¹⁰⁵ She also challenged the legislation that authorised the Chief Medical Officer to impose the restrictions as being outside the legislative authority of the province. This ground of challenge is not relevant for present purposes.

¹⁰⁶ At [402] and [415].

¹⁰⁷ *Taylor v Newfoundland and Labrador*, above n 104, at [59].

¹⁰⁸ At [60].

implemented was crucial from a public health perspective. It was evident that extraordinary measures would be necessary.¹⁰⁹

- (d) Swift deployment of public health measures, including implementing travel restrictions, had been key to control infections of the virus in the province to date. Other measures that kept rates of community transmission low, combined with limiting the number of imported cases, would support the safe de-escalation of public health measures.¹¹⁰

[194] The purpose of the travel restrictions was stated to be to prevent the spread of COVID-19 in the province. Ms Taylor contended that the ostensible purpose was to not overwhelm the medical resources available in the province. She argued that the measures in place had already been successful at “flattening the curve” and this made the travel restrictions unnecessary. The Court disagreed. It referred to evidence that the biggest risk came from the introduction of the virus from other jurisdictions where case numbers were higher. This was a pressing and substantial objective.¹¹¹

[195] Ms Taylor contended the travel restrictions were not rationally connected to the goal of reducing the spread of COVID-19 because people were still able to enter the province via the exemptions, including from areas with high infections. Ms Taylor contended that it was the 14-day self-isolation period and other measures such as social distancing that resulted in success in the fight against the virus. The respondents, however, adduced expert modelling evidence that demonstrated that the travel restrictions significantly reduced the spread of COVID-19. There was no contrary evidence adduced. The Court concluded that the travel restrictions were rationally connected to their objective.¹¹²

[196] As to whether the means chosen interfered as little as possible with the protected right, the Court said it must “tread carefully”.¹¹³ It was always possible for

¹⁰⁹ At [62]–[64] and [67].

¹¹⁰ At [88].

¹¹¹ At [427]–[437].

¹¹² At [438]–[451].

¹¹³ At [455].

“imaginative counsel to posit alternatives” and the Court was considering the matter with the benefit of hindsight.¹¹⁴ The Court said it was mindful that the travel restrictions were in essence a medical decision directed towards protecting the health of those in the province. The Chief Medical Officer had the qualifications to make that decision and she drew upon specialised resources at her disposal. The Court did not have access to those resources and did not have the specialised expertise to second-guess the decision.¹¹⁵

[197] Ms Taylor argued that less drastic measures were available – for example, wider exemptions and tailoring travel restrictions to target individuals who were exposed to increased risk by their means of travel or through not having self-isolated in their home province. The Court referred to the precautionary principle and that public health measures across a population were often a more effective means than trying to target smaller, at risk sub-groups.¹¹⁶

[198] A requirement to self-isolate was also not a sufficient protection on its own. The reality was that not everyone actually self-isolated. When the province implemented the travel restrictions, over a six-week period public officials received 989 complaints of individuals that were not complying. Studies in the UK had also shown that 75.1 per cent of those with COVID-19 symptoms or who were a household contact of someone with symptoms failed to self-isolate as required. Moreover, the province had a diverse population over a vast geographical area making it impossible to monitor compliance on a larger scale.¹¹⁷

[199] Testing all incoming travellers was also not an effective substitute for the travel restrictions. Testing was a point-in-time result and would not pick up someone who was infected with the virus but pre-symptomatic and without enough viral load to test positive at the time the test was taken. Contact tracing was not an effective measure on its own but was an effective tool when used with the travel restrictions.¹¹⁸

¹¹⁴ At [455].

¹¹⁵ At [457]–[458].

¹¹⁶ At [465]–[467].

¹¹⁷ At [106]–[107] and [474]–[477].

¹¹⁸ At [478]–[482].

[200] The Court concluded that none of the alternatives were a reasonable substitute for the travel restrictions. The Court noted that the restrictions admitted exemptions. Those who were denied exemptions also had recourse to an appeal process within seven days.¹¹⁹

[201] As to the proportionality test:¹²⁰

While restrictions on personal travel may cause mental anguish to some, and certainly did so in the case of Ms Taylor, the collective benefit to the population as a whole must prevail. COVID-19 is a virulent and potentially fatal disease. In the circumstances of this case, Ms Taylor's *Charter* right to mobility must give way to the common good.

[202] In Australia, the Minister for Health with effect from 15 May 2021 determined that any passenger on an international flight could not enter Australia if they had been in India within 14 days before their flight was scheduled to depart.¹²¹ An Australian citizen, temporarily living in India where there were very high numbers of COVID-19 cases and who wished to come home, challenged the determination as contrary to his right to remain in, depart from, and re-enter Australia as he thought fit.¹²² The challenge was unsuccessful. The legislation under which the determination was made contemplated that citizens could be restricted from entering Australia in response to the threat of disease.¹²³ The Minister was satisfied that the determination would be likely to contribute to achieving its purpose, it was appropriate for that purpose and was no more restrictive than was required in the circumstances, and it was in place only for the period that was necessary.¹²⁴

[203] New Zealand cases have arisen by way of judicial review challenges of individual decisions made by the Ministry of Health or MBIE. One of those was the Ministry of Health's refusal to allow a person to cut short his mandatory 14-day MIQ

¹¹⁹ At [483]–[485].

¹²⁰ At [492].

¹²¹ *Newman v Minister for Health and Aged Care*, above n 70.

¹²² Australia recognises a common law right of Australian citizens to remain in, depart from, and re-enter Australia as they think fit. But the legislature may limit this right expressly or by necessary implication.

¹²³ There were other grounds of challenge but they were all unsuccessful.

¹²⁴ The legislation was viewed as incorporating a proportionality analysis. See discussion at [76]–[97].

to see his dying father.¹²⁵ The High Court found there to be a strong case that the decision-maker had construed the exemption test too narrowly and had failed to consider the applicant's submissions for an exemption properly. The Judge acknowledged that deference to the decisionmaker was appropriate in the context of an unprecedented public health crisis but the issue involved freedom of movement, which was a fundamental right. The applicant was granted relief authorising him to leave MIQ to visit his father on strict conditions.

[204] The other concerned MBIE's refusal to permit two business partners to self-isolate at their home on return from a proposed work meeting in Boston on 11 and 12 November 2021.¹²⁶ The High Court adopted a broad interpretation of the power to permit a person to isolate and quarantine other than in a MIQF. It did so reflecting that it "should be given the interpretation most consistent with" s 18 of BORA.¹²⁷ It held that MBIE erred in its interpretation of the kinds of needs that could warrant an exemption from the MIQ requirement. MBIE had also failed to take into account that over 140 people were isolating at home at that time and that it was in New Zealand's interests to facilitate overseas business travel by New Zealanders as long as this did not create a significant risk of community transmission of COVID-19. MBIE was directed to reconsider the application.

ASSESSMENT

The limiting measures

[205] Grounded Kiwis submits there are three distinct limiting measures on the right of New Zealanders to enter New Zealand, namely that:

¹²⁵ *Christiansen v Ministry of Health* [2020] NZHC 887, [2020] 2 NZLR 566. Clauses 13 and 14 of the COVID-19 Public Health Response (Isolation and Quarantine) Order 2020 [the Isolation and Quarantine Order] permitted a person to leave their place of isolation or quarantine in certain circumstances under directions of conditions imposed by the Chief Executive of MBIE or if authorised by her to do so.

¹²⁶ *Bolton v Chief Executive of the Ministry of Business, Innovation and Employment*, above n 5. Clause 12 of the Isolation and Quarantine Order permitted the Medical Officer of Health to determine that a person's place of isolation or quarantine could be at any other facility or place.

¹²⁷ At [56].

- (a) entry was conditional on having a voucher for MIQ, spending a prescribed period of time in managed isolation, and reporting for and undergoing medical examination and testing;¹²⁸
- (b) the lottery model for obtaining a voucher in MIQ gave New Zealand citizens the same chance of obtaining a voucher as temporary visa holders and the low odds of securing a voucher meant there was no guarantee of ever being able to enter; and
- (c) allowing group allocations constrained the capacity of MIQs by up to 500 rooms per fortnight.

[206] The respondents submit that there is only one limiting measure, the MIQ system, and it is artificial to consider different aspects of it in isolation from the others. The limit on the numbers who may enter New Zealand at any one time is a function of the capacity of the system and the need to ensure that they can be effectively, safely and humanely quarantined in that system.

[207] The respondents submit that the way in which capacity is allocated within the system could only create a separate limit on the right of New Zealand citizens to enter if that system gave priority to foreign nationals over New Zealand citizens. The respondents say that it does not do so and the opposite is true because some emergency allocations were only open to New Zealand citizens or resident class visas.

[208] I accept that decisions about the way in which the constrained MIQ capacity was allocated when demand exceeded capacity operated as limits on the exercise of overseas New Zealanders' right to return. For example, the voucher system, the virtual lobby and the group allocation system were available to temporary visa holders when it is plain from the material before the Court that overseas New Zealand citizens could not return as and when they wished to do so.

¹²⁸ In describing this first measure, Grounded Kiwis also refers to the requirement for a negative COVID-19 test 72 hours before departure. However, no submissions were advanced that this measure was not demonstrably justified. As it is not addressed in the submissions I do not consider it further.

[209] However, I also accept that the limiting measures raised by Grounded Kiwis must be considered in the context of the MIQ system as a whole. If the voucher, virtual lobby and group allocation systems operated as a limit on New Zealanders' right to enter, it might be possible to show that they were demonstrably justified when considered alongside the emergency allocation process.

[210] I therefore consider the issues that relate to each of the limiting measures before considering whether the limits imposed by the system as a whole were reasonable and demonstrably justified.

Prescribed by law

Legislative framework

[211] MIQ arrangements were implemented under the COVID-19 Public Health Response Act 2020 (**the COVID-19 Act**), and the COVID-19 Public Health Response (Air Border) Order (No 2) 2020 (**the Air Border Order**) and the COVID-19 Public Health Response (Isolation and Quarantine) Order 2020 (**the Isolation and Quarantine Order**) made under the COVID-19 Act.

[212] The relevant provisions of the Act and the orders are set in **Appendix five**. They include a requirement in the Act that, when making orders under it, the Minister must “be satisfied that the order did not limit or was a justified limit on the rights and freedoms in [BORA].”¹²⁹

Voucher requirement, prescribed MIQ period and testing

[213] There is no issue that the first alleged limiting measure (that entry into New Zealand was conditional on having a voucher for MIQ, spending a prescribed period of time in managed isolation, and reporting for and undergoing medical examination) was prescribed by law.

[214] The Act permitted the Minister to make orders requiring people to do things that were likely to contribute to preventing the risk of an outbreak or spread of

¹²⁹ COVID-19 Public Health Response Act 2020, s 9(1)(ba) [COVID-19 Act].

COVID-19 including being “isolated and quarantined in any specified way”, to “undergo medical ... testing of any kind, time and place” and to satisfy any criteria for entering New Zealand including “being registered to enter an MIQF on arrival”.¹³⁰

[215] The Air Border Order, in force from 7 September 2020, required (as relevant for present purposes) all arrivals to New Zealand to be isolated or quarantined in accordance with the Isolation and Quarantine Order with some exemptions. As at 3 November 2020, it also required (as relevant) that the person have a “confirmed allocation (for example, a voucher)” to enter a MIQF.¹³¹ The Isolation and Quarantine Order required the person to stay in a MIQF for 14 days,¹³² until it was amended to seven days in November 2021,¹³³ and to submit to medical testing. These requirements were all within the power to make to orders granted under the Act.

Virtual lobby

[216] There is also no issue that the second alleged limiting measure (the virtual lobby) was prescribed by law. The Air Border Order required a person to have a “confirmed allocation” to enter a MIQF. From 9 April 2021 to 20 November 2021 the Isolation and Quarantine Order contained details of how a person could obtain a “confirmed allocation” for MIQF which included “registering on the managed isolation allocation system online portal and obtaining a voucher”.¹³⁴ From 20 November 2021 this was provided for in the Act and included the further detail that online allocations could be “issued on a basis that the Minister decides”.¹³⁵ The virtual lobby was the method by which the online system operated during the Relevant Period.

¹³⁰ Section 11(1)(a), (vi), (viii) and (x) (as at 6 August 2020).

¹³¹ Clause 8(2A)(a).

¹³² Isolation and Quarantine Order, cl 10(1)(a) (as at 6 September 2020).

¹³³ Clause 10(1)(a) (as at 17 November 2021).

¹³⁴ Clause 15J(1)(a).

¹³⁵ COVID-19 Act, s 32M (as at 20 November 2021).

Group allocations

Background

[217] Whether “group allocations” were prescribed by law is in issue. As discussed earlier, group allocations were an offline system through which places in a MIQF could be obtained to enable entry.

[218] Between borders closing in March 2020 and September 2020, the way in which individuals were granted exceptions evolved. As at 8 June 2020, Cabinet delegated decisions on whether a person was an “other essential worker” to immigration officers based on criteria that Cabinet set. This was implemented through the immigration instructions. Cabinet retained the ability to designate specific classes of workers as “other critical workers” where these fell outside the criteria set for immigration officers.

[219] On 21 September 2020 Cabinet established the Border Exception Ministerial Group, which comprised the Ministers of Immigration, Housing, Health and Internal Affairs. This group was to consider proposals for class exceptions to New Zealand’s closed border. The rationale for having a ministerial group to make these decisions was to ensure that decisions took into account requests presenting most urgently but also the broad spectrum of possible proposals in the pipeline. Class exceptions were to be for critical workers but other groups might also be proposed.

[220] Cabinet agreed a framework for the Border Exception Ministerial Group. This included criteria that workforce class and groups other than workforces would each have to satisfy. For groups other than workforces the criteria were that they: provide net economic, social, cultural or academic benefits that have national significance for New Zealand (including for defence, national security and foreign policy including benefit for New Zealand’s relationships in the Pacific); did not create more than minimal labour market displacement risks; be “reasonable in light of the tightly

restricted border settings”; and deliver high level of benefits, and be aligned to strategic objectives for the sector and the government.¹³⁶

[221] The framework also included that for all group exceptions (workforce and other groups), the impact on MIQ capacity had to be manageable in light of forecast pressures and the nature of the group, taking into account MIQ total capacity, MIQ timing, MIQ facility requirements, public health risk and international agreements.

[222] It is unclear on the evidence when the first groups were approved for entry after these changes. However, the briefing and other papers before the Court indicate that in October and November 2020 expected group arrivals were cricket teams from the West Indies, Pakistan and New Zealand, and the United States Antarctic Programme.¹³⁷

[223] If any approved groups were arriving before the introduction on 2 November 2020 of the requirement for a voucher in MIQ, once approved and issued with visas for entry, they would simply then have needed to book seats with an airline through the quota system that was operating. From 2 November 2020, when a voucher was necessary and the MIAS was operational, once a decision had been made by the Ministerial group that a group was eligible for a group allocation, places in the MIAS system needed to be obtained. Around 400 rooms were set aside for this purpose.

[224] The Minister’s evidence is that through late 2020, as the MIAS system bedded in, it became apparent that groups who had been granted exceptions to border restrictions for specific economic or social purposes were having difficulty in securing space within MIQ. The Minister sought advice from officials about this. In this period, for travel in the January to March 2021 period, it appears that approvals were granted for a seasonal employer scheme, the Australian and Bangladesh cricket teams, the Australian netball team and the refugee programme.¹³⁸

¹³⁶ For workforce class proposals the criteria involved: filling gaps that could not be filled domestically; minimal labour risks for New Zealanders or with conditions that would support improvements to the industry’s conditions and employment of New Zealanders; not undermining the longer-term objective of reducing reliance on low-skilled migrants and improving the quality of jobs in a sector; and demonstrating a strong overall case.

¹³⁷ During this period returnees from India on a chartered flight and critical workers were approved.

¹³⁸ Given the arrival dates, I have assumed these were granted before the process changes made in February 2021 but some of them may have been made under those changes.

[225] On 4 February 2021, officials advised that most groups would be directed to secure their place using the MIAS but, in circumstances where their entry was a high priority and time-sensitive, manual allocation would be necessary. Following that advice, the Minister agreed with the Chair of the Border Exceptions Ministerial Group (Hon Kris Faafoi), that this Group would decide whether a group should be eligible for a group allocation of MIQ space alongside the decision to grant an exception to the border restrictions.

[226] The Minister's evidence is that he subsequently made decisions on an application process and criteria, including the need to have the support of a sponsoring Government agency. The Border Exceptions Ministerial Group made the decision whether an applicant was eligible for a group allocation and then MBIE made the allocation for the appropriate dates through the MIAS system.

[227] The respondents acknowledge that the criteria were not published on MBIE's MIQ website "for a period" and that it ought to have been.¹³⁹ It seems that it was first published on 1 September 2021 and was on the website throughout the Relevant Period.¹⁴⁰ At some point, the website also published details of all the groups approved. The details provided to the Court about this are correct as at 11 February 2022. It includes expected arrivals for the period between January 2021 to June 2022.¹⁴¹

[228] These details show that, for expected arrivals between February 2021 to 30 June 2021, approvals were granted to cricket teams from Australia and Bangladesh, the Australian Diamonds (a netball team), the Southern Stars (a sports team), the refugee programme, Rocket Lab, Fijian Rugby (in the place of Italian Rugby) and the Black Caps (the New Zealand men's cricket team). For expected arrivals between June 2021 and 1 September 2021, approvals were granted to the New Zealand Defence Force, the refugee programme, international students, the construction sector, the

¹³⁹ This was raised as an issue in the "agreed statement of issues". However, it is outside the Relevant Period and Grounded Kiwis does not address the issue in its submissions beyond mentioning the point.

¹⁴⁰ See Appendix three.

¹⁴¹ These do not cover those who were granted "time-sensitive" allocations. It appears that MBIE did not publish approvals under this category. Ms Livas' evidence is that film production crews mainly used MIAS or received approvals under the offline time-sensitive allocations.

seasonal employer scheme, the English Roses (the English netball team), Olympics pre and post travel, and the Antarctic programmes.

[229] For expected arrivals during the Relevant Period, approvals were given to a cohort of refugees, seasonal workers, the construction sector, Paralympics, the Black Caps and the White Ferns (the New Zealand men's and women's cricket teams), the Antarctic Programmes, the Dubai Expo, Crankworx, New Zealand Defence Force, Mariner workers, exporters, the All Blacks and Black Ferns (the New Zealand men's and women's rugby teams), health workers, and "Sport and Culture".

Submissions

[230] Grounded Kiwis submits that there was no primary or secondary legislative basis for group allocations prior to 20 November 2021. It submits that:

- (a) in September 2020 there was no legislative mechanism for permitting an allocation for a managed isolation facility to be made to a group;
- (b) on 3 November 2020, when the Air Border Order was amended to require a person entering New Zealand by air to have a confirmed allocation, and defined this as a confirmed allocation from a "web-based managed isolation allocation system", there was no system in place to enable a group to use the web-based system to obtain a group allocation;
- (c) on 9 April 2021, when the MIQ order was amended to allow a person to obtain a confirmed allocation via an online or offline allocation, the language made it clear that offline allocations were for individuals and their purpose was to allow people to apply for a voucher if they had endured a long wait time, had a time-sensitive reason for their entry, or were vulnerable and to help mitigate the risk of New Zealanders facing unreasonable delays; and

- (d) group allocations lacked transparency. Despite this category commencing in September 2020, no information was published on MBIE’s website until 1 September 2021.

[231] If the Court finds that group allocations were prescribed by law before 20 November 2021, Grounded Kiwis submits that the Chief Executive acted unlawfully by failing to publish the criteria on MBIE’s website and by allowing the Border Exemption Group to make the determination when the power rested with her.

[232] The respondents submit that it is the MIQ system in its totality that imposes the limitation on the right to enter New Zealand, by limiting the number of people who enter New Zealand each day, and that the Court should therefore consider whether the system in its entirety has a basis in law, rather than examining individual aspects of the system. They submit that broad discretionary powers can meet the degree of particularity required to be “prescribed by law”. They further submit that during the Relevant Period, group allocations were empowered by cl 15L of the Isolation and Quarantine Order (between 9 April 2021 and 20 November 2021) and then by s 32N of the COVID-19 Act.

[233] The respondents accept that the criteria was not on MBIE’s website earlier as it should have been but that it was published throughout the Relevant Period. They also accept that there was a misalignment in the process for granting group allocations under cl 15L and the practice and this was remedied on 20 November 2021.

Analysis

[234] The purpose of the “prescribed by law” component of the test is:¹⁴²

... to ensure that basic rule-of-law values are complied with when limits are placed on rights. To preclude arbitrary and discriminatory action by government officials, action in derogation of rights must be authorised by law. In addition, citizens should a reasonable opportunity to know in advance what the law prohibits so that they can act within it.

¹⁴² Butler and Butler, above n 58, at 6.12.1, citing *Attorney-General v IDEA Services Ltd (in stat man)*, above n 74, at [177]; and *Constitutional Law of Canada* (5th ed Thomson Reuters, Toronto, looseleaf, 2007), vol 2 at [38.7(a)].

[235] The leading statement of what is meant by “prescribed by law” is that of McGrath J in *Hansen v R* who said:¹⁴³

... To be prescribed by law, limits must be identifiable and expressed with sufficient precision in an Act of Parliament, subordinate legislation or the common law. The limits must be neither ad hoc nor arbitrary and their nature and consequences must be clear, although the consequences need not be foreseeable with absolute certainty.

[236] I do not accept the respondents’ submission that it is sufficient if the MIQ system in its entirety had a basis in law (as it did), rather than examining whether individual aspects of the system were prescribed by law. Approved groups with expected arrival dates that would coincide with places in MIQ during the Relevant Period included the Bangladesh cricket team¹⁴⁴ and the English netball team.¹⁴⁵ Neither of these were approvals for New Zealand groups. The rooms in MIQ set aside for those allocations were rooms that were not available to New Zealand citizens. They therefore imposed an additional limit on citizens’ right to return.

[237] That was recognised in briefings about group allocations. For example, the 22 December 2020 Cabinet paper proposed a target allocation for critical workers of 10 per cent and 75 per cent ring-fencing for New Zealand citizens in MIAS. This was because, with the first come, first served MIAS system, there was an “ongoing risk” of either group “crowding out” the other when New Zealand citizens had the legal right to enter.

[238] It is therefore necessary to consider whether group allocations were prescribed by law. This proceeding is focussed on the Relevant Period.¹⁴⁶ For part of that period, that is from 20 November 2021, it is clear that they were. The COVID-19 Act specifically provided that both offline and online allocations in MIQs could be made

¹⁴³ *Hansen v R*, above n 72, at [180]. Cited in *New Health New Zealand v South Taranaki District Council*, above n 76, at [106].

¹⁴⁴ Thirty-one rooms for an expected arrival in early December 2021.

¹⁴⁵ Twenty-two rooms for an expected arrival on 27 August 2021 (meaning that 9 of the 14 days in MIQ would be within the Relevant Period).

¹⁴⁶ It is therefore not necessary to consider whether any approved groups prior to 2 November 2020, (when the MIAS and the voucher system were not in operation) or between 2 November 2020 and 1 September 2021 (when the MIAS and the voucher system was in operation) were prescribed by law. I note, however that, prior to April 2021 the authority to grant MIQ vouchers to groups was not made explicit in the COVID-19 Act or the orders issued under them. From April 2021 the position was as discussed in the period between 1 September 2021 and 20 November 2021.

on a basis that the Minister decided.¹⁴⁷ It also specifically provided that offline allocations could be made to group allocations.¹⁴⁸ The issue is whether for the earlier part of the Relevant Period (from 1 September 2021 to 20 November 2021) provisions in the COVID-19 Act, and the Air Border Order and Isolation and Quarantine Order in force at that time, met the “prescribed by law” requirement.

[239] During this period, the COVID-19 Act did not itself authorise group allocations to be made in MIAS by MBIE as determined by the Border Exception Ministerial Group. However, the purposes of the COVID-19 Act included supporting a public health response to the virus that “prevents, and limits the risk of, the outbreak or spread of COVID-19”, “avoids, mitigates, or remedies the actual or potential adverse effects of the COVID-19 outbreak (whether direct or indirect)” and “allows social, economic, and other factors to be taken into account where it is relevant to do so”.¹⁴⁹ Approving groups for places in MIQ under the criteria set by the Minister is within those purposes.

[240] The COVID-19 Act envisaged that requirements to enter MIQ and to meet specified criteria before entering MIQ would be imposed by orders issued by the Minister.¹⁵⁰ It empowered the Minister to make orders authorising requirements and measures that would or would be likely to contribute to the COVID-19 Act’s purpose of preventing the risk of an outbreak or spread of the virus. This included requirements to “be isolated or quarantined in a specified way” and to “satisfy any specified criteria before entering New Zealand”.¹⁵¹ The Act also contemplated that those requirements or measures could impact on BORA rights and freedoms. That is because, in making any orders, it required that the Minister “be satisfied that the order did not limit or was a justified limit on the rights and freedoms in [BORA]”.¹⁵²

[241] During this period, the Air Border Order required a person arriving by air to have a “confirmed allocation” which was defined as “the meaning given by clause 15H

¹⁴⁷ Section 32M.

¹⁴⁸ Section 32N.

¹⁴⁹ Section 4(b) and (ca) (as at 6 August 2020).

¹⁵⁰ Section 11.

¹⁵¹ Section 11(1)(a)(v)) and (x).

¹⁵² Section 9(1)(ba).

of the Isolation and Quarantine Order”.¹⁵³ Clause 15H of that order defined “confirmed allocation” as meaning “a confirmed allocation issued under the managed isolation allocation system to a low-risk MIQF”. A “managed isolation allocation system” was defined as meaning “a managed isolation allocation system operated by or on behalf of the New Zealand Government”.¹⁵⁴ A “low risk MIQF” meant an MIQF designated for the purposes of isolating or quarantining people with a low risk of transmitting COVID-19.¹⁵⁵

[242] Clause 15J of the Isolation and Quarantine Order provided that “a person” could obtain a “confirmed allocation” via an online or offline allocation. An offline allocation was obtained by “applying to the chief executive in the form approved by the chief executive”.¹⁵⁶ Clause 15L set out further details about offline allocations. Specifically: they could be issued to “persons” who met the criteria “decided by the Minister” and published on MBIE’s Internet site; and the application was made to the chief executive who determined the application in accordance with the criteria.

[243] I consider that group allocations were “prescribed by law” for the purposes of s 5 of BORA during the period 1 September 2021 to 20 November 2021. This is because the Act permitted the Minister to determine criteria for entering New Zealand providing he was satisfied that this was not a limit on the rights and freedoms under BORA or, if it was limit, that it was a justified limit. The Minister issued the Isolation and Quarantine Order that permitted offline allocations to be determined against criteria that he set and that was published on the website. That criteria was not outside his discretion. Group allocations were consistent with the purposes of the COVID-19 Act as discussed earlier.

[244] As such, group allocations were not an arbitrary and discriminatory action by the Minister or government officials. They were an authorised way by which groups of people could enter MIQ. Citizens had notice of them – they could see from the Isolation and Quarantine Order that offline allocations could be made and would be

¹⁵³ COVID-19 Public Health Response (Air Border) Order (No 2) 2020, cl 4(1) (as at 15 August 2021) [Air Border Order].

¹⁵⁴ Isolation and Quarantine Order, cl 15H (as at 13 November 2021).

¹⁵⁵ Clause 4(1).

¹⁵⁶ Clause 15J(1)(b).

determined against criteria published on the MBIE website. During the Relevant Period that criteria was published on that website.

[245] In reaching this conclusion, I reject Grounded Kiwis' submission that the language of 15L made it clear that offline allocations were for individuals only. It is a statutory interpretation principle that "words in the singular include the plural" unless the context otherwise requires.¹⁵⁷ The context does not require any different interpretation here. A group is made up of several people and a group application is simply a combined application for each of the people within the group. Moreover, when clause 15L came into force, group allocations approved for MIQ had been manually allocated in MIAS from November 2020. The Minister's evidence confirmed that the amendments made to the Air Border Order and the Isolation Quarantine Order, with effect from April 2020, were to implement the online and offline framework, that he considered they were consistent with the purpose of the COVID-19 Act and that framework would ensure allocation decisions if they imposed limits under BORA were reasonable and proportionate.

[246] Although prescribed by law, there is the issue of misalignment between what was prescribed and what happened in practice. Clause 15L required the chief executive of MBIE to determine an application for a group allocation in accordance with the Minister's criteria. This was not what happened. Rather, the Border Exception Ministerial Group determined the application against the Minister's criteria and MBIE then made the allocation in the rooms that were set aside for these purposes. This was an error in carrying out what clause 15L authorised.

[247] From 20 November 2021, s 32N of the COVID-19 Act provided that the Minister was to determine group allocations. However, the evidence is that the Border Exceptions Ministerial Group determined the applications against the criteria set by the Minister. Once again, that was an error in carrying out what s 32N authorised.

[248] I accept the respondents' submission that this is not the same as whether the group allocations were "prescribed by law" for the purposes of s 5 of BORA. The

¹⁵⁷ The current version of this interpretation principle is found in the Legislation Act 2019, ss 9 and 19.

prescribed by law test is about whether a derogation of rights (here, the derogation of the right of citizens to enter New Zealand by group allocations for non-New Zealanders) was authorised. Here it was, albeit that they were to be authorised by the chief executive (up until 20 November 2021) and then by the Minister and not by the Border Exceptions Ministerial Group as occurred.

[249] The respondents have not made submissions on the legal effect of this misalignment between what was prescribed and the practice. It would, however, seem to follow that it meant the approvals were unlawfully granted.

[250] The other error was the failure to publish the criteria on MBIE's website before 1 September 2021. This proceeding is, however, focussed on the Relevant Period. Moreover, it is not clear how the lack of transparency affected the rights of individuals represented by Grounded Kiwis to return home.

Purpose of limit

Voucher requirement, prescribed MIQ period and testing

[251] Grounded Kiwis frames the first limiting measure on the right to enter as being that MIQ was conditional on having a voucher for MIQ, spending a prescribed period of time in managed isolation, and reporting for and undergoing medical examination and testing.

[252] The voucher itself was, however, no more than a method of allocation for the constrained supply of MIQ rooms. It did not impose an additional limit on citizens' right to return to New Zealand beyond the limit that was provided by the requirement that all arrivals must enter MIQ for the prescribed period and be subject to testing requirements. The requirement to enter MIQ operated as a limit because demand for spaces in MIQ exceeded supply during the Relevant Period and for several months before that. The prescribed period of time and reporting for medical examination and testing operated as a further limit in that a shorter period accompanied by a different testing regime or permitting vaccinated arrivals to self-isolate would have freed up some capacity.

[253] The evidence shows that the purpose of the requirement to enter MIQ for a prescribed period and to be subject to testing was to reduce the likelihood of a community outbreak being seeded from overseas to as close to zero as possible. This was part of the larger policy objective of the elimination strategy. MIQ was a key part of the “keep it out” pillar of that strategy. When the policy objective transitioned in October 2021 to managing and attempting to contain the outbreak (following the Delta outbreak), the purpose of continuing MIQ for all arrivals was to limit the extent of the outbreak by preventing additional outbreaks. Later, with the emergence of Omicron as a variant of concern, the purpose of requiring all arrivals to quarantine in MIQ was also to prevent outbreaks of the Omicron variant in the community. This was to allow time to bring the Delta outbreak under control, assess the risk posed by the Omicron variant, prepare for any Omicron outbreak by increasing “booster” vaccination coverage and vaccination of children, and to develop a strategy for the different risk posed by Omicron.

[254] These purposes were sufficiently important to justify the curtailment of citizens’ right to return to New Zealand. The potential public health risks were significant.¹⁵⁸ I will address whether the public health purpose of MIQ for overseas arrivals became disproportionate to the risk presented by overseas arrivals during the Relevant Period due to the Delta community outbreak under the “proportionality” heading below.

¹⁵⁸ Legal advice was provided to the Attorney-General on 27 July 2020 about the BORA implications of charging New Zealanders and requiring them to have a booked MIQF before arrival. The advice was that both were compliant with the BORA. The booking requirement was justified because in the context of an extraordinary global pandemic of a virus that has been shown to have extreme impacts on public health, public health measures can be sufficiently important to justify the right to freedom of movement. Without some form of MIQ, border cases would likely spark a resumption of community transmission. MIQFs were of paramount importance to the continuing effectiveness of New Zealand’s response to the pandemic. The ability to require users to register in advance regulated demand and thereby promoted the quality and sustainability of New Zealand’s MIQ system. While it “could lead to delay for some people”, it was an effective way to ensure MIQFs have sufficient capacity to meet demand at any given time. This was essential to the effective operation and integrity of the MIQ system. The COVID-19 Act required the Minister to consider whether the registration requirement was a justified limitation too before making an Order to give effect to that requirement.

Virtual lobby

[255] The purpose of the virtual lobby was to manage high demand for the limited and fixed supply of MIQ places. It was implemented to improve the booking platform for users. It was a two hour, transparent, process which avoided the fasted-finger problems with the first come, first served process it replaced. It operated as a limit on the right of New Zealanders to return because demand significantly exceeded supply. As with the former system, it did not prioritise New Zealanders over non-New Zealanders. Nor did it prioritise those who had been waiting longer to return and nor did it distinguish on the basis of need.

[256] The purpose of having a usable website system to enable New Zealanders to manage high demand for the limited and fixed supply of MIQ places, to replace a system that was unworkable and causing users considerable distress, was an important purpose. To the extent that it was a demand management tool to allocate a limited number of places in MIQ, and that MIQ was created for a purpose that was sufficiently important to justify the curtailment of citizens' right to return to New Zealand, a demand management tool was also sufficiently important to justify that curtailment. I will address the fact that the system was the main mechanism by which New Zealanders could exercise that right to return home and it did not give priority to New Zealanders who had already experienced considerable delay in exercising their right, or otherwise on the basis of need, when considering whether the curtailment was no more than reasonably necessary.

Group allocations

[257] The purpose of group allocations was to mitigate the potentially significant economic and social impact of a restricted border.

[258] The allocations that were approved (set out above) were predominantly made to New Zealand sports teams and to some businesses. These approvals limited the right of some New Zealanders to return to New Zealand only to the extent that they gave priority to other New Zealanders when demand exceeded supply.

[259] The allocations that were made to non-New Zealanders limited the right of New Zealanders to return to New Zealand if they were approved for MIQ spaces when demand exceeded supply. During the Relevant Period (when demand exceeded supply), in addition to allocations to New Zealand sports teams and businesses, refugees, the construction sector and seasonal workers, health workers, the English netball team, and the Bangladesh cricket team had approved places in MIQ.¹⁵⁹

[260] Additionally, by 2 November 2021, 181 rooms for the Women's Cricket World Cup were allocated places in MIQ in January to February 2022, and 35 rooms were allocated to the South African and Netherlands men's cricket teams respectively for places in MIQ in early February and March 2022. As at 2 November 2021, dates for MIQ free travel for overseas New Zealanders were yet to be announced.

[261] Grounded Kiwis submits that the onus is on the respondents to establish the sufficiently important purpose that is served by allowing every group to enter New Zealand at the expense of New Zealand citizens. It refers to the Women's Cricket World Cup places displacing 181 citizens from being able to return home in January and February 2022. It submits that, in the context of a global pandemic, it is a struggle to comprehend how the value in holding the event would justify displacing such citizens like AS and HW (the examples referred to earlier) who have been delayed in returning to New Zealand for almost a year, or CB who was unable to return to farewell her son's body before it deteriorated, or TG (discussed later) who was left stranded in the United States, without a visa or a job, or the other examples provided by the affidavits.

[262] The respondents do not directly address this point. They submit that, in making group allocations, Ministers weighed up the social and economic benefits of a particular group arriving in New Zealand in the context of heavily constrained borders, balancing the impact of the group's arrival on the MIQ system. They submit this is a judgment appropriately exercised at the highest level for the purposes of democratic responsibility.

¹⁵⁹ I have assumed here that construction workers were not New Zealanders but this assumption may not be correct.

[263] In principle, I accept that the policy objective of mitigating the potentially significant economic and social impact of a restricted border was sufficiently important to justify the curtailment of the right of some citizens to return to New Zealand. I also accept that sports teams and the hosting of international sports events bring economic and social benefits to the country. The COVID-19 Act purposes recognised that New Zealand needed to function economically and socially in the midst of the pandemic. The Border Exceptions Ministerial Group or the Minister (albeit in practice via and as part of the Border Exceptions Ministerial Group) were appropriately placed to make decisions about this.

[264] However if sports teams are able to secure entry, the MIQ system must also have a mechanism to ensure that overseas New Zealanders do not experience unreasonable delay in exercising their right to return.

Rationally connected to the purpose

Voucher requirement, prescribed MIQ period and testing

[265] The voucher requirement, 14-day period in MIQ and testing regime were rationally connected to their purpose of reducing the likelihood of a community outbreak being seeded from overseas to as close to zero as possible. Overseas arrivals were a potential source of COVID-19. During the Relevant Period any such cases were likely to be the Delta and Omicron variants, both of which were highly transmissible. The voucher requirement helped ensure there was a place in MIQ for all overseas arrivals by air. The period of time in MIQ and the testing regime helped ensure that cases in MIQ were detected before arrivals were able to enter the community.

Virtual lobby

[266] The virtual lobby was rationally connected to its purpose of managing demand for spaces in MIQ and so was also rationally connected to ensuring arrivals entered MIQ to reduce the likelihood of a community outbreak being seeded from overseas to as close to zero as possible.

Group allocations

[267] Group allocations were rationally connected to the objective of bringing economic and social benefits to New Zealand, in the context of tightly controlled borders intended to contribute to preventing the risk of an outbreak or spread of COVID-19.

No more than reasonably necessary

The law

[268] On this part of the framework for whether a limit is demonstrably justified, McGrath J in *Hansen* framed the test as being “whether there was an alternative but less intrusive means of addressing the legislature’s objective which would have a similar level of effectiveness”.¹⁶⁰ In the same case, Tipping J described the issue as being “whether Parliament might have sufficiently achieved its objective by another method involving less cost” to the right at issue.¹⁶¹

[269] In *New Health*, the judgment of O’Regan and Ellen France JJ referred to and applied the approach of McLachlin J in *RJR-MacDonald Inc v Canada* that:¹⁶²

... the law must be carefully tailored so that rights are impaired no more than necessary. The tailoring process seldom admits of perfection and the courts must accord some leeway to the legislator. If the law falls within a range of reasonable alternatives, the courts will not find it overbroad merely because they can conceive of an alternative which might better tailor objective to infringement ... On the other hand, if the government fails to explain why a significantly less intrusive and equally effective measure was not chosen, the law may fail.

¹⁶⁰ *Hansen v R*, above n 72, at [217], applied in *Ministry of Health v Atkinson*, above n 74, at [154].

¹⁶¹ At [126].

¹⁶² *New Health New Zealand Inc v South Taranaki District Council (SC)*, above n 76, at [132] citing *RJR-MacDonald Inc v Canada* [1995] 3 SCR 199 at [160] and applied in *New Health New Zealand Inc v South Taranaki District Council* [2016] NZCA 462, [2017] 2 NZLR 13 at [156]. O’Regan and Ellen France JJ, in the Supreme Court in *New Health* at [134], applied this approach to fluoridation of water (a limit on the right to refuse medical treatment). It was one of a range of reasonable alternatives to address the problem of dental decay and the suggestive alternatives (for example, using fluoridated toothpaste and reducing the consumption of foods and drinks containing sugar), while less rights impairing, were of limited efficacy.

Voucher requirement, prescribed MIQ period and testing

Submissions

[270] Grounded Kiwis submits that the 14-day component of MIQ (the **14-day model**) impaired the right to enter New Zealand more than was reasonably necessary. It submits that there were other equally effective, but less rights impairing ways to prevent community transmission of COVID-19 cases, namely a 7-day period of managed isolation or self-isolation for vaccinated travellers with a negative pre-departure test.

[271] Grounded Kiwis submits that the first and second respondents were steadfast in maintaining the 14-day model until an abrupt shift to a 7-day period plus 3 days self-isolation (the **7-day model**), announced on 28 October 2021 and put in place on 14 November 2021. It says the Ministry's stated rationale for the move to the new model was not new or probative at the time.¹⁶³

[272] Grounded Kiwis submits that the move to the 7-day model was expedient because of the pressure on MIQ availability due to MIQFs being used for community cases in the Delta outbreak. It also says that, because MIQFs were used for that purpose, the move at this time did not increase capacity for overseas arrivals because of this. It submits that, had the Government acted on information it had in November 2020, kept pace with technological and testing advancements, and implemented a day 6/7 test earlier, a shift to 7 days managed isolation could have been implemented some time before the Delta outbreak in New Zealand and would have increased capacity in MIQ for overseas arrivals. It further submits that there were a number of indicators that a period shorter than 14 days, for example 7 or 10, may have been sufficient before 14 November 2021, in line with the Government's risk tolerance.

¹⁶³ The Ministry's stated rationale was that the move to the new model was safe at this time due to: increased understanding of the epidemiology of the Delta variant (it having a short incubation period) and recent testing/case detection data from Singapore and other jurisdictions confirmed that the majority of acute cases of COVID-19 were detected within three days of a quarantine/isolation period; a significant reduction in the number of positive COVID-19 cases coming over the border in recent months; the majority of arrivals reporting that they were fully vaccinated; and pre-departure testing.

[273] Grounded Kiwis also submits that self-isolation was not given conscientious consideration.

[274] The respondents submit that the 14-day model was consistent with WHO guidance and was the most effective approach for the initial variants. It was the most effective approach because a significant minority of cases only became detectable after 8 days and anything short of 14 days gave rise to a level of risk that was unacceptable to maintain the elimination strategy. For this reason, they say there was no need to test the viability of a shortened period of quarantine by introducing a day 6/7 test. They say that, while the Government was pursuing an elimination strategy, there was no need to consider a self-quarantine model because that model could not meet the policy objective of the strategy.

[275] The respondents also submit that in late 2020 consideration was given to reducing the quarantine period for people arriving from low-risk countries. Priority was given to progressing QFT with countries that had successfully avoided or eliminated community transmission. They submit that the risk of COVID-19 increased substantially in late 2020 and early 2021 with many countries increasing their public health measures. They say a shortened quarantine period was considered later in 2021 and the timing of introducing this reasonable.

Incubation period

[276] I agree with the respondents that, prior to the emergence of Delta as a variant of concern in May 2021, information about the epidemiology of the virus and modelling supported a 14-day quarantine period. For example:

- (a) In February 2020 WHO and People's Republic of China Mission on COVID-19 reported that the mean time between infection and symptoms was five to six days, with an incubation period ranging from one to 14 days. A 14-day quarantine period was recommended by WHO again on 29 February, 19 March, and 19 August 2020.

- (b) Similarly, an article written by New Zealand academics on 16 July 2020 (not peer-reviewed at that time) concluded that a 14-day managed isolation period with testing on days 3 and 12 reduced the risk of an infectious case being released into the community at a very low level. In contrast, a 5-day managed isolation period was “ineffective and would present a much higher risk to the community”.
- (c) The Ministry of Health’s Science and Technical Advisory (STA) Group briefing for the period 23 to 25 November 2020 referred to a study from the United States Centre for Disease Control (CDC) that modelled quarantine period and testing. It evaluated a 7-day isolation period with symptom monitoring and day 5/6 testing as 91–99 per cent effective at preventing post transmission risk. However, the limitations on the study included the ill-defined infectious period for COVID-19, test turnaround time, and the degree of non-compliance with quarantine.
- (d) A further CDC scientific briefing on 2 December 2020 estimated post-transmission risk from varying quarantine lengths but said “[a]ny option to shorten quarantine risks being less effective than the currently recommended 14-day quarantine ... [and] there may be settings ... where even a small risk of post-quarantine transmission could still result in substantial secondary clusters.”
- (e) A WHO scientific brief on 16 December 2020 referred to a mean time from exposure to the virus until symptom onset as 5–6 days but with a range of 1–14 days. In most individuals, the virus became detectable in the upper respiratory tract approximately 1–3 days before symptom onset and for days to weeks after symptoms develop (5–11 days).
- (f) On 25 March 2021 an academic paper calculated the risk from four possible quarantine scenarios: (1) test on arrival; (2) 5-day stay with a test on day 3; (3) 14-day stay only; and (4) 14-day stay and tests days 3 and 12. The paper found that the 14-day stay with two tests was highly effective in preventing post-quarantine transmission.

- (g) A peer reviewed article on 8 April 2021 examining 42 studies in China determined that long incubation periods were possible. The mean and median incubation periods for COVID-19 were eight and 12 days respectively. It was difficult to estimate the right-hand tail of the incubation period based on the small sample size but the highest 99th percentile could be as long as 20.4 days. The article concluded that it was “prudent not to dismiss the possibility of incubation periods of up to 14 days at this stage of the epidemic.”

[277] There were more papers and modelling available to the Ministry prior to the emergence of Delta. Dr Harriette Carr, a public health physician and the Deputy Director of Public Health at the Ministry of Health, confirmed that the 14-day quarantine period was based on the available evidence and guidance. In short, there was ample support for the 14-day model as appropriate for the elimination strategy.

[278] Following Delta’s designation as a variant of concern, on 25 June 2021 WHO continued to recommend a 14-day quarantine period for contacts of COVID-19 cases to minimise the risk of onward transmission.¹⁶⁴ It also stated that it was “possible for differences to be caused by viral mutations but at the present time, there is no data to suggest that there is a change in the incubation of the current SARS-CoV-2 variants of concern.” Similarly, on 2 July 2021, WHO said “several modelling studies show that rRT-PCR testing combined with 14-day quarantine is the most effective strategy”.

[279] The evidence before the Court indicates that information about a shorter incubation period for Delta began to emerge from early August 2021. For example:

- (a) Advice from the STA Group’s advice on 3 August 2021 noted that a Chinese study calculated the median incubation period for Delta at four days, but that “[a]dditional evidence will be required to say conclusively that viral load and incubation period are the main contributing factors for the observed transmission capabilities of Delta.”

¹⁶⁴ Although this guidance relates to contacts, rather than border quarantine arrangements, it is relevant because they are targeted towards the same objective.

- (b) A pre-print study of 167 patients in China published on 13 August 2021 found that those with Delta had more rapid symptom onset. Further, the higher the viral load, the higher the risk of pre-symptomatic transmission. The Delta latent period was estimated at four days and the mean incubation period was 5.8 days. The 95th percentile was 11.5 days.
- (c) A 28 August 2021 CDC study concluded that the latent period for COVID-19 was 5.5 days with a 95th percentile of 10.6 days. Repeated testing used in combination with symptom monitoring could therefore justify shorter quarantine periods. However, in places aiming for zero cases, it should be recognised that there was a greater cost of infections if they are introduced into the community.
- (d) Advice from the STA Group on 30 September 2021 noted that the latency period and incubation period for Delta were both 4–6 days.
- (e) Advice from the STA Group on 7 and 15 October 2021 was that evidence on latency and incubation periods was limited. One study reported the mean incubation period at 5.8 days. Another study reported a significantly shorter incubation period for Delta (four days) compared with a wild-type strain (six days).

[280] Knowledge about the shorter incubation period of Delta appears therefore to have emerged from August 2021 but the information was relatively limited. On its own, while New Zealand was pursuing an elimination strategy, it was reasonable to maintain a 14-day quarantine period. A press briefing given by the Executive Director of WHO Health Emergencies Programme as recently as 29 December 2021 referred to “trade-offs” between “the science and being absolutely perfect in what you try to do”. He said “[i]f people shorten the quarantine period [from the recommended 14-day period], there will be a small number of cases that will develop disease and potentially go on to transmit because they’ve been let out of quarantine earlier.”

[281] The affidavit from Dr Carr reinforces this point. She said the 14-day quarantine period was supported by WHO guidance and modelling available to the Ministry of Health. She explained the difference between the incubation period and the latent period of the virus. She said that, although there had been significant study on this from early 2020, both of these periods have been difficult to determine accurately and a level of scientific uncertainty remained. This had been aggravated by the continual emergence of new variants with potentially differing viral dynamics and epidemiology.

[282] Dr Carr explained that the distribution of both the latent and incubation periods of the virus fit a gamma distribution, with a peak distribution short of the mean, and a long “right-hand tail”. The estimated mean distribution for Delta was approximately four days with a 95th percentile at approximately eight days. This left five per cent of infected people who would remain asymptomatic and only return a positive test following that period.

[283] Dr Carr said it was important to balance the reduction in the risk of transmission provided by a given policy against its economic and social costs. When assessing the risk of transmission, both the likelihood and consequence of the risk eventuating needed to be considered. The consequence of a quarantine failure that resulted in introducing COVID-19 into a population where it was not otherwise circulating was greater than if the virus is already prevalent in the population.

[284] She said this had led to countries pursuing an elimination strategy, including New Zealand, taking a more cautious approach to the quarantine period. Some countries, notably China and Hong Kong, had taken an absolute zero-risk tolerance approach and therefore applied 21-day and 28-day quarantine periods in some contexts. She said the balance between the benefits and costs of quarantine have changed in the context of large outbreaks of the Omicron variant in many countries. For example, the risk of further transmission from reducing quarantine periods had to be balanced against the cost of requiring workers to quarantine for an extended period, especially where it would have significant impacts on essential services and supply chains.

[285] I accept Dr Carr’s uncontested evidence. I would add that, in balancing the reduction in the risk of transmission provided by a given policy (MIQ for all arrivals for 14 days) against its economic and social costs, the right of New Zealand citizens to enter their country was also relevant.

Testing

[286] Dr Anne Wylie, an international expert in COVID-19 testing, provided an affidavit for Grounded Kiwis.¹⁶⁵ Amongst other things, her evidence included that:

Data from an additional PCR test could better inform whether a person with three negative PCR saliva tests, on day 0, day 3, and day 7 accompanied by a negative antigen test on departure at day 7 (and leaving another saliva sample to be tested), is safe to released.

[287] Professor Hill, a specialist in internal and public health and a professor of International Health, provided an affidavit for the respondents. He was a member of three Ministerial Advisory Groups (“the Skegg Group”, “the Roche Group” and “the Simpson/Roche Committee”). He agreed with this evidence from Dr Wylie in the context of the arrival of Delta. However, he maintained that the decision not to move to a 7-day isolation period prior to the arrival of Delta was correct.

[288] Grounded Kiwis contends that a day 6/7 test in MIQ should have been introduced in early 2021 to test the viability of a shortened quarantine period. Dr Wylie considered this was a “missed opportunity” that would have provided data points that could have been used to properly inform downstream decisions regarding the length of MIQ stays or self-isolation requirements.

[289] More generally, she considered that a better testing protocol could have been implemented involving a combination of a RAT (while still in the plane or while waiting in line at the airport) along with a saliva PCR test (on arrival). The saliva PCR test would have detected people with low viral loads who were not yet contagious and

¹⁶⁵ She is a research scientist at the Yale School of Public Health in Connecticut. In 2020 she was the lead author of a research paper that identified saliva as a sensitive sample type for COVID-19 detection. This led to the development of the SalivaDirect PCR method of testing. It has high efficacy and is less invasive than the nasal swab PCR test and has been the mainstay of Hong Kong’s testing programme since early 2021. It has been independently validated in many countries.

required quarantining but could also identify historic infections who did not need to go into managed isolation at all.

[290] Grounded Kiwis refers to a 28 September 2020 report of the Simpson/Roche Committee on New Zealand's COVID-19 surveillance plan and testing strategy. Included in this report was a discussion about the need for the community to accept that in the foreseeable future the presence of relevant symptoms should trigger a test. For that to be sustainable the test needed to be less invasive than that currently being used. The report went on to say:

91. Many other jurisdictions internationally are relying on saliva tests for the bulk of their surveillance. While work is underway in New Zealand on verifying such testing, on current plans widespread introduction is still more than 2 months off, even though in other jurisdictions saliva testing, involving large numbers of test[s] per day, has been well established for several months. The New Zealand time frame appears to be driven by a presumption that saliva testing would replace the PCR test. This need not be so, as it could well be complementary.
92. All efforts should be made to introduce saliva testing as soon as possible as part of the range of testing methods being conducted. If necessary outside assistance should be sought to accelerate development. While sensitivity of saliva testing may be slightly less than the current method, the ability to test more frequently and with greater acceptance, may far outweigh that.

[291] This report was not about obtaining data points for a possible reduction in the quarantine period.

[292] However, later reports did discuss the efficacy of a test around day 6 in reducing the quarantine period. One of those was the Covid-19 STA Group briefing for the period 23 to 25 November 2020 referred to above.¹⁶⁶ In addition to modelling a 7-day quarantine with symptom monitoring and a day 5/6 day test, the Group also discussed that: the efficacy of pre-departure testing was highly dependent on the timing and sensitivity of the test; testing three days prior to travel provided little benefit; and pre-departure testing did not detect in-flight transmissions or travellers infected just prior to travel.

¹⁶⁶ At [276(c)].

[293] The STA Group also said that uncertainties in the modelling included that “the infectious period of COVID-19 remain[ed] hard to define”. The Group nevertheless regarded the modelling as “very useful” and as providing “one of the more robust risk frameworks for comparing options around the border” and a “very useful basis for some ongoing discussions regarding border options and could be considered alongside relative risks from countries with different disease burdens”.

[294] Other research on this topic included the CDC scientific briefing on 2 December 2020 referred to above¹⁶⁷ that estimated post-transmission risk from varying quarantine length. This briefing included a discussion of a 7-day quarantine period with PCR testing but, as noted above, continued to advise that shortening the quarantine period from 14 days risked being less effective.

[295] Another was a 14 April 2021 BMC Madison Research article that used various mathematical models to analyse the expected effectiveness of symptom monitoring, testing, and quarantine. It found that a 14-day quarantine after arrival, without symptom monitoring or testing, reduced post-travel risk by 96–100 per cent on its own. However, a shorter quarantine of seven days combined with symptom monitoring and a test on day 5/6 after arrival was also effective (97–100 per cent) at reducing introduction risk and was less burdensome, and might improve adherence.

[296] The Roche Group provided a report on 23 September 2021 about the impact on the Delta outbreak on the Reconnecting New Zealanders strategy. A framework of protection would involve vaccination (the first layer), border processes with credible information about the individual traveller as to their vaccination status and their country of origin and with rapid testing (the second layer), public health measures such as masks, scanning and proactive testing and tracing across the community (the third layer), and delivering additional equipment and staffing to hospital and community health systems (the fourth layer).

[297] In discussing the third layer, the Roche Group said surveillance, testing, and contact tracing needed to be bolstered. The Delta outbreak had led to a surge in people

¹⁶⁷ At [276(d)].

being tested and there were issues around backlogs and delays that compromised early outbreak containment. In this context the Roche Group said:

Increased investment in saliva testing and overall testing capacity is urgently needed. Wider use of saliva testing would mean that individuals can be tested more frequently and reduce the risk of undetected cases in the community ...

Testing should be a priority area of focus. It is a worry that it is nearly a year since recommendations re saliva testing were made and yet it is still very much in its early stages as a tool to be used against COVID-19.

[298] Grounded Kiwis relies on this comment and the earlier 28 September 2020 Simpson/Roche Committee report to say that the Ministry of Health had failed to turn its mind to saliva testing at day 6/7 of MIQ. The first point in response to this submission is that neither the 28 September 2020 or 23 September 2021 advice were specifically about introducing saliva testing with a view to reducing the quarantine period at the border. They discussed having a faster, less invasive test available for testing and surveillance generally.

[299] The other point is that, in between those two reports, work had been carried out on the use of saliva testing and other testing options. Specifically:

- (a) On 30 July 2021 the Ministry of Health provided a briefing to the Minister's office on saliva testing. Based on international literature, validation work by local laboratories, and the position of the New Zealand Microbiology Network, the Ministry said it was now confident there were surveillance situations where testing for COVID-19 could be carried out using saliva samples, including where frequent testing of border workers could potentially identify cases earlier, before chains of transmission were generated. This updated position was reflected in the rollout of saliva testing for border workers.
- (b) On 12 August 2021, in a briefing to Minister Hipkins, the Ministry of Health proposed to implement self-administered saliva testing in MIQ on days 6 and 9 to enable the gathering of detection rate data at two intervals between days 3 and 12 to inform future advice about the options of shorter stays in MIQ from a public health perspective. The

proposal was for a phased implementation approach beginning with a proof of concept pilot in select locations.

- (c) On 19 August 2021 advice was provided to Minister Hipkins on how point of arrival testing for COVID-19 could be established to support New Zealand to maintain its elimination strategy while gradually reopening its borders. Healthcare worker-administered RAT and Rapid rT/PCR were recommended for consideration. The advice proposed a three-stage process for introducing point of arrival testing. These three stages would be a small scale controlled trial, a wider trial and then a phased rollout of point of arrival testing.
- (d) On 24 September 2021 the Ministry of Health briefed the Minister on RATs. A pilot at Middlemore Hospital's emergency department would help the Ministry to find the potential utility in healthcare settings. Work was also underway on point of arrival testing for a self-isolation pilot.

[300] In these circumstances I reject Grounded Kiwis' submission that a reasonably available alternative to a 14-day period of quarantine, that could have been implemented some time before the Delta outbreak and would have met the purpose of the elimination strategy as effectively, was a 7-day quarantine period supported by a different testing protocol than the days 0, 3 and 11/12 PCR testing that was in place from about January 2021. Dr Wylie does not say that having an additional test would have shown that everyone testing positive would have done so by day 7. Professor Hill does not support this submission. Rather, it was the emergence of Delta and the evidence of a shorter incubation period that made this an acceptable risk. I accept the respondents' submission that it is speculative to say that a day 6/7 test implemented earlier would have enabled a shift to a 7-day period sooner.

[301] Moreover, in the context of a fast moving and complex pandemic, the Government was not required to invest its limited resources in gathering its own data from a 7-day test. It was entitled to rely on WHO and other studies that were being undertaken elsewhere. While the emerging evidence about Delta indicated a shorter

incubation period, the information was limited. Further, although Delta was becoming the dominant variant, it was not the only variant circulating in the world. Dr Bloomfield said it was necessary to exercise caution in making changes to MIQ until it became clear that Delta was the dominant strain.

[302] The Minister and the Government were also entitled to adopt a precautionary response and not to adopt policies that, based on available evidence, were higher risk. It is appropriate for the Court to give leeway to the Minister, and the expert advice he was receiving in this area, in decisions about this.¹⁶⁸

A shortened MIQ stay

[303] In addition to the “missed opportunity” to obtain data from a day 6/7 test at an earlier time, Grounded Kiwis submits that other steps the Government took to consider a shortened stay in MIQ were inadequate. It points to a 15 December 2020 paper to Minister Hipkins in which officials from the Ministry of Health and the Department of the Prime Minister and Cabinet (**DPMC**) agreed to provide “advice on shorter stays” in MIQ for in-bound travellers from low-risk countries (for example, Australia and the Pacific) by 31 January 2021.¹⁶⁹

[304] Grounded Kiwis says this advice never materialised. Instead, the Government opted to pursue full QFT from countries where the risk was sufficiently low. When this failed to “operationalise safely”, there was no contingency in place because advice on shorter stay advice was never given. Grounded Kiwis says the Government’s Reconnecting New Zealand Strategy, that would ultimately bring an end to managed isolation, was not a substitute. This is because its implementation depended on the “highest possible coverage across the population” which was forecast for 2022 at the earliest.

¹⁶⁸ The Court’s view in *Taylor*, above n 104, discussed earlier at [196], supports this.

¹⁶⁹ This advice would cover: potential ways to assess country risk; the health criteria for different risk and other criteria that might inform or complement a health-risked based approach; options and scope of pace of moving to a risk-based approach by reducing the duration of MIQ; and the costs (including public health risk), benefits and operational implications for health, border agencies and the aviation industry.

[305] Grounded Kiwis says that it follows that this is not a case where there were a range of legitimate policy choices and the Government adopted a particular approach following a conscientious consideration of the options. They say there was no consideration given to the efficacy of a shortened stay in MIQ, even though it had been identified as a “critical contingency” in the 14 December 2020 paper and even though the Ministry of Health was “armed with two ‘robust’ reports signalling the viability of a 7-day model in line with the elimination strategy.”

[306] I do not accept this submission. One of the two “robust” reports referred to is the 23 November 2020 discussion of the CDC paper referred to earlier.¹⁷⁰ The other is a detailed paper dated 8 December 2020 that included modelling for 7 days in MIQ followed by 7 days home isolation for arrivals from countries with low prevalence of COVID-19, such as Australia. This paper pointed out risks with the 7-day self-isolation component and recommended more detailed modelling before any policy change was carried out. It also included modelling of the risk posed by allowing QFT with Australia. As is discussed earlier, there was a range of papers and modelling that were available to the Ministry and the Minister after these papers.

[307] I consider that the Ministry was not required to proceed with its foreshadowed advice on shorter stay MIQ risks in early 2021. As the respondents put it, in late 2020 and early 2021 there was an aggravated public health risk internationally, with cases of COVID-19 and deaths continuing to mount and new variants emerging. January 2021 had the highest number of deaths per week at any time during the pandemic. On 25 January 2021 a community case in New Zealand was identified. This person was a recent returnee who had been through MIQ and had returned a negative day 12 test. A DPMC briefing to the Minister dated 15 February 2021 recommended taking “a cautious and measured approach to altering current settings”. This briefing said that the emergence of new variants had been a key development and there was little data on how they interacted with the Pfizer vaccine. It also said that, due to the increased infectiousness of the new variants, public health officials advised that “an even more precautionary approach should be taken to contain future community cases going forward”.

¹⁷⁰ These are the CDC papers already discussed at [276(c)] above.

[308] As Dr Carr put it, while a shortened quarantine period had been considered as an option towards the end of 2020, “by early 2021 this calculus had changed”. An alternative approach was to pursue QFT with countries that presented very low risk (initially Australia and some Pacific Islands). The Minister’s evidence is that it was decided that QFT with such countries was to be the first step to reopening the border. If those arrangements were successful, they could provide a model for further opening up to other low-risk countries. However, the experience of QFT with Australia demonstrated that a country-risk based approach to quarantine arrangements posed too many risks and complexities to be viable. Opening the borders in a more enduring way would need to happen once New Zealand was able to accept more risk of COVID-19 entering the community with high levels of vaccination.

[309] Moreover, Grounded Kiwis has not provided evidence that, had the foreshadowed advice on shorter stay options been given by 31 January 2021, it would have demonstrated that it was viable and in line with the Government’s elimination strategy. It is more likely that the increasing public health risk internationally would have led to the opposite conclusion. As discussed earlier, papers and modelling continued to recommend and demonstrate that a 14-day MIQ model was appropriate for countries pursuing an elimination strategy.

Self-isolation

[310] Grounded Kiwis submits that another reasonably available, less rights impairing, approach was self-isolation for border arrivals during the Relevant Period.

[311] Grounded Kiwis supports this submission with an affidavit from Sir Raymond Avery, a professional pharmaceutical scientist. He said that self-isolation was a safe and viable alternative, involving less cost than managed isolation. The returnee could be provided with a well-fitted N95 mask and hand sanitiser when travelling from the airport to the place of self-isolation. While at the place of self-isolation, the returnee could use a self-isolation product (like the JUPL geofencing wristband).¹⁷¹ MBIE approved the use of the JUPL wristband for two returning New Zealanders following

¹⁷¹ Sir Raymond is a provider of this JUPL product which has been used for monitoring in lone worker, domestic violence and aged care situations.

the High Court's decision in *Bolton*.¹⁷² It was also approved for use on a government self-isolation trial for business travellers.

[312] The respondents' position is that there is a significant risk that non-compliance with self-isolation would lead to earlier transmission of COVID-19 in the community. The respondents rely on the experience of self-isolation in the period prior to 9 April 2020, the experience of people breaching the MIQ requirements, and research concerning the effectiveness of self-quarantine.

[313] I have earlier referred to the concerns about tourists not complying with self-isolation at the start of the pandemic.¹⁷³ New Zealand's experience was that during the period between 14 March 2020 and 9 April 2020 when all arrivals were required to self-isolate for 14 days, 41 per cent of New Zealand's cases had a history of recent international travel and 43 per cent were close contacts of imported cases.¹⁷⁴ Subsequent modelling analysis suggested the introduction of a self-isolation requirement for international travellers reduced transmission by only 35 per cent. Professor Hill's affidavit also discussed evidence about significant non-compliance in the United Kingdom.¹⁷⁵

[314] Professor Hill also said that Sir Raymond's evidence did not consider the risk of non-compliance with self-isolation protocols. A tracking device might alert authorities but it takes time and resources to locate an "escapee". He noted that very few countries had resorted to geolocation monitoring but many had moved from voluntary or incentivised compliance to penalties for non-compliance.

[315] Further, escapees were not the only vector of risk. Self-isolation within households carried risks of transmission through other household members which was likely to be greater than from staff and other guests in an MIQ facility. There was no practicable technological solution that could prevent a person in self-quarantine being

¹⁷² *Bolton v Chief Executive of the Ministry of Business, Innovation and Employment*, above n 5.

¹⁷³ Above at [46].

¹⁷⁴ A Ministry of Health briefing paper dated 25 August 2021 discussing isolation and quarantine arrangements for community Delta cases and contacts said: "The experience in New Zealand over the last 18 months has been that compliance with requests for cases and contacts to self-isolate has been very high" but was dependent on good relationship management and adequately supporting the health, welfare and cultural needs of those isolating.

¹⁷⁵ The comments in *Taylor*, above n 104, referred to at [198], are similar.

visited by another person, thereby creating an exposure risk. Professor Hill said that self-isolation with geolocation monitoring therefore did not reduce the risk of infection as effectively as enforced isolation through MIQ.

[316] Dr Bloomfield's evidence was that options for compliance with self-isolation were considered. They included electronic monitoring by wearable device or a smartphone app and random phone calls or spot checks. For similar reasons to Professor Hill, he said there was "no self-isolation option that is practicable to implement that would provide the same measure of assurance of limiting the risk of cases seeding community outbreaks".¹⁷⁶

[317] Grounded Kiwis acknowledges that Professor Hill and Dr Bloomfield disagree with Sir Raymond's evidence. It accepts that the Court is not equipped to determine disputed issues of scientific or technical opinion. It therefore does not ask the Court to resolve the question of whether self-isolation ought to have been permitted before the elimination strategy was abandoned. Its position instead is that the Government failed to give this option conscientious consideration. The QFT arrangement with Australia was too limited, the Reconnecting New Zealand Strategy was not to be implemented until the highest possible vaccination coverage which was forecast for 2022 at the earliest, and the 3 day self-isolation period did not commence until October 2021.

[318] I agree with the respondents that self-isolation as an alternative to 14 days in MIQ was given conscientious consideration. Dr Bloomfield's evidence referred to the compliance monitoring options that were considered. From June 2020 consideration was being given to a reconnection strategy; QFT travel with low risk countries was an intended first step. The strategy was based on expert advice. For example, the Skegg Group advisory committee provided advice to Minister Verrall on 24 June 2021 which said the Group was:

... surprised by suggestions that New Zealand could start to permit [quarantine-free entry] for individuals and cohorts from other countries before

¹⁷⁶ Grounded Kiwis submits that no papers have been disclosed to support this. The respondents say that disclosure was carried out under urgency and it is therefore not certain that disclosure is comprehensive. Regardless, there is no proper basis on which I could reject Dr Bloomfield's sworn evidence about this.

the vaccination programme is completed. Even with the most rigorous precautions ... it would be inevitable that people carrying the virus would enter New Zealand on a regular basis. ... with only a partially vaccinated population, the resulting clusters and outbreaks of infection might well be too large for our public health units to extinguish by testing, rapid tracing and isolation of contacts. ... Overloading these staff could impede the vaccine roll-out. Raising of alert levels might become a recurrent necessity, which would cause not only economic and community disruption, but also progressive damage for the social licence that enables lockdowns to be successful.

[319] Work was also carried out on a self-isolation model that was to begin as a pilot. On 10 November 2021 the Minister received advice on the initial operation settings for a large-scale self-isolation approach for travellers to New Zealand. The Minister said this demonstrated the complexity of the approach and that it would not be able to avoid instances of transmission of COVID-19.

[320] It might be said that some of the steps for enabling more arrivals into the country or for reducing the quarantine period were too slowly implemented. However, another way of putting it is that it was determined that a cautious approach would deliver the best health outcomes. A cautious approach was one that was open to the Government to take. The only caveat to that is whether, in taking that approach, the right of New Zealanders to return was considered and given proper weight. This is best considered in the context of the MIQ system as a whole. I therefore return to it later.

Virtual lobby

[321] Grounded Kiwis submits that, while the task of allocating a scarce resource is complex, there must have been a less rights impairing method of distributing vouchers than the virtual lobby. It says it is not apparent how a wholly randomised system, which is reset every round, can be justified as a way to give effect to the fundamental right to return home. Even if a random method were to be used, it is not apparent why a person could not retain their position in the queue so that at some point he or she would be able to return. Otherwise, it is possible that a person may never be able to return.

[322] The respondents submit that the virtual lobby was simply a tool for allocating fixed supply in high demand situations. It aided the return of New Zealanders because it was a system that improved the booking experience for users. I accept that the virtual lobby may have aided the return of some New Zealanders who were within the successful 10 per cent in each lottery, but it did nothing to help HW's return for example. Despite trying to get home from November 2020 and entering six rounds of "the lottery" during the Relevant Period, she still had not secured a voucher as at December 2022.

[323] The impact from not prioritising is also illustrated by the evidence of MC. She is a New Zealand citizen who has lived in various overseas places due to the nature of her work. In March 2020 her stepfather was diagnosed with stage 4 mesothelioma. In April 2020 her 90-year-old grandmother started having falls and was in and out of hospital. Her mother was not coping well. MC started her bid to get home for a visit in June 2021.

[324] Between June 2021 and August 2021 MC tried almost every day to find a spot in MIQ. She was unsuccessful every time. In July 2021 she wrote to the Prime Minister, the Minister of Health and the Minister of Immigration. She received a response from Minister Hipkins' office that did not assist. She felt powerless when the Government temporarily paused the release of rooms on 23 August 2021. When the first lobby took place and she was 22,081 in the queue, her "sense of frustration was acute". She participated in the lobby on 28 September 2021 and was 9,606 in the queue. This felt like "a government exercise in grief and misfortune". When she was successful on 5 October 2021, she was "relieved but incredibly over-wrought" and felt a sense of guilt because of others who had missed out. She felt "the strangest mix of anxiety and depression" she had ever experienced and it was "a huge outpouring of pent-up stress and grief".

[325] The context of the virtual lobby process was that a place in MIQ was a condition imposed on the right to return. It was implemented against the history of demand having significantly exceeded supply for the most part of a year. Additionally, after 7 July 2021, rooms were largely not available to overseas New Zealanders through the online process (other than the managed returns from Australia) until the

first virtual lobby on 20 September 2021. As Grounded Kiwis submits, it is for the respondents to explain why a less rights impairing model for allocating the limited supply was not available.

[326] The documents show that the virtual lobby was one of six options considered to improve MIAS. Those options were: the status quo (with better communication about timing and volume); the virtual lobby; a weighted ballot; a waitlist; an airline quota; and full prioritisation. Those options were assessed (by a colour-coding system) against Government and traveller criteria.

[327] Ms Rush explained that the virtual lobby was a better option than a long waiting list where users could be required to wait for hours or days. She said a long waiting list would have been ineffective in navigating variable and uneven demand on a given day or week and so would have been inefficient and wasteful. She also said that the declining numbers in the lobby rounds indicated it was successful in meeting more of the demand. She acknowledged that the announcement on 24 November 2021 of the phased reopening of the border may have assisted to quell the initial rush of traffic on the earlier lobbies.

[328] I agree with Grounded Kiwis that this response does not answer why a technical solution was not available that would have allowed a person to retain their place in their queue nor to have a system that included some priority system. For example, the “weighted ballot” option noted there could be multiple design options, including how travellers could apply to be in one ballot and how their chances might be weighted to serve other policies. Against the context just discussed, it was necessary to have a system allowing priority for those who had already experienced unreasonable delay. Grounded Kiwis submits that the Minister failed to take into account the right of New Zealanders to enter New Zealand in implementing the virtual lobby which gave no such priority.

[329] It is correct that the virtual lobby did not give any priority to New Zealanders as it might have done. As Grounded Kiwis submits, it meant that a DJ with a temporary visa to attend a music festival had the same chance as entering as people like HW and MC. Nor did the virtual lobby prioritise on the basis of New Zealanders

who had been trying to return to New Zealand for a long period or on the basis of need. This was also the case with the first come, first served system. This was recognised as potentially problematic in a number of MBIE briefing papers to the Minister. Legal advice on BORA, over which privilege is claimed, was included in those papers.

[330] It is evident from those papers that two things were proposed because of this. One of those things was the offline process. An early example of consideration being given to this is a 21 September 2020 Cabinet paper discussing the upcoming move to MIAS. It referred to the absence of priority for New Zealanders in the online system, included privileged legal advice on this topic, and advised that “to mitigate this risk” an offline prioritisation function was being developed.

[331] This paper went on to say:

The primary purpose of this offline process is to act as a mechanism to ensure New Zealand citizens and permanent residents can access a place in managed isolation if they are facing unreasonable delays entering New Zealand.

[332] The paper also said:

Officials are exploring how to best improve MIAS functionality to enable some form of prioritisation in the medium term. However, due to the complexity of decisions around prioritising different requests for time-critical entry into New Zealand, some form of manual process and decision-making will always be required to manage competing demands for MIQ capacity.

[333] And, in discussing the impact of proposed categories of offline allocations, said:

To inform decisions by the Ministerial group, and ensure the demand for MIQ does not exceed supply, officials will provide regular advice on the estimated number of individuals ministers can agree to permit into MIQ over a period of time. This advice will be based on current and forecasted MIQ utilisation rates as well as current waiting times for New Zealand citizens seeking to book a place in managed isolation. This will help ensure that the cumulative impact on MIQ capacity is taken into account when any new proposals for border exceptions for groups is considered and that any new decision does not have the effect of unreasonably displacing New Zealand citizens and residents seeking to return home.

[334] The emergency allocation offline process was duly implemented. This process was intended to give priority to some overseas New Zealanders with urgent travel

needs that fitted the tightly prescribed criteria. A new category 4 was implemented late in the Relevant Period for citizens who had been overseas before 3 November 2020 and who met other requirements. I will discuss later whether the offline emergency allocation process sufficiently ameliorated the absence of any priority in the virtual lobby for New Zealanders experiencing unreasonable delay.

[335] The other proposal was to ring-fence a proportion of places in the online system for returning New Zealanders. Papers and other documents about this included:

- (a) Advice by officials in October 2020 that ring-fencing MIQ places in MIAS for New Zealand citizens and permanent residents (to mitigate the “small risk” they would be displaced by class exceptions) was expected to be implemented in late 2020 or early 2021.
- (b) A November 2020 briefing to the Minister that repeated this advice and also said that any changes to the MIQ settings would need to be monitored and reviewed to ensure that they remained justified under BORA.
- (c) A further November 2020 briefing, in the context of “unprecedented demand” for MIQ, discussed that enhancing the functionality of MIAS to mitigate the risk that New Zealanders faced unjustified delay in returning was a priority. (This advice also said that the number of places set aside for emergency allocations would be kept under review.)
- (d) A 22 December 2020 Cabinet paper that said ring-fencing of 75 per cent for New Zealanders was to be implemented in the first quarter of 2021.
- (e) A draft Order prepared by officials in March 2021 that included the power to implement ring-fencing to balance the legal right of New Zealanders to return home with critical workers and other arrivals

that would support the social and economic recovery from the pandemic.

[336] However, in April 2021 officials advised against implementing ring-fencing. This was because of the slower uptake for MIAS vouchers in April and May. Significant IT work had nevertheless been carried out and the ability to implement ring-fencing if required was available. By 16 July 2021, officials were back to recommending implementing ring-fencing. The advice recommended ring-fencing 70 per cent for New Zealanders leaving 30 per cent for other travellers. Evidence from Ms Livas is that this was deferred “in favour of more pressing priorities during the last half of 2021.”

[337] With the high competition for places in MIQ, the Minister requested advice on alternative ways of managing MIQ allocations over the high demand summer period, including an option to prioritise New Zealanders who had been overseas for an extended period. On 25 August 2021 MBIE provided that advice. One of the options this advice discussed was having an automated allocation for citizens or permanent residents who last left New Zealand prior to 25 March 2020.

[338] MBIE envisaged that this might be able to be implemented through MIAS ring-fencing alongside an automated checking of departure data. MBIE did not recommend this option, however, due to the significant pressures it would place on the MIAS development team. It advised that it would be necessary to design and implement this system and to hire additional staff. In view of this and the current demands on MBIE, it advised that, if the option was to be implemented, applications would likely be opened in November for travel in December to February. This option was not pursued. The new category 4 for emergency allocations was implemented instead.

[339] The respondents say that the failure to implement ring-fencing was of no moment because allocations in MIAS never dropped below the 70 per cent marker set by the Minister. Indeed, the proportion of MIQ rooms that New Zealanders (citizens and permanent residents) booked online in MIAS throughout September 2021 to the end of December 2021 averaged 86 per cent. I agree therefore that the failure to

implement ring-fencing for New Zealanders as proposed, while reasonably available, was not less rights impairing.

[340] What is not clear is why the proposal MBIE made on 8 October 2021 to restrict MIAS bookings to those with a legal right to enter New Zealand from December 2021, and agreed to by the Minister, was not made earlier. As officials advised at this time, current demand for MIQ significantly exceeded supply and “[w]hen New Zealand citizens and non-citizens with visas are facing delays to enter the country, it is reasonable to restrict the booking ability of people without the right to enter the country”. That, however, had been the position in the lead up to and during the Relevant Period.

[341] Ms Livas points out that the change would reduce the number of no-shows by around 50 people per month. That may be a relatively small number but it would have made rooms available to 50 New Zealand citizens who had not secured a room through the virtual lobby.

[342] More generally, the respondents have not demonstrated that there was no reasonable alternative that was less rights impairing than the virtual lobby system via which most New Zealanders seeking to exercise their right to return were expected to use. Many New Zealanders may have been successful in obtaining a voucher via the virtual lobby (including 15 of the 22 Grounded Kiwis deponents). However the chances of success were so low that MBIE recognised that much of the demand for vouchers in September 2021 would be unmet by the end of the year. As over 86 per cent of those who secured vouchers through the lobby were New Zealanders, it can be inferred that a similarly high percentage of those who did not were also New Zealanders (given the absence of ring-fencing). The virtual lobby gave no weight to users who had experienced unreasonable delay to those who had not.

[343] The virtual lobby was therefore a flawed system for giving effect to the right of New Zealanders to enter their country. The comments set out earlier from users of the lobby aptly capture that point.¹⁷⁷ A lottery, as the virtual lobby effectively was, may be an appropriate management tool where demand exceeds supply and those

¹⁷⁷ At [110].

seeking access to that supply have no greater call on the supply than others. Examples are the lottery for a “green card” in the United States or for members of the public to obtain Wimbledon tennis tickets. Here, however, those seeking that supply were seeking to exercise a fundamental right and some had greater call on that right than others. A lottery for the majority of places was not appropriate and other reasonable alternatives should have been pursued.

Group allocations

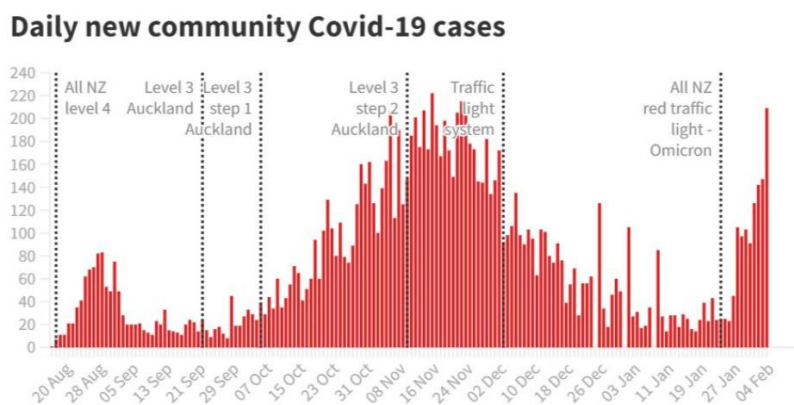
[344] Group allocations are not challenged on the basis that there were reasonable alternatives that would have met their purpose that were less rights impairing.

Proportionality

MIQ after the Delta outbreak

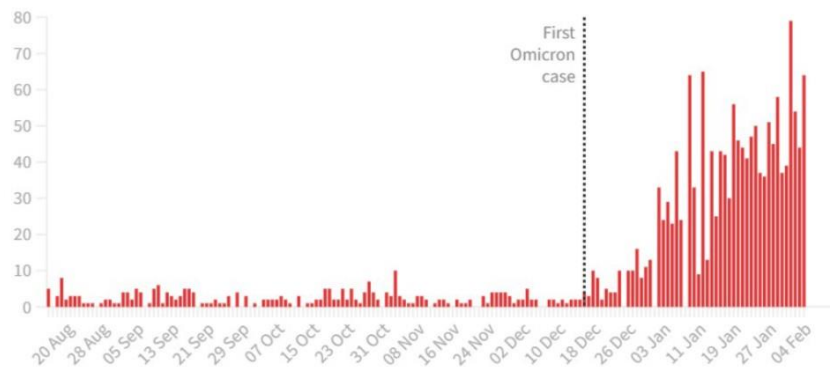
[345] Grounded Kiwis submits that the Delta outbreak centred mainly in Auckland changed the comparative risk profile of vaccinated arrivals at the border and Auckland residents. It says that this meant that from November 2021 MIQ was no longer proportionate to the public health risks vaccinated arrivals presented.

[346] The following graphs show daily case numbers in the community and at the border respectively between August 2021 and February 2022:



Source: [Ministry of Health](#) • 26 Dec, 2nd Jan and 9th Jan total is for 48 hours.

Daily new border Covid-19 cases



Source: [Ministry of Health](#) • 26 Dec, 2nd Jan and 9th Jan total is for 48 hours.

[347] As Grounded Kiwis puts it, the number of daily COVID-19 cases in the community surpassed the number at the border within days of the Delta outbreak. Whereas the border cases were few and steady from 17 August 2021, the community cases rose exponentially and the juxtaposition of community and border cases is striking.

[348] With the strain on places in MIQ, from 19 October 2021 positive COVID-19 community cases in Auckland and their close contacts were permitted to self-isolate at home. Concurrently, vaccinated citizens with a negative pre-departure test and negative tests on days 3 and 6/7 were required to spend 14 days in MIQF. This was the case even for vaccinated citizens returning from places with no COVID-19 in the community, such as AL from Vanuatu and RS from Western Australia (referred to in Appendix four).

[349] To understand why this was so, some further background is necessary. With the Delta outbreak focussed in Auckland, a managed boundary was placed around Auckland on 1 September 2021 in an attempt to prevent transmission of COVID-19 beyond the Auckland region. On 20 September 2021 the Director-General advised the Minister that he was increasingly confident that the Auckland outbreak had been contained. While there were two sub-clusters that needed close monitoring, the signs were promising. The intention at this time was to eliminate the outbreak and then gradually transition to a new framework when vaccination rates were sufficiently high. The Director-General's advice noted the risk of transitioning too quickly – there had been exponential transmission in some countries where public health measures had

been relaxed too quickly. He considered that border settings should be the last lever to move.

[350] On 23 September 2021 the Minister received the Roche Group report on the impact of the Delta outbreak on the Reconnecting New Zealanders strategy. This advised that the strategy continued to make considerable sense. The core foundation of this was vaccination and the excellent progress on this needed to translate into high coverage across the population. The phased reopening of the border would require credible/verifiable information about the individual traveller as to their vaccination status and country of origin and rapid testing would also be critical.

[351] The Minister's evidence was that, following cases emerging in the Hamilton and Raglan areas on 3 October 2021, by around 4 October 2021 it became apparent that, after more than six weeks with significant restrictions, it was unlikely that the Delta outbreak could be eliminated completely. At this point the strategy was to aim for elimination outside of Auckland while containing and minimising the outbreak within Auckland.¹⁷⁸

[352] On 12 November 2021 the Director of Public Health, Dr Caroline McElnay, provided a memorandum to Dr Bloomfield. The background and context of the memorandum was stated to be: an ongoing requirement to consider the public health rationale for managed isolation and other legislative restrictions and BORA; and that the public health risk profile of COVID-19 in New Zealand had changed and would continue to evolve with the vaccine rollout, and changes to managing the virus in the community taking effect. The advice included that:

- (a) Transmission of the virus through the international border had previously presented the greatest public health risk. However, community transmission in Auckland now posed a "higher proportionate risk of domestic transmission".

¹⁷⁸ The High Court's decision in *Bolton*, above n 5, at [68] and [71], was decided in late October 2021. The Judge noted that the change in strategy with COVID-19 in the community was a relevant consideration not taken into account in deciding on the required exemption.

- (b) There was no longer a “justification on public health grounds” for the routine use of MIQ as the “primary” means of controlling the spread. MIQ would likely still be necessary in some circumstances. For example, where the incoming traveller did not have an approved vaccination or the person would be living in an unsafe or overcrowded household.

[353] Dr Bloomfield agreed with this assessment on 15 November 2021. This updated assessment was provided to the Minister on 16 November 2021. Dr Bloomfield considered the advice should be independently peer reviewed because it represented a “significant change that could have irreversible adverse consequences if we got it wrong”. He sought this advice from Professors Hill and Blakely.

[354] Professor Blakely provided his comments on 21 November 2021. He agreed that the level of infection in Auckland was higher than many countries from where arrivals to New Zealand came “which is now an unacceptable double standard”. He also considered that New Zealand was “ready to start transitioning to some form of opening borders up.” He also considered that home quarantine could “become more common, but [he] would argue not the ‘standard’”. He suggested that New Zealand observe what happens in Australia over the next few months. He provided some modelling supporting his comments that:

Unless you are running at high infection levels with little control in NZ, the number of people coming in per day who are vaccinated but infected strongly influences the health loss and time in lockdown.

... This may sound counterintuitive – why would it make a difference if the virus is already circulating? The reason is the new infections arrive in parts of NZ ... where often there is not transmission, goes underground, and starts a new outbreak.

... I believe that quarantine free travel without risk stratifying some into quarantine will use up more of the space for the freedoms we want back ...

[355] Dr Bloomfield called Professor Blakely to discuss his comments. Professor Blakely reinforced his points in that discussion.

[356] Professor Hill provided his comments on 22 November 2021. Professor Hill considered that the risk-based judgments in the 12 November 2021 memorandum were

debatable and overly-simplified the situation. He considered that New Zealand appeared to have “an acute problem of tens of thousands of New Zealanders being stuck overseas, as well as a need to make a cautious transition at the border”. He noted the advice from the Roche Group that health system readiness was “absolutely critical to a successful transition” and this readiness needed to be properly planned, structured, assessed and proven. He accepted that the risk profile had changed in Auckland with the move to community-based isolation and care but there were difficulties in comparing this with the risk presented by travellers. He made the same point as Professor Blakely about overseas arrivals seeding a new cluster in areas without cases. He said seedings of this kind would have “an unpredictable effect” and was “very different from adding a new case to an existing cluster.” He also considered that the potential for new variants was “of significant concern”.¹⁷⁹

[357] On 19 November 2020¹ Dr Bloomfield received internal advice that when the border opened on 16 January 2022 for vaccinated New Zealanders travelling from Australia, arrivals were likely to increase from 2,000 to 9,000 people per week. The advice said that the risk of transmission from arrivals was likely to increase significantly without appropriate mitigations given the scale of these arrivals.

[358] Having received the independent advice and the internal advice, Dr Bloomfield did not recommend progressing further changes to the border settings at this point, additional to the 7-day model that had been put in place on 14 November 2021. Dr Bloomfield briefed the Minister about this on 23 November 2021. The advice included that any transition away from MIQ would need to be carefully managed to reduce potential impacts on communities and the health system from changing the system too quickly. Based on that advice, the Minister took a paper to Cabinet on 24 November 2021 that resulted in the announcements made later that day of a phased reopening. This started with fully vaccinated New Zealanders returning from Australia not needing to enter MIQ from 16 January 2022. The day following this announcement, a new variant of the virus (Omicron) was identified in South Africa.

¹⁷⁹ As the respondents point out, the Government had received advice about the possibility of a new variant from its experts. For example, the Skegg Group’s advice on 27 July 2021 said it was “entirely possible that Delta may have been displaced by an even more transmissible variant (without other unique characteristics) by the end of the year”.

[359] It is apparent from this sequence of events that careful consideration was given to whether MIQ remained justified for border arrivals with the Delta outbreak in New Zealand. The respondents submit that MIQ continued to be proportionate given the counterfactual of the risk of an escalation of case numbers in areas where there were no cases. Professor Hill reiterated his views in an affidavit to this Court. He acknowledged that Aucklanders permitted to leave the Auckland border could also seed new clusters, but his concern was the additive risk of overseas arrivals.

[360] Grounded Kiwis submits that the advice to the Minister was solely with a “public health lens”. It submits that the right of overseas New Zealanders to return was not taken into account at this point as it should have been. However, the evidence shows that the advisers and the Minister were conscious of the BORA issues. MIQ briefing papers to the Minister throughout the pandemic contained privileged legal advice on BORA. The advice on 23 November 2021 from Dr Bloomfield was against the backdrop of media articles about MIQ that included, for example, a 29 October 2021 article in *The Spinoff* from Andrew Geddis, a law professor at University of Otago, that was critical of the MIQ system from a “rights perspective”. The 19 November internal advice to Dr Bloomfield contained privileged legal advice from Crown Law that in context can be inferred to be about BORA issues. Further, the Minister was well aware of the constraints on MIQ capacity at this time.

[361] This is an area where the Court should appropriately defer to the evidence of the experts. I accept therefore that MIQ continued to be justified on public health grounds at least for arrivals who would not be self-isolating in Auckland. The risks of transitioning to a self-isolation model too quickly were too high in a country that was still trying to control the Delta outbreak in Auckland and keep it out of other areas of the country and to increase its vaccination coverage, including in vulnerable communities. The emergence of the Omicron variant bears that out. The issue is whether those compelling interests of society were proportionate to the interests of individual New Zealand citizens unable to return to New Zealand. In principle it may have been in many cases, but the particular circumstances of individuals matter. While a more proportionate alternative may have been to permit individuals returning to New Zealand on a case-by-case basis if they had satisfactory self-isolation

arrangements in place in Auckland, the Court's decision in *Bolton* provided scope for this after October 2021 anyway.¹⁸⁰

A bright line test: three months delay

[362] Grounded Kiwis submits that a denial of the right to enter for more than three months was not justified on any basis. It submits that once a New Zealand citizen had been denied the right to enter for a period of three months the Government must make hard choices – to enlarge the emergency allocation criteria, to increase MIQ capacity, or to change the border settings. It submits that, whatever course it chose to take, it must enable entry.

[363] I accept the respondents' submission that there is no three months' bright line at which the length of the delay becomes disproportionate to society's interests in maintaining MIQ for border arrivals. For some people a short delay may be disproportionate. For example, where a New Zealand citizen needs urgent healthcare in New Zealand and the risk that they will transmit the virus can be managed. For some people even a long delay may not be disproportionate – for example, if they have no particular reason for returning other than, say, a wish to walk the Milford Track at some stage while overseas tourists are not present.¹⁸¹ As it was put in *Taylor*, “like times of war and other crises, pandemics call for sacrifices to save lives and avoid broad base suffering”.¹⁸²

[364] On the other hand, the evidence shows that some individuals, for example HW, experienced long delays in difficult circumstances. I agree with Grounded Kiwis that an MIQ system that did not allow someone like HW to be able to return disproportionately gave weight to public health risks over an individual's right to return. The system needed to be able to cater for individuals that were experiencing undue delay. The respondents submit that the system did so via the emergency

¹⁸⁰ *Bolton*, above n 5. There were complexities with a broader self-isolation model that the pilot would assist with.

¹⁸¹ Similar to the view in *Spencer v Canada*, above n 67, discussed at [189] above. In *United States of America v Cotroni*, above n 67, at 1481, extradition was said to lie “at the outer edges of the core values to be protected by” the right. A preference to travel to have a holiday is not at the heart of the s 18(2) right either.

¹⁸² Cited at [191] above.

allocation process. I therefore turn to consider how that process operated to determine if it appropriately ameliorated the risk of disproportionate delay.

EMERGENCY ALLOCATIONS

Criteria

[365] As at 3 September 2021, the emergency allocation criteria had three categories that related to medical treatment and safety (category 1), time critical travel (category 2) and bereavement of a close relative (category 3). From 22 November 2021, the category 2c and 2e criteria were amended and a new category was added for New Zealand citizens who had been overseas since before 3 November 2020 and who met other criteria (category 4).¹⁸³

Errors of law

Issues

[366] From 30 August 2021 to 21 November 2021 category 2c applied to: “New Zealand citizens or residents, who are unable to legally remain in their current location and have no other option but to return to New Zealand.”

[367] From 21 November 2021 this was amended to:

New Zealand citizens or residents whose visa to remain in their current location:

- i. has expired and who have received notice from a local authority of detention or deportation if they do not depart; OR
- ii. has been unexpectedly revoked or shortened due to circumstances outside their control.

[368] The MBIE website advised applicants that they must fall within one of the criteria to be eligible for an emergency allocation. It also advised that “[a]pplications must be submitted within 14 days of your intended date of departure” for category 2c.

¹⁸³ Further detail of the criteria is set out at Appendix three.

[369] Grounded Kiwis submits that the Chief Executive of MBIE erred in law in her approach to the requirement for an application to be made within 14 days of the intended departure and the need for there to be “on other option” under the category 2c criteria.

Fourteen days of a person’s intended date of departure

[370] Grounded Kiwis provides two examples illustrating that the Chief Executive unlawfully applied the “applications must be submitted within 14 days of [the] intended departure” requirement.

[371] The first example is BG. She applied for an emergency allocation on 15 June 2021 because her tourist visa, permitting her to stay in El Salvador, had expired and because she was pregnant with a high-risk pregnancy, which required the provision of health services. MBIE responded that it could “not process [her] application as [she did] not intend to arrive to New Zealand within 14 days”.

[372] The second example is TG. On 27 June 2021, TG applied for an emergency allocation on the basis that he had been unable to secure a voucher through the MIQ booking system and his F1 Student Visa was due to expire on 23 August 2021. MBIE responded that it was “not able to process [his] application as [he did] not intend to arrive in New Zealand within 14 days”.

[373] TG then booked a flight for 14 September 2021 (which fell within the two-month grace period of his visa expiring) and applied for an emergency allocation on 31 August 2021 (taking into account the time difference between Colorado and New Zealand). Again, he was advised that MBIE was not able to process his application “as [he did] not intend to arrive in New Zealand within 14 days”.

[374] TG then applied for an emergency allocation a third time, on 2 September 2021. However, this time TG was advised on 11 September 2021 that due to the “extremely high volume of applications ... we cannot guarantee that a decision will be provided to [him] before [his] departure date”. The Chief Executive did not make a decision until 15 September 2021, by which time TG had missed his flight.

[375] The respondents rely on an affidavit from Russell Burnard, an Acting General Manager at MBIE responsible for the operation of the emergency allocation process. He said that the arrival date was used at times to ascertain an assumed departure date. So, when a departure date was not known or confirmed for a person travelling from the Northern Hemisphere (such as the United Kingdom, Europe or United States), the arrival date was used as a marker to count back two days (from Los Angeles LAX) or two to three days maximum (from the UK/Europe) to arrive at the presumed departure date.

[376] Because of the possibility of variation from the assumptions made, Mr Burnard said there was also a general practice of processing an application where it appeared to be one day outside the 14-day time period. After 25 September 2021, arrival dates were no longer used to work out the likely departure date. Intended departure date was sought from all applicants.

[377] For the purposes of this proceeding, Mr Burnard reviewed BG's and TG's applications. BG's application was made on 16 June 2021 (New Zealand time) and was for travel intended on 7 August 2021, arriving on 9 August 2021. This was well outside the 14-day period, regardless of the issue over departure versus arrival dates. Her application was therefore not considered on its merits but she was encouraged to "reapply again within 14 days of [her] intended arrival date in New Zealand" if she could not secure a voucher through MIAS.

[378] Mr Burnard said the same applied to TG's first application. That application was made on 28 June 2021 (NZ time) with a travel date of 15 September 2021. His application would not have been considered on its merits but he was encouraged to "reapply again within 14 days of [his] intended arrival date in New Zealand" if he could not secure a voucher through MIAS.

[379] TG's second application was made on 1 September 2021 (NZ time), or 31 August 2021 (US time). The application did not provide a flight booking but did provide a flight code (NZ9492) and an arrival date of 17 September 2021. Mr Burnard said that the triage team at MBIE counted back two days from the arrival date for international flights from the United States. This gave an assumed departure date of

15 September 2021 (NZ time), being one day outside the 14-day timeframe. As a result, the application was deactivated and TG was advised of this by email on 1 September 2021 (NZ time), 31 August 2021 (US time). Mr Burnard accepted that TG was not given one day's grace as was the general practice.

[380] TG replied the same day by email. He advised "we are leaving the United States on the 14th [September]" and asked that his application still be processed "today". This did not happen. In Mr Burnard's words, once an application was deactivated for failing a core requirement, there was no process for it to be reopened or reviewed, unless evidence could be provided that MBIE's decision to deactivate was made on incorrect information. An applicant was usually advised to reapply.

[381] When TG did reapply on 3 September 2021 (NZ time), 2 September 2021 (US time), Mr Burnard said the application was accepted for processing as within the 14-day timeframe. He said that it was later declined on its merits on 24 September 2021 (NZ time). By way of explanation for not replying to TG before his flight was due to leave, Mr Burnard said that September 2021 was the busiest period for emergency allocation applications with MIQ receiving nearly 2,000 such applications that month.

[382] The respondents submit that the evidence does not reveal any misunderstanding by officials of the criteria they were to apply. Rather, it reveals that departure dates were not always known or definitively confirmed. The respondents accept that there may be an argument that TG's second application should not have been deactivated as outside the 14 days.

[383] The respondents further submit that the exigent circumstances facing officials from extreme demand, which meant that TG missed his flight due to severe pressure on processing times experienced by officials, "did not result in [MBIE] refusing to consider his application on the merits". They suggest that, if the application had been successful, TG would have been permitted to secure new flights aligning with a confirmed emergency allocation voucher date. The respondents further submit that the merits of his application are not an issue in this proceeding as it is a challenge at a system level.

[384] I consider the 14-day departure date requirement was misinterpreted. Instead of seeking confirmation from the applicant of the actual departure date, the practice was to assume the departure date based on the arrival date. It was possible to obtain the actual departure date as the change in practice after 25 September 2021 showed. If the 14-day departure period was to be interpreted strictly, then it was also necessary for those processing applications to do that accurately. The general practice of allowing one day's grace was an inadequate substitute as TG's experience bears out. Even when he pointed out that his application had been wrongly declined on this ground, MBIE did not have a system that enabled his application to be reconsidered. Simply advising applicants to reapply within the correct timeframe was insufficient. As TG's experience shows, valuable time that ought to have been used to consider his application on the merits was lost. Moreover, to have a strict 14-day timeframe between application and departure date and to refuse to process applications outside that timeframe made it crucial to have the staff resources to be able to process an application made within that timeframe. Without that, the emergency allocation process could not operate as it was intended (that is, to provide a process by which overseas New Zealanders experiencing unreasonable delay could enter New Zealand).

[385] It is true that this is a systems challenge rather than a merits review of TG's application for an emergency application. However, it is relevant to whether the MIQ system as a whole operated to disproportionately restrict the rights of citizens to return to their country. If MBIE did not have sufficient resources to respond to applications made within the timeframes it set, it was a flawed system for seeking to ensure those rights were properly accounted for.

The "no other option" criterion

[386] Grounded Kiwis submits that the Chief Executive interpreted the "no other criteria" more than just strictly. It submits that, even in circumstances where visa extensions were not possible, an emergency allocation was denied unless evidence could be supplied showing that an extension had been sought and declined. It says this was required even when that evidence was not practically available. It also submits that the Chief Executive's assessment of "no other option" failed to take into

account the applicant's personal circumstances, including their financial state and their physical and mental health.

[387] In support of this submission, Grounded Kiwis relies on the evidence of BG. She had entered El Salvador on 10 November 2020, when its borders opened, to be with her long-distance partner. She entered El Salvador on a tourist visa, which she extended. She became pregnant and, with her visa expiring, she was looking to return home with her partner in March 2021. They applied for a critical purpose visa for her partner that was granted in June 2021, they booked flights for August 2021 and constantly tried to obtain an MIQ spot without success.

[388] BG made two applications under category 1b. The first was rejected for being outside the 14-day timeframe. In response to the second, MBIE sought evidence that urgent travel was necessary to provide her baby with care and protection. The third application, on 25 July 2021, was made under category 2c. BG submitted a picture of the stamp on her passport showing that her visa was expiring on 4 August 2021. Her application was declined on 30 July 2021 and again on 2 August 2021. She was unable to obtain written confirmation that she was not eligible for a further extension and no other visa was available to her because immigration officials in San Salvador said that the stamp in her passport was evidence of her right to remain only until the expiry of the visa stamp date.

[389] BG then, required to leave El Salvador, travelled to the United States on an ESTA visa waiver which did not entitle her to access medical care which she needed for her high-risk pregnancy. She was living in transit, mentally fragile, and financially unable to meet the high costs of giving birth in the USA without medical insurance. She made three further applications under category 1a, all of which were rejected. She filed a judicial review in the High Court on 6 September 2021. Seventy-two hours later, MBIE approved an emergency allocation.

[390] Grounded Kiwis also relies on the evidence of TG. He moved to the United States in August 2016 to study at university having been awarded a soccer scholarship. With the ongoing pandemic and his classes being conducted remotely, in June 2020 he booked a flight to New Zealand for December 2020 but this was later

cancelled. He then looked at options to extend his F1 student visa that was due to expire on 23 August 2020. He was able to find an employer to sponsor him to extend his visa for the maximum permitted period of one year. From 23 August 2021, he would then have a two-month grace period within which to leave the United States.

[391] In anticipation of the end of his visa and grace period coming, in May 2021 he registered with MIQ and started looking for flights in September 2021. He could not find any spaces in MIQ that connected with flights from the United States. He emailed MBIE asking what he should do. He was told to apply for an emergency allocation if he met the criteria. He booked a flight for 14 September 2021 and spent hours on the MIQ site trying to find a place. When he was asleep his family in Auckland would refresh the page for him. They were also unable to find him a place.

[392] As discussed above, he proceeded to make three emergency allocation applications, the first two of which were rejected as outside the 14-day timeframe. He had not received a response to the third application by 13 September 2021. He emailed MBIE asking what he should do. He did not get a response until 15 September 2021, by which time he had missed his flight. The response was to say that he had supplied insufficient information.

[393] TG replied on 17 September 2021 saying that he had already provided a letter from his university (his visa issuing authority) advising that his visa could not be extended any further and from his employer explaining that multiple attempts had been made to obtain a working visa but that has not provide possible. To meet MBIE's requirement to show he had tried to remain in the USA, TG also applied for a tourist visa at a cost of US\$455 even though it takes the US Government three to four months to process and so would not arrive in time.

[394] In rejecting TG's application on 23 September 2021, MBIE said "we are not satisfied that you are unable to legally remain in your current location and have no other option but to return to New Zealand". TG responded on 24 September 2021 expressing his dismay and asking whether MBIE would rather he be deported. From 23 October 2021, TG was living in the United States illegally, and therefore potentially liable to deportation, and unable to work. He felt lonely and helpless and "tossed

aside” by his own country. He participated in seven virtual lobbies. He was successful on 9 November 2021 (the seventh attempt) and arrived in New Zealand on 3 December 2021.

[395] In addition to these two examples, Grounded Kiwis submits that that the overly high threshold applied to category 2c is evident from the fact that between 1 July and 6 September 2021, only five per cent of people who applied under this category were provided with a voucher.

[396] The respondents rely on Mr Burnard’s explanation that the “no other option” category was deliberately high. It was not intended to be a general visa expiry category. That would have been of wide application and care was taken to avoid this. It was intended for those who were at real risk of deportation. Prior notice would be given of that consequence and would show that the person had an urgent need to leave the country.

[397] The respondents say that someone whose visa is expiring and cannot be renewed is not necessarily facing a heightened risk of deportation in the immediate future. They may ultimately be liable to deportation at some point if they remain, but that is not the same thing. At the time of TG’s 2 September 2021 application, for example, he had until 23 October 2021 before he became unlawfully present in the United States. The respondents say that, even now, TG has not provided correspondence from immigration authorities as to his ineligibility for any visa, nor what the consequences would have been if did not depart from a fixed date. The outcome of his tourist visa application is also not known.

[398] Mr Burnard explained that category 2c was part of a wider emergency allocation system. The combined categories inform the approach to the granting of exceptions to citizens and residents in an otherwise limitless range of circumstances. He said the narrow 2c criteria was offset by the introduction of the new category 4 for New Zealand citizens put in place on 22 November 2021.

[399] Lastly, Mr Burnard said that the numbers show that category 2c was not deprived of any meaning. From December 2020 until category 2c was amended from

22 November 2021, there were 1227 applications of which 202 were approved (16.5 per cent). The percentage is higher if only applications that proceeded through to substantive consideration are included. If the 620 that “failed core requirements or otherwise were not progressed” are excluded, then the approval rate was 33 per cent of all “viable” applications. I agree that the approvals show that category 2c was not deprived of all meaning.

[400] The evidence shows that “no other option” criteria was applied strictly and intentionally so. The only relevant consideration was a person’s visa status – whether they were financially able to stay in the country and their physical and mental health were not part of the equation. Moreover, it was necessary to provide confirmation from the visa issuing authority that the visa could not be extended or converted to another type. As the examples provided by BG and TG show, there was no flexibility in how “no other option” was to be interpreted or proven. Furthermore, at a time when it was known that MIQ could not meet demand and emergency allocations were intended to provide priority to New Zealanders facing unreasonable delays, surprisingly, the criteria for category 2C was tightened on 21 November 2021.

[401] The rest of the overall system for overseas New Zealanders to return was inadequate for them. Both BG and TG had tried booking through online MIAS many months before making their emergency applications to return. BG began trying in June 2021 when the visa for her partner had been approved. TG was trying in May and June 2021 (he had also tried to get home in 2020).

[402] I agree that the BG and TG examples show that MBIE misinterpreted the “no other option” criteria by requiring a particular form of evidence. BG did have no other option and there ought to have been flexibility in how this could be demonstrated. I also agree that the wording of category 2c did not require that a person be presently liable for deportation. Given the purpose of the emergency allocation process (to allow New Zealanders facing unreasonable delays to return), this was too narrow an interpretation. Practically, TG did have no other option for lawfully remaining in the United States when he made his application.

[403] BG was also rejected multiple times on the other emergency criteria that were potentially applicable to her circumstances. TG was potentially eligible for the new category 4, but that was not available in advance of all his efforts to get home before his period of grace finished. There is also no guarantee he would have been granted an allocation under this criteria had it been necessary for him to rely on it. That is because, if there were insufficient spaces, MBIE intended that categories 1, 2 and 3 would have priority. At that time MBIE was experiencing high demand for emergency allocations.

[404] It is to be remembered that the emergency allocation was “to ensure New Zealand citizens and permanent residents can access a place in managed isolation if they are facing unreasonable delays in entering New Zealand”. The tightly prescribed criteria, interpreted strictly and requiring an inflexibly prescribed form of evidence, did not give sufficient effect to this purpose.¹⁸⁴ The BG and TG examples illustrate that this was the case with category 2c and the overall MIQ system did not protect against this.

MIQ PROCESS OVERALL

[405] The MIQ system did not have the capacity to meet the demand for rooms during the Relevant Period. That had been the case since late 2020 and throughout 2021 except for a few months during QFT with Australia. The problem of excess demand for supply was particularly acute in the July and August 2021 period and was expected to continue to be acute in the lead up to the Christmas period.

[406] Officials and the Minister were aware of this when introducing the virtual lobby. They were also aware that the virtual lobby did not prioritise New Zealand citizens over others, or on the basis of need, or the length of delay citizens had experienced in their attempts to return home. The respondents have not shown why a technical solution was not available that would have allowed a person to retain their place in their queue or that could have provided some other priority criteria. The

¹⁸⁴ An earlier example is provided by CB. She was a registered nurse working in Australia. She learned by telephone on 2 March 2021 that her son had died unexpectedly due to a medical event. Her application for an emergency allocation to bury her son was declined. She watched her son’s funeral by Telenet link. Finally she secured an MIQ spot at 3 am for a date in June 2021. She has suffered greatly from the experience of not being able to lay her only son to rest.

virtual lobby was intended as the primary way by which a voucher for MIQ could be secured. Reliance was placed on the emergency allocation process to ensure that New Zealand citizens were not facing unreasonable delays in exercising their right to return.

[407] The MIQ system as it operated reflected the cautious approach New Zealand had taken throughout 2020 and 2021 in response to the pandemic. That approach served the public health of New Zealanders present in New Zealand very well. Grounded Kiwis does not challenge the necessity of a robust public health response and the importance of protecting infection-vulnerable communities. A robust public health response protected people's health, both by avoiding or minimising sickness and deaths from COVID-19 and reducing the risk of an overwhelmed health system that in turn would increase illness and death from other diseases as well. These were very important objectives entitled to considerable weight when balancing them against individual citizens' right to return to their country.

[408] The cautious approach and the reliance on the emergency allocation process to protect New Zealand citizens' right to enter their country meant that this process needed to be fit for purpose. I now consider whether it was.

[409] I first consider the demand for emergency allocations. The response to an OIA request from Grounded Kiwis, MBIE provided the number of emergency allocations made (7,775), declined (2,671) and granted (1,671) broken down into each of the categories that qualified for an emergency allocation over the period from December 2020 to 6 September 2021. The highest number of applications were made in July 2021 (1,587) and August 2021 (1,727) with declinations of 321 and 464 respectively and approvals of 320 and 452 respectively.

[410] On its face, when comparing approvals with the number of applications made, it appears that the demand for emergency allocations significantly exceeded the number granted. The information is, however, limited. It does not indicate whether those who were declined allocations were in circumstances of real need, whether for financial, health (including stress and anxiety) or other reasons, nor how long they had been waiting to secure a place in MIQ. Nor does it fully explain what happened to the

3,433 applications that were made but were neither granted nor declined over this period. MBIE did explain that the information related to applications rather than individuals. This indicates that some of these may have been repeat applications (BG and TG are examples of individuals who made more than one application). Some, however, may simply be applicants whose applications were not processed for being non-compliant and who then gave up for whatever reason.

[411] Ms Rush’s evidence provided the following information about emergency allocations.

Emergency Allocation Applications	Last week of Nov 2021 29 Nov 2021 – 5 Dec 2021	YTD Totals 30 Oct 2020 – 5 Dec 2021
Applications processed ¹⁸⁵	145	7,957
Approved	117	4,685
Declined	28	3,272
Applications not processed or cancelled by the applicants	Not available	5,352
Applications in process	Not available	140
Applications received	217	13,449

[412] She explained that applications processed included only those applications considered completed, with all supporting evidence and received within the required timeframes. She noted that almost 40 per cent of applications fell into this category.

[413] There is also evidence that MBIE was experiencing such high demand for emergency allocations that it was unable to process TG’s application when it was made within the required 14-day timeframe. This was the required timeframe for most categories (for bereavements it was 7 days).

[414] An additional problem with this requirement was that it meant emergency allocations were only available for people who had a time-critical and almost immediate need to travel. This meant it was not available for those who had compelling reasons for returning to New Zealand (for example, those who lived

¹⁸⁵ Applications processed include only those applications considered completed, with all supporting evidence and received within the required timeframes.

overseas before the pandemic and whose circumstances had materially changed) but who did not meet the time-critical requirement or the other associated criteria. This meant that someone like TG, who knew his visa was coming to an end, and who wished to plan in advance for his return given the difficulty of securing a place through the online system, needed to wait until 14 days before their intended departure before they could apply for an emergency allocation. This was a highly stressful way for someone to seek to exercise their right to return. On top of that, as discussed “the no other option” was interpreted strictly and was tightened during the Relevant Period.

[415] Until category 4 was introduced in late November 2021, the emergency allocation categories did not include a general category for anyone who had suffered unreasonable delay in seeking to return. Even when category 4 was introduced, it was confined to anyone who had been overseas since before 3 November 2020. They also needed to show that they had been unsuccessful in their attempts to secure a MIAS voucher and their visa had expired or was due to expire in the next 60 days.

[416] Ms Rush’s evidence was that there had not been a high uptake of category 4. At the date of her affidavit (31 January 2022) she said there had been 34 applications received, of which six were approved, eight were still in progress and “the bulk of the remaining applications have not been followed up by those applicants”. Those numbers do, however, show that category 4 met a demand that the other categories did not. Moreover, this new category did not cover others whose circumstances had changed after 3 November 2020 and who could not get a place home (as was the case with HW).

[417] The approach to emergency allocations for overseas New Zealanders contrasts with MBIE recognising in August 2021 the difficult situation New Zealanders found themselves in when QFT with Australia was paused. Those travellers had been advised at the time of their travel that it was “flyer beware”. Despite this, managed flights were arranged and the rooms set aside for emergency allocations were increased for returnees from Australia.

[418] The respondents submit that Grounded Kiwis has significantly overstated the extent of delay and consequences that overseas New Zealanders suffered. Amongst

other points made in this respect, is that of the 22 individuals who provided evidence, 15 of them secured vouchers in the lobby releases and one was allocated a voucher as a health worker. Two individuals “did not avail themselves of ‘green’ flights” back to New Zealand when QFT was suspended and “only participated in 3 virtual lobbies”. Three individuals (AL, PW, CN) travelled into and out of New Zealand on more than one occasion.

[419] There are a number of points that can be made in response to this submission. Take the example of PW, who has been employed as an airline pilot in Hong Kong since 2000. He lived in New Zealand with his wife and children (who attend school and university in New Zealand) and commuted to Hong Kong for his job. He has been in Hong Kong since June 2020, except for the period between January to May 2021 when he was able to spend time with his family in Auckland.

[420] PW wanted to get home to see his family for Christmas. He “won the MIQ lottery” for a position in MIQ for 19 November 2021. However, he was unable to get the time off from his employment to take the flight for that day. He had to return his voucher back into the MIQ pool. He found the process “extremely stressful” and the situation has placed “incredible strain” on his family. He said:

The really frustrating circumstance for me is the fact that I have been double vaccinated with the BioNTech vaccine (called Pfizer in NZ) since June 2021, I am tested for Covid 19 on average every 3 days in my job as a pilot with literally hundreds of negative tests, and the only option in NZ is 2 weeks of MIQ in a hotel.

[421] But, as Ms Rush said, this proceeding is a challenge to the MIQ system, not individual decisions. The more important, systems level, point is that there is no evidence to suggest that MBIE had a process for keeping track of anyone who might be experiencing unreasonable delay and who could not get a voucher and were not eligible under the emergency allocation criteria. The Grounded Kiwis’ survey demonstrates that collating information of this kind was a relatively simple exercise.¹⁸⁶ Without information of this kind, the Minister could not know whether some New Zealanders were experiencing unreasonable delays that were disproportionate to the public health risk they might present. Officials recognised the need to monitor

¹⁸⁶ See [108] above.

changes to MIQ settings to ensure they remained justified.¹⁸⁷ That monitoring appears primarily to have involved advising the Minister of issues with demand exceeding supply on the online MIAS and adjusting the number of rooms allocated to the offline categories. That was insufficient to ensure that the limits imposed by the MIQ system remained justified.

[422] I accept the Minister’s evidence that he was aware that the MIQ system imposed limits on the rights of New Zealanders to return and he was satisfied that they were justified. He explicitly considered that when making the Air Border Order and the Isolation and Quarantine Order. It is also evident that he did so when seeking advice from officials in the July to October 2021 period when demand for MIQ significantly exceeded supply.

[423] I also accept the evidence of Carolyn Tremain, the Chief Executive of MBIE, who said:

I reiterate MBIE’s overarching goal has been to support the ability for New Zealand citizens and residents to return home during this pandemic, and also to facilitate a means by which citizens and residents could travel from New Zealand where necessary. The critical consideration has been to develop and implement systems by which such travel could be facilitated safely given the exigencies of the pandemic and Government policy at the relevant time.

[424] I acknowledge that MIQ was a substantial undertaking intended to enable overseas New Zealanders to return safely and that over 200,000 have entered the MIQ system. I acknowledge that there were no easy answers in the tension between protecting the health of New Zealanders present in New Zealand and ensuring New Zealanders seeking to return to New Zealand did not face unreasonable delays. Professor Hill aptly described it as “an acute problem”. New Zealand’s success in minimising outbreaks and seeking to maintain that made the problem of allowing overseas New Zealanders to return more difficult than in countries where the virus was not so carefully controlled.

¹⁸⁷ See [335(b)] above. The need to keep all aspects of the MIQ system under review to ensure it was proportionate and necessary was also referred to in a July 2020 Cabinet paper discussing imposing fees.

[425] One of MBIE’s proposals was to manually prioritise all bookings. This was not recommended because it would be very resource-intensive and require a high level of subjective judgement. While that may be so, some other middle ground was potentially achievable. For example, MBIE could have had a system that enabled New Zealand citizens to set out circumstances demonstrating their case for having been unreasonably delayed in exercising their right to return and a points system or other ordering system to determine them. Another possibility was to change the number of rooms as between the virtual lobby and emergency allocation.

[426] The virtual lobby was a more appropriate management tool for people who could not show they had been unreasonably delayed but nevertheless wished to exercise their right to enter. A larger pool of rooms available for New Zealanders through an offline system that properly could take into account individual circumstances and needs would have been a less rights impairing option. A larger pool of rooms could simply been made available on application for anyone who had been overseas for a long period of time.

[427] Counsel for the respondents accepted in oral argument that if there was “real evidence of this delay, at a system-wide level that undermines the purposes of the system which is to bring New Zealanders home in a safe and orderly way”, then “some kind of ordering principle around time” could be applied. The respondents submit that there was no evidence that this was so. However, the evidence that there is does show that demand significantly outstripped supply, both on the online system and under the emergency allocation process. Primarily, the response was to make minor adjustments to the number of rooms for the offline allocations and the criteria. These were changes at the margins and insufficient to ensure that New Zealanders were not facing unjustified delays.

[428] I have taken into account that the Isolation and Quarantine Order permitted exceptions. *Bolton* shows that this was narrowly construed and would not have enabled New Zealanders facing unreasonable delays to return home.¹⁸⁸ The Court’s view that a wider interpretation was appropriate may have enabled at least some

¹⁸⁸ *Bolton v Chief Executive of the Ministry of Business, Innovation and Employment*, above n 5.

New Zealanders to apply to MBIE to self-isolate after that decision was given in late October 2021.

[429] I am mindful that I am considering all of this with the benefit of hindsight and therefore must “tread carefully”.¹⁸⁹ I am also mindful that considerable work was carried out and significant funds were invested in running the MIQ system. I am also mindful that the Minister was aware of the acute MIQF supply problem and the BORA right to return and sought a good deal of advice about this that was provided on an urgent basis. I am also mindful that the public health risks of making the wrong decisions were very significant and that the Minister at all times considered the limit on citizens’ right to return was justified. However, I have reached the conclusion that because, and to the extent that, the system did not sufficiently allow individual circumstances to be considered and prioritised where necessary, it operated as an unjustified limit on the right of New Zealand citizens to enter their country. Grounded Kiwis challenge therefore succeeds.

RELIEF

[430] The respondents submit that relief should be declined in the exercise of the Court’s discretion and that the judicial review should be dismissed. This is because the challenge has been overtaken by subsequent legislative changes and events. This includes the dismantling of the MIQ system.

[431] However, although relief is discretionary, where the Court upholds one or more grounds of review, the starting point is that relief should be granted.¹⁹⁰ There must be “extremely strong reasons to decline to grant relief”.¹⁹¹ As the High Court put it in *Borrowdale v Director-General of Health*.¹⁹²

Declarations perform the critical constitutional function of vindicating legal rights and promoting the ideals of the rule of law. They announce to the world at large breach of the applicant’s rights and operate as a vindication for the prejudice or loss suffered.

¹⁸⁹ See [196] above.

¹⁹⁰ Butler and Butler, above n 58, at [26.1].

¹⁹¹ *Air Nelson Ltd v Minister of Transport* [2008] NZCA 26, [2008] NZAR 139 (CA) at [60].

¹⁹² *Borrowdale v Director-General of Health* [2020] NZHC 2090, [2020] 2 NZLR 864 at [288].

[432] Imposing, as a condition of the right to return, that a person have a place in a MIQF in circumstances where the demand could not match the supply for an extended period was an extraordinary step imposed in the context of the extraordinary circumstances of the pandemic. As it was said in *Borrowdale v Director-General of Health* “in times of emergency the courts’ constitutional role in keeping a weather eye on the rule of law assumes particular importance”.¹⁹³

[433] I consider that declaratory relief is appropriate. However, recognising that the relief Grounded Kiwis now seeks differs from the pleaded relief and that this complex proceeding was brought and heard with urgency, at the respondents request I foreshadowed at the hearing that I would allow the parties to be heard on the formulation of the relief. The parties are to confer to determine if they can agree on the wording of appropriate declaratory relief consistent with the findings of this judgment. If they are unable to do so within 14 days of the date of this judgment, they should submit a joint memorandum with an agreed timetable for submissions on this. The joint memorandum should also advise whether there are any issues as to costs and, if so, what those issues are.¹⁹⁴

Mallon J

¹⁹³ At [291].

¹⁹⁴ The joint memorandum may also point out typographical errors in this judgment that can be corrected pursuant to the “slip” rule.

Appendix one – key events from New Zealand’s perspective

January 2020
WHO issued a disease outbreak notification for “2019 novel coronavirus” followed by a declaration that the outbreak was a Public Health Emergency of International Concern.
February 2020
WHO renamed the novel coronavirus “COVID-19” and encouraged countries to be “as aggressive as possible in fighting this virus” stating that there was a “window of opportunity” to “strike hard” to avoid far more cases and costs. On 26 February 2020 Italy imposed its first lockdown in the Lombardy region. On 28 February 2020 WHO raised the threat to “very high at a global level” and called on countries to “find, isolate and care for every case, to trace every contact”. On the same day New Zealand had its first confirmed COVID-19 case.
March 2020
WHO declared COVID-19 to be a global pandemic on 11 March 2020. On 18 and 19 March New Zealanders travelling overseas were advised to return home as soon as possible and New Zealand closed its borders to everyone except New Zealand citizens, permanent residents, their partners and dependent children. On 21 March 2020 the Prime Minister announced the “Alert Level” system (a four-level system with increasing restrictions on freedom of movement) and by 11.59 pm on 25 March 2020 New Zealand was at Alert Level 4 (the highest level of restrictions, requiring everyone to stay at home, with limited exceptions).
April to June 2020
New Zealand moved down the Alert Levels and was at Alert Level 1 at 11.59pm on 8 June 2020.
August to October 2020
After 102 days without any community cases, four COVID-19 cases were detected in Auckland. On 11 August 2020 Auckland moved to Alert Level 3 and the rest of the country moved to Alert Level 2. Auckland joined the rest of the country at Alert Level 2 on 30 August. ¹⁹⁵ All regions except Auckland moved to Alert Level 1 at 11.59 pm on 21 September 2020. By 7 October 2020 all of New Zealand had moved to Alert Level 1.
February 2021
Three new community cases were detected in Auckland on 14 February 2021. Two new cases were detected on 27 February 2021. During this period, Auckland moved in and out of Alert Levels 3 and 2 and the rest of New Zealand moved in and out of Levels 2 and 1. Medsafe had provisionally approved the Pfizer vaccine and MIQ workers had begun to receive the vaccine.
March 2021
By 12 March 2021 the country was back at Level 1. By this time masks or face coverings had become mandatory for all public transport in New Zealand (children under 12 and those with medical conditions were exempt).
April and May 2021
India was experiencing a record rise in cases (the emergence of what became the Delta variant). WHO designated the Delta variant a “variant of concern” on 11 May 2021.
August to November 2021
The first case of Delta was detected in the community in Auckland on 17 August 2021. New Zealand moved to Alert Level 4 on 18 August 2021. Most of the country moved to Alert Level 3 on 1 September 2021 and to Level 2 on 27 September 2021. There were changes to Alert Levels for areas above and around Auckland at various times as community cases were detected in those areas.
November 2021
By 7 November 2021 the three Auckland DHBs had met the Government’s 90 per cent vaccination target. By 12 November 2021, all of the country except Auckland was at Alert Level 2 and Auckland was at Alert Level 3, step 2. ¹⁹⁶ On 25 November 2021 South Africa confirmed a new variant had been detected there. On 26 November 2021 this new variant was named Omicron and was designated by WHO as a new variant of concern.
December 2021
Australia recorded its first Omicron community case on 3 December 2021. Omicron was confirmed as present in 77 countries as at 15 December 2021. On that day the Auckland boundary was formally lifted and, for the period between 15 December 2021 to 17 January 2022, those travelling out of Auckland needed to be fully vaccinated or to have a negative COVID-19 test result within 72 hours of departure. The first case of Omicron was detected at the border (in MIQ) on 16 December 2021. A community exposure from an individual with Omicron who was a recent international arrival was confirmed on 29 December 2021.
Subsequently
As is well-known, New Zealand has experienced a widespread community outbreak of Omicron in the first few months of 2022 that, at the time of writing, continues.

¹⁹⁵ Auckland had additional restrictions to the usual Alert Level 2 requirements.

¹⁹⁶ The “steps” were a refinement on the original Alert Level system that adjusted some of the permitted activities.

Appendix two – key events relating to MIQ

Date	Event
February 2020	2 Feb: temporary travel ban on all foreign nationals travelling from or transitioning through mainland China. 5 Feb: chartered plane of 157 people evacuated from Wuhan, China arrived for quarantine in Whangaparāroa. 28 Feb: temporary travel ban on all foreign nationals travelling to NZ from Iran.
March 2020	2 Mar: travel ban on travellers from China and Iran extended and anyone arriving into NZ from northern Italy and South Korea was required to self-isolate. 14 Mar: all travellers (some limited exceptions) required to isolate for 14 days and cruise ships were no longer permitted to enter NZ. 16 Mar: announcement that tourists who were not self-isolating would be deported and notice of power to quarantine arrivals whose self-isolation measures were inadequate. 19 Mar: border closed from 11.59 pm to everyone except NZ citizens, permanent residents, their partners and dependent children who were required to self-isolate for 14 days. Exceptions to this for essential workers or others were made on a case by case basis by Ministers.
April 2020	10 Apr: all arrivals required to be isolated or quarantined in a Government facility and to submit to medical testing if appropriate. The first MIQ facility opened at midnight.
June 2020	20 June: all returning travellers required to undergo testing on days 3 and 12 of their quarantine period and to return a negative test before being released. New MIQ facilities commissioned in Auckland, Hamilton, Rotorua and Christchurch. 30 June: all arrivals by sea required to comply with quarantine and isolation requirements.
July 2020	Four more hotels commissioned to bring total MIQFs to 32.
August 2020	Charges for returnees staying less than 90 days introduced.
September 2020	Cabinet agrees to criteria for entry into NZ for critical workers and other groups. Cabinet advised of proposed online system (MIAS) with an offline system for anyone requiring priority.
October/November 2020	MIAS pilot commenced on 1 October 2020. From 3 Nov 2020 all arrivals required to have a confirmed space (a voucher) in a MIQF via MIAS (vouchers available three months in advance).
December 2020/January 2021	31 Dec: arrivals from the USA and the UK required to have a negative test no more than 72 hours before departure and to have a day 0/1 test. 15 Jan: 72 hours negative pre-departure test and day 0/1 test extended to all arrivals except Australia, Antarctica and most Pacific Islands. 21 Jan: one-way inbound QFT for Cook Island arrivals commences. 30 Jan: arrivals not permitted to leave room while awaiting day 11/12 test.
February 2021	Vaccination of MIQ workers commenced.
March 2021	22 Mar: exemption from MIQ fees extended from stays of 90 to 180 days. 24 Mar: QFT travel from Niue to NZ began. Vouchers from MIAS could be secured six months in advance. 30 Mar: Minister agrees specific criteria for time-sensitive travel.
April 2021	11 Apr: all travel from India temporarily suspended. 18 Apr: QFT with Australia commenced (but paused with Western Australia on 23 April). 22 Apr: “cohorting” new arrivals in MIQ commenced. 28 Apr: travel from India, Brazil, Pakistan and Papua New Guinea was restricted to NZ citizens and their immediate family members.
May to July 2021	17 May: QFT with Cook Islands commenced. 25 May: QFT with Victoria paused, the pause extended on 10 June with some “green flights”, and resumed again on 22 June. ¹⁹⁷ 22 June: QFT with NSW paused. 26 June: QFT with Australia paused. 4 July: QFT with South Australia, ACT, Tasmania and Victoria permitted but paused again for South Australia on 20 July. On 5 July: QFT with Western Australia and the Northern Territory resumed. 23 July: QFT with Australia suspended and “green flights” were available from 23 July to 30 July 2021.
August 2021	12 Aug: Prime Minister announces plan to progressively ease border restrictions in 2022 and confirms NZ is “not in a position to fully reopen just yet.” 17 Aug: QFT with Cook Islands suspended. 20 Aug: changes to time-sensitive offline criteria approved.
September 2021	20 Sept: first release of rooms via “virtual lobby”. 22 Sept: new MIQF in Christchurch announced and available from 30 November. 30 Sept: day 6 test in MIQ added.
October 2021	28 Oct: Emergency allocation criteria expanded. Minister Hipkins announces plans to reduce MIQ period to seven days from 14 Nov and to introduce three days home isolation in the first quarter of 2022. 30 Oct: self-isolation pilot for businesses begins.
November 2021	1 Nov: most arrivals over the age of 17 required to be vaccinated. 8 Nov: emergency allocation expanded and QFT with Vanuatu, Samoa and Tokelau to NZ begins. 14 Nov: the quarantine period for international arrivals reduced from 14 to 10 days (7 days in MIQ followed by home-isolation until a 9 day test negative result). 24 Nov: Minister Hipkins announces the next steps in the border phased reopening. Step one: fully vaccinated NZers can return from Australia without MIQ from midnight 16 January 2022. Step two: fully vaccinated NZers from the rest of the world can arrive from 13 February in step two. Step three: fully vaccinated foreign nations can arrive from 30 April.
December 2021	21 Dec: Minister Hipkins announces delay to the start of non-MIQ travel until the end of February 2022 to keep Omicron out of the community for as long as possible. 23 Dec: quarantine period amended to 10 days to be spent in a MIQF.
February 2022	3 Feb: Government announces five stages to the reopening of the border. These include that vaccinated NZers can self-isolate from midnight 27 February (if returning from Australia) and from 13 March (the rest of the world). 28 Feb: Government announces the removal of the self-isolation requirement for returning vaccinated NZers and brings forward the date for returning vaccinated NZers from the rest of the world to 4 March.
March 2022	18 March: Government allows unvaccinated NZ citizens to self-isolate from 11.59pm.

¹⁹⁷ Green flights permitted a limited class of returnees to return without a quarantine requirement.

Appendix three – offline criteria during Relevant Period

Emergency Category 1
<p>30 August – 3 September 2021</p> <p>1a) New Zealand citizens or residents where a serious risk to health or safety exists for the applicant or their dependant, which requires urgent travel to New Zealand; OR</p> <p>1b) Where urgent travel is required to ensure a child is provided with appropriate care and protection.</p>
<p>3 – 10 September 2021</p> <p>1a) New Zealand citizens or residents:</p> <p><u>i. requiring access to time-critical medical treatment for the applicant or their dependant, which has been scheduled in New Zealand and is unavailable or inaccessible in their current location; OR</u></p> <p><u>ii. requiring access to time-critical medical treatment for the applicant, or their dependent, which is scheduled overseas and has been confirmed by a New Zealand medical specialist as being unavailable in New Zealand, and where timely return travel is unlikely to be possible if the person books through the Managed Isolation Allocation System; OR</u></p> <p><u>iii. who are in a location or situation where there is a serious risk to their safety and their only option is to return to New Zealand, taking into account advice from the Ministry of Foreign Affairs and Trade where relevant;</u></p> <p><u>OR</u></p> <p>1b) Where urgent travel is required to ensure a child is provided with appropriate care and protection.</p>
<p>10 September – 21 October 2021</p> <p>No changes.</p>
<p>21 November – 17 December 2021</p> <p>1b) Where urgent travel is required to ensure a child <u>under 18</u> is provided with appropriate care and protection.</p>
Emergency Category 2
<p>30 August – 3 September 2021</p> <p>2a) New Zealand citizens or residents who are required to provide critical care for a dependant person in New Zealand and need to travel urgently to do so; OR</p> <p>2b) A person whose entry to New Zealand is time-critical for the purpose of commencing work that involves delivering a critical public or health and disability service, such as the clinical and direct provision of health services required to prevent serious illness, injury or death; or the maintenance of essential infrastructure or lifeline utilities whose failure would result in significant harm or disruption to a large number of New Zealanders; OR</p> <p>2c) New Zealand citizens or residents, who are unable to legally remain in their current location and have no other option but to return to New Zealand; OR</p> <p>2d) New Zealand and non-New Zealand citizens, where national security, national interest or law enforcement reasons require urgent travel to New Zealand, or return travel to New Zealand is required on the completion of national security, national interest or law enforcement duties overseas.</p> <p>2e) New Zealand citizens or residents:</p> <p>i. entering New Zealand to visit a close relative¹⁹⁸ who is living with a terminal illness or end-stage disease (with a life expectancy of six months or less), where timely travel is unlikely to be possible if the person books through the Managed Isolation Allocation System; OR</p> <p>ii. who are living with a terminal illness or end-stage disease (with a life expectancy of six months or less) entering New Zealand to visit a close relative or to reside in New Zealand, where timely travel is unlikely to be possible if the person books through the Managed Isolation Allocation System; OR</p> <p>iii. who are living with a terminal illness or end-stage disease (with a life expectancy of less than six months) who have travelled or are travelling to visit a close relative who resides overseas, where timely return travel is unlikely to be possible if the person books through the Managed Isolation Allocation System; OR</p> <p>iv. who have travelled or are travelling to visit a close relative who is living with a terminal illness or end-stage disease (with a life expectancy of six months or less) and resides overseas, where timely return travel is unlikely to be possible if the person books through the Managed Isolation Allocation System.</p> <p>2f) Citizens or residents of Pacific countries requiring access to time-critical medical treatment which has been scheduled in New Zealand that is unavailable in their own country, and accompanying clinical personnel or essential caregivers.</p>
<p>3 – 10 September 2021</p> <p>No changes.</p>
<p>10 September – 21 October 2021</p> <p>No changes.</p>
<p>21 November – 17 December 2021</p> <p><u>2c) New Zealand citizens or residents whose visa to remain in their current location:</u></p> <p><u>i. has expired and who have received notice from a local authority of detainment or deportation if they do not depart; OR</u></p> <p><u>ii. has been unexpectedly revoked or shortened due to circumstances outside of their control.</u></p> <p>2e) New Zealand citizens or residents:</p> <p>i. entering New Zealand to visit a close relative¹ who is living with a terminal illness or end-stage disease (with a life expectancy of 6 months or less) or has recently suffered a life-threatening medical event, where timely travel is unlikely to be possible if the person books through the Managed Isolation Allocation System; OR</p>
Emergency Category 3
<p>30 August – 3 September 2021</p>

¹⁹⁸ A close relative is a spouse or partner, parent, child, brother or sister, grandparent, grandchild, spouse's or partner's parent.

This category had not yet been created.
<p>3 – 10 September 2021</p> <p>3) New Zealand citizens or residents who have suffered the bereavement of a close relative within seven days of the date of application and urgently need to:</p> <p>a) return to New Zealand where the close relative died in New Zealand; OR</p> <p>b) travel to another country, and return to New Zealand, where the close relative died in that other country, including for the purposes of accompanying the body of the deceased to New Zealand:</p> <ul style="list-style-type: none"> • where timely return travel is unlikely to be possible if the person books through the Managed Isolation Allocation System.
<p>10 September – 21 October 2021</p> <p>No changes.</p>
<p>21 November – 17 December 2021</p> <p>No changes.</p>
Emergency Category 4
<p>30 August – 3 September 2021</p> <p>This category had not yet been created.</p>
<p>3 – 10 September 2021</p> <p>This category had not yet been created.</p>
<p>10 September – 21 October 2021</p> <p>This category had not yet been created.</p>
<p>21 November – 17 December 2021</p> <p>4a) New Zealand citizens who have been overseas since before 3 November 2020, and who have been unsuccessful in their attempts to secure a MIAS voucher through the regular lobby release process, and whose visa to remain in their current location has expired or will expire in the next 60 days. You will be able to bring your spouse/partner and dependent child/ren if they are travelling with you and hold the right to enter New Zealand. Please provide their details as part of your application. Visa requirements and vaccination requirements may apply to those travelling with you who are not New Zealand citizens.</p>

The time-sensitive criteria required:
<ul style="list-style-type: none"> • being legally entitled to enter New Zealand under the border restrictions; • having an endorsement from the relevant Government agency; • that travel be “time-sensitive”; • being unsuccessful in obtaining an allocation in MIAS for the date required for the work; • undertaking work that is essential for the operation or construction of critical infrastructure or lifeline utilities; or for the continued operation of supply chains of regional or national significance; or for a critical health and disability service that was not practicably accessible in a local community or region; or for New Zealand’s national security, international obligations or relations, or national interest or law enforcement duties overseas; or for preventing lasting damage to New Zealand’s substantial economic interests; or for preventing significant disruption to government-funded research programmes;¹⁹⁹ • where there would be significant consequences unless there is guaranteed entry or return to New Zealand within the next allocation window; and • there is no reasonable alternative available to enable the work to take place.
The group criteria required that a group:
<ul style="list-style-type: none"> • have a sponsoring Government agency; • need more than 20 rooms; • have a time-sensitive entry OR a time-sensitive need to leave New Zealand and to have certainty of return before departing; • need to enter as a single unit OR there was no reasonable alternative pathway for them; and • be a government priority. <p>To be considered a government priority the criteria was:</p> <ul style="list-style-type: none"> • National interest: returnees are usually based in New Zealand and are returning from representing New Zealand at an international event or activity of national interest; or the persons visiting New Zealand are essential to holding an event or activity considered to be in the national interest. • Economic impact: the group is travelling to support delivery of a major investment (>\$100 million) and/or a priority in the Government Major Events portfolio; the purpose for which the group is travelling is expected to generate significant economic or employment activity. • National security or obligations under international law or international relations: the purpose for which the group is travelling is considered essential for New Zealand’s national security or New Zealand has obligations under international law or international relations.

¹⁹⁹ This is the criteria that applied between 15 October to 17 December 2021. It was similar but not identical between 1 September and 14 October 2021.

Appendix four – Grounded Kiwis affidavits

	Period lived overseas and reasons for such	Date and reasons for return	Steps taken to return	Consequences of failed efforts
KG	Moved to Australia to “broaden [their] horizons” in Sept 2016.	Began thinking about returning home once remedial work on house in NZ was completed. Commenced attempts to return in Mar 2021	Obtained MIAS MIQ voucher in July 2021. MIQ cancelled voucher in Apr 2021 (with QFT). Complaint to MIQ Sept 2021. Participated in lottery 6 times with following queue placings: 21,405, 19,319, 23,671, 9,423, 19,750 and 1,710. Obtained MIQ voucher on 2/11/21 for 8/12/21.	Handed in notice to landlord in Nov 2021 so living in motels and AirBnBs “has been immensely stressful and feels so unnecessary”. The lottery system “resulted in stress, upset, anxiety and anger”. Without work since September. “Suffering additional expenses” for house in NZ. Attended father’s funeral through zoom. “life has been put on hold indefinitely; every day [they] went through grief, anger, despair, hopelessness, anxiety, fear.”
RO	Moved overseas to work in super yacht industry in 2016 and was in US.	June 2021	Checked daily for available MIQ slots. Slept with headphones on. Wrote letter to Ombudsman, Minister Hipkins, Prime Minister, Andrew Milne, and media in Aug 2021 Entered 4 lobby rounds with following queue placings: 20,052, 15,647, 23,019 and 2,719. Obtained MIQ spot on 12/12/21 for 24/12/21.	MIQ system has “made it impossible to continue [her] career” in superyachts. “Desperate to obtain a spot” to come home and “put her life on hold” while trying to obtain one. Was “the most heart-breaking situation [she] had ever dealt with.” “This MIQ system [had] resulted in [her] mental health deteriorating so much that [she] had to leave [her] job despite not being able to come back to [her] home country.” It “plunged [her] into a depression [she had] never felt before.”
AS	NZ citizen living in the UK since 2001, having moved over there for work.	Began looking to return to NZ to spend Christmas with family and support mother with dementia. Engaged with MIQ on 18/11/20.	Secured an MIQ booking for 12/1/21 on 18/11/20. On 6/1/21 airline cancelled her flight. Used first-in, first-served from Jan-July 2021 with approximately 630 attempts. Made three lottery system attempts on 19/9/21 (coming 26,074 in the queue), 11/10/21 (15,156) and the 7th lobby (13,269). Had not tried emergency allocation as she believed she was not eligible.	Found the MIQ lotteries “too exhausting and [her] exhaustion levels over this process have peaked.” Inability to support mother and father has “caused [her] unbelievable stress and grief.” Gave “up hope of returning this Christmas and maybe seeing [her] mother again.” “Mental health has suffered terribly” and “has seen a GP in connection with stress” – was recommended to seek counselling.
CN	Travelled with wife to the US for medical and business purposes in June 2021.	July 2021	Began looking for rooms every two to three days since July 2021. Participated in 8 lobby rounds with following queue placings: 1,529, 6,488, 16,423, 15,407, 4,251, 6,954, 9,436 and 51. Secured voucher on 18/12/21 for 17/10/21.	Uncertainty about return home “is a maddening and highly frustrating situation to be in.” Wife “will not be able to fulfil [her] condition [of residency to spend 163 days per year in NZ] unless she gets back by 8/12/21.” Now finds himself “abandoned by [his] country” and “stripped of [his] citizenship rights.”
CB	Works in Japan as an Assistant Professor in English in a Japanese university. Moved to Japan in 2012.	Was always intention to return to NZ to retire. Also needed to return to care for sick elderly mother and daughter. Engaged with MIQ in July 2021.	Registered with MIQ July 2021. Checked MIAS every day for hours. Entered 11 lobbies with following places in queue: 13,800, 12,018, 19,774, 17,651, 16,815, 9,499, 6,642, 6,923, 462, 581, 4,538. Wrote numerous emails to PM and other MPs. Secured voucher in lobby 10 on 30/12/21 with arrival date 20/02/22.	“Trying to make a booking became an all-consuming focus requiring hours every day, and a source of stress and anxiety.” “Experiencing [long positions in the lottery queue] ... with no assurance of every being able to return home, is becoming increasingly anxious and despairing.” If unable to return to NZ before retirement, “will be unemployed and ... unable to continue to rent [her] house”. Missed out on sharing granddaughter’s milestones “has been a source of great frustration and sorrow to [her].” Chronic illness means she “experience[s] 24/7 pain and discomfort ... [she] cannot access suitable medical treatment that enables [her] to manage [her] condition”. Situation “is becoming increasingly unbearable.”
LD	NZ and Australian citizen who has been working in Perth for the last 37 years.	Decided to return to be with partner.	Participated in both MIAS systems. Wrote letters to MIQ complaint system as well as Ministers and MPs. Entered 7 lobby rounds with following queue placings: 24,108, 21,260, 22,943, 19,960, 11,943, 2,075. Secured voucher on 9/11/21 with arrival on 17/11/21.	Has been “living off [her] savings, which [she] hoped to use to set [herself] up in New Zealand” as she left paid employment and was unable to secure temporary employment. Says the “system is soul destroying. [She is] permanently anxious.” “Developed paranoia, and chest pain” and has heart palpitations. Was “distracted and wish[ed] to return to [her] homeland as soon as possible. [Her] mental health is now suffering”.
KP	Moved from NZ to the US for work in 1997 and became a permanent resident.	Intended to return to NZ upon retirement and to re-join family in NZ. Experiencing serious health issues and younger brother is fighting cancer. Has an autoimmune disorder. Engaged with MIQ after planning move in July 2021.	Booked flights to NZ and MIQ space for early July 2021. Was forced to cancel MIQ space in June 2021 for personal reasons. Booked a flight to NZ for mid-Nov. Could not secure MIQ space for Oct, Nov or Dec 2021 –sat at computer for 12–18 hours daily. Began searching again in Aug 2021 after surgery. Entered 2 lobby rounds with following queue placings: 14,821 and 23,731. No voucher as at Dec 2021.	“MIQ system has negatively impacted [her] financially” as has been “living off [her] savings and (from Aug 2021) US Social Security payments.” “The MIQ system has also adversely impacted [her] physical health ... it has been difficult to be active on the MIQ booking website for more than an hour at a time, and not easy to rest, relax and sleep” after surgery. Most “devastating impact ... has been the fact that [she] continue[s] to be separated from [her] family during this very difficult period.” Is “deeply saddened to say that [she] feels displaced, forgotten, abandoned and devalued by the New Zealand government.”
TG	Moved to the US on a student visa to study in Aug 2016.	Decided to finish his studies in NZ with his classes being held remotely due to the ongoing pandemic.	Booked a flight to NZ for Dec 2020 in June 2020 which was cancelled. Registered with MIQ in May 2021. On 18 June 2021 submitted an online enquiry with MBIE requesting assistance.	“Currently lives in fear that [he] will be deported, with the immediate consequence of being detained and the longer-term consequence of not being able to return to the United States, which would destroy [his] relationship” as visa grace period ended on 23/10/21. “This has been an extremely emotional time. It brings [him] to tears. [He] has never felt so lonely and lost. Hopelessness has been the killer for [him] –

	Period lived overseas and reasons for such	Date and reasons for return	Steps taken to return	Consequences of failed efforts
		Began seeking MIQ in May 2021.	On 27 June 2021 applied for emergency allocation under cat 2c (outside window). Booked flights home on 14/9/21. Applied for emergency allocation on 31/8/21 (outside window). On 2 Sept applied for emergency allocation (delayed response and missed flight). Participated in 7 lobby rounds with following queue placings: 17,790, 17,805, 10,373, 4,429, 14,309, 3,161 and 475. Secured voucher on 9/11/21 for 3/12/21.	and the feeling of hopelessness has only been exacerbated by the lottery system which pushes you down the hole further each time.” Feels “tossed aside by [his] own country ... it is heart breaking.”
HW	Travelled to the UK to support younger brother following death of their father on 1/10/20.	Planned to return after about 3 months. Sought MIQ in Nov 2020 when the UK lockdown began.	Registered for MIQ in Nov 2020. Checked the MIQ page daily. Booked a flight to Sydney in June 2021 for Nov 2021 to use QFT bubble (but bubble closed). Wrote a letter to PM and received a reply from Minister Hipkins’ office. Entered 6 lobby rounds being placed 15,000, 23,000, 21,000, 17,000, 17,600 and 13,600. As at Dec 2021 she had no current voucher or offline allocation.	Found being away from family at Christmas difficult. “Mental health started deteriorating quite badly, [she] started having panic attacks and severe anxiety. For the first time in [her] life, [she] had become depressed.” “Anxiety has become significantly worse. [She was] having difficulty sleeping, and [was] tearful all the time. [She] cannot describe how much [she misses her] daughters. The uncertainty of not knowing when [she] will return home is unbearable.” Has missed milestones for daughters and “both [her] daughters are struggling.” “Mother is under huge financial strain trying to cover mortgage payments. [She] now stands to lose [her] house in New Zealand.”
SD	Living and working in the US since Jan 2018 as a Senior Scientist at a biotechnology company.	Regularly returned to NZ to support mother with severe depression and anxiety. After being vaccinated and with mother soon to be double vaccinated, first interacted with MIQ on 19/6/21.	Created MIQ account on 19/6/21. Engaged with first-in, first-served system numerous times. Successful a few times but had to cancel as no flights available for those places. Entered lobby four times with following queue places: 16,652, 11,637, 3,786 and 3,366. Secured voucher in lobby 7 on 9/11/21 with arrival on 14/12/21.	First-in, first-served model was “having too negative an impact on [his] mental health and wellbeing.” MIQ system has also had a negative impact on wellbeing of his mother, who “has a history of depression and anxiety. She deeply wants [him] to return home.” Worries that his absence on her birthday “along with the unknown about when [he] will ever be able to return home, will trigger her to have an anxiety attack or rekindle episodes of extreme paranoia.” Has “also experienced a significant amount of stress and anxiety through the advocacy work that [he has] been doing for Grounded Kiwis.”
CB	Has been working as a nurse in Australia for some time.	Regularly returned to NZ at the end of each contract. On 2/3/21 engaged with MIQ as her son passed away and needed to return to bury him.	Created an MIQ account on 2/3/21. Would spend up to 10 hours a day on system. Tried to secure emergency allocation at the same time but application was denied. On 10 Mar a complaint was made on her behalf to MIQ. On 18 Mar she secured an MIQ date for 11 June.	“Viewed [her] son’s funeral from [her] dining area via a telenet link. [She] did not get to see him” in person before he was buried. “Not being able to return to New Zealand to farewell [her] son has impacted [her] work and [her] mental health ... [she has] been depressed and at times saw no purpose in living”. Has “experienced stress related physical disorders, cardiac abnormalities and other ailments.” Has felt her “human rights have been denied to re-enter NZ to tend to what is a basic need.”
SR	Is a psychiatrist. Flew to Australia to assist daughter with birth of second child on 22/7/21, planning to stay until 7/8/21.	Engaged with MIQ on 23/7/21.	Registered on the MIQ website on 23/7/21. Checked the MIQ website several times a day. Applied for exemption on 9/8/21 for self-isolation (declined as not currently in MIQ). Applied for emergency allocation on 9/9/21 under category 2B (rejected). Complained to MIQ on 18/9/21. Participated in 4 lobby rounds with following queue placings: 8,870, 30,357, 2,586 and 12,346. Received health worker allocation on 8/11/21 for 28/11/21.	“Can only run a very rudimentary practice remotely from Australia”. Found the lottery system “gruelling, distressing and anxiety-provoking.” Had “been in Melbourne for over three months, with no prospect of returning home this year, or in the foreseeable future. [She] feels deeply distressed.” Could not provide support to brother in NZ with chronic disease and to a close elderly friend in rest home. “Financially, the situation has been very challenging too” and was “renting a room in an AirBnB.”
AL	Built a house in Vanuatu after retirement and travels there over the winter months.	Made two trips to Vanuatu during the pandemic. Booked MIQ for first trip in Sept 2020.	Began using MIAS from Sept; secured a spot in Dec 2020 for 13/1/21. On second trip from NZ he looked for MIQ spaces from 4 Oct and participated in 5 lotteries. Made a complaint to Ombudsman in Jan 2021. Participated in five lobby rounds with following queue placings: 17,474, 8,524, 21,475, 7,421 and 17,773. Was able to travel through QFT scheme with Vanuatu on 8 Nov.	“Had enormous difficulty booking a spot in MIQ.” From Vanuatu only had approx two flights per month to choose from and MIAS had dates missing. “We have a shared frustration of the MIQ regime and the unresponsiveness of those who administer it.”
SN	Travelled to Sydney to support daughter who had to be admitted to hospital on 25/6/21.	Planned to return to NZ after two weeks. Learned on 26 June that whāngai son had been diagnosed with stomach cancer and needed to return.	Flight home on 9/7/21 was cancelled. Submitted an emergency ground application on 16/7/21. Participated in MIAS first-in, first-served and missed out on “red flights”. Made emergency allocation requests on 25 and 30 Aug, 1 and 9 Sept 2021 (declined). Entered MIQ lottery on 20/9/21 and booked MIQ for 17/10/21.	“The emotional and mental anguish in not being able to be there to support [his whāngai son] and the whanau with [the] stomach removal surgery has been significant.” “Spouse lost her employment; this has affected [them] financially and has created no small amount of upset and emotional mental anguish.” Relationships with community and local iwi “have suffered as [he] has not been visible and present”. “In 34 years of policing, this experience has been the most challenging, the most emotionally taxing and has created the most stress.”

	Period lived overseas and reasons for such	Date and reasons for return	Steps taken to return	Consequences of failed efforts
JS	Decided to travel to Perth to visit children on 15/8/21 with a confirmed flight home on 25/9/21.	Engaged with MBIE when border closed at end of Aug 2021.	Registered with MBIE at the end of Aug. Participated in six lobby rounds with following queue placings: 9,085, 14,494, 18,734, 17,362, 16,889 and 2,002. Secured a spot in MIQ on 2/11/21 for 16/12/21.	“At time [she] felt like [she] would ‘crack’”. “Some days [she] would cry for most of the day. [She has] had pains in [her] chest” and “can’t sleep properly.” “Mental state has deteriorated at times to the point that [she] began to think that it would be great to join her [deceased] husband.”
BB and RS	Travelled as husband and wife to Australia to visit their son and family on 17/7/21. Intended to stay for a month.	Engaged with MIQ when it was clear that travel bubble would not open in Sept 2021.	BB: Entered lobby 6 (17, 047 in queue) and lobby 8(16,243) but holding no current voucher as at December 2021. RS: Registered with MIQ in September 2021. Wrote to Dr Bloomfield requesting acceptance on flight from Australia with All Blacks team. Participated in three lobby rounds with following queue placings: 3,367, 17,047 and 16,243. No voucher or offline allocation as at Dec 2021.	“Strongly resent[s] being exiled from [his] homeland by government decree.” “This will be the first time in more than 25 years that [he] has been unable to attend a family Christmas.” Has “incurred substantial costs as a result of having to stay in Western Australia”. Understands his “eligibility for New Zealand Superannuation will be at risk if [he is] overseas for more than 26 weeks.”
TV	Moved to Singapore with family in Dec 2019 for work with a technology company.	With arrival of Covid the family decided to move back to NZ. Did not engage with MIQ until June due to work obligations (family returned first).	He engaged with first-in, first-served for hours in June 2021. Also attempted lottery system. Applied for emergency allocation under criteria 2c in Oct 2021 (declined). Contacted the Singapore government who advised that NZ must allow return. Applied for emergency allocation under category 2a (declined). Entered 4 lobby rounds with following queue placings: 18,421, 17,807, 22,215 and 990. Secured an MIQ room on 12/10/21 for 8/11/21.	Had “been on medication for anxiety since 2013, however the situation made the distress and anxiety far worse that it has been in many years.” “Being separated from [his] wife and boys over this period was extremely stressful”. “Started hearing about people had managed to book a spot [with the lottery], and this was really hard to stomach.” As he “was unable to secure a MIQ spot, could no longer earn an income [after his role was dissolved], and faced threat of penalties ... for staying beyond [his] short term visitor pass, the situation became even more stressful”. “Was concerned for [his] own wellbeing and considered checking into a psychiatric hospital for help.”
BG	Flew to El Salvador on 10/11/20 after its borders opened to be with long-distance partner.	Became pregnant and was in EL Salvador on an expiring tourist visa so prepared to return home with partner in Mar 2021.	Applied for partner’s critical purpose visa to enter NZ in Mar 2021 (granted 13/6/21). Booked flights to NZ for 4–7/8/21 (no MIQ spots available). Applied for emergency allocation 15/6/21 under category 1b (not within window). Made an emergency allocation application 25 July (request for more evidence). On 25/7/21 made third emergency allocation application under category 2c (declined). On 4 Aug they flew to LA. Applied for emergency allocation three more times under category 1a (declined). Filed a judicial review on 6/9/21 – MBIE agreed to reconsider decision within 24 hours and granted allocation 72 hours later.	“The stress of the whole situation was immense. [She] was struggling mentally, emotionally and financially, and [she] was concerned she would end up overstaying ... with a new-born baby with no way to earn income to support the child.” She “can’t believe the way the New Zealand Government treated [them], and the stress [they] went through.”
CA	Moved to Cayman Islands with husband in 2016.	Regularly returned to NZ to visit family and decided by 2/11/1 to try and see family.	Entered the lobby three times: lobby 6 (12,526 in queue), lobby 7 (9044) and lobby 8 (3214). Secured voucher in lobby 8 on 18/11/21 with arrival due 4/2/22.	“As 2021 has gone on [she has] become more and more desperate to see [her] family in New Zealand. This is now something which [she thinks] about daily and which frequently makes [her] tearful.” “A combination of [her] fear that [she] could not cope with two weeks locked in a hotel room with an 18 month old and a 3 year old and the stories of people in much more desperate circumstances than [her] trying to get home, have made [her] hold off on” MIQ. “It is very upsetting to have no end in sight”.
MC	NZ citizen born in Australia and has worked overseas, but considers NZ home.	Decided to try to return to NZ to support her stepfather and grandmother who have health issues in June 2021.	Used the first-in, first-served system between June and Aug 2021. Emailed PM on 12/7/21 requesting another system. Participated in three lottery rounds on 20 and 28 Sept (placed 22,111 and 9,651 respectively), and 5 Oct 2021 (placed 3,140). Booked an MIQ voucher for 1 Dec on 5 Oct 2021. Prepared documentation to apply under emergency allocation if her MIQ booking was cancelled as stepfather was critically ill.	The first time participated in the lottery she “was so upset, distracted and inconsolable that [she] called her boss and took a half-day off”. MIAS “felt dystopian and extremely psychologically unsettling.” “This situation has been all-consuming and has had a terrible impact on [her] mental health. On 8 July 2020 [she] commenced medical treatment for [her] anxiety, which started early in the pandemic”. Has “also had to take time off work”.
PM	A pilot employed in Hong Kong and commutes from Auckland for job. Due to the pandemic, returned to Hong Kong for work in June 2020 while family remained in NZ.		Had been trying to gain a place in MIQ to get home before Christmas. Entered into 9 lobby rounds with following queue placings: 19,306, 2,594, 14,327, 18,151, 7,743, 1,829, 4,662, 14,505 and 967. Secured a MIQ position for 19/11/21 but could not get time off work to travel. Secured voucher in lobby 9 on 25/11/21 for 25/01/2022.	“The 2 weeks of isolation required for MIQ in NZ has been the main factor restricting my movement” and a “six-week period of time off would mean 2 weeks at home”. Engaging with MIQ “is analogous to trying to win the lottery.” “This was an extremely stressful experience, having to align time off from work, limited flight schedules to NZ and the lottery”. “This situation has placed an incredible amount of strain on [his] marriage and family life. All children require the input and influence of both their parents”. “The lack of innovation from our border control authorities regarding methods of isolation has been very frustrating to watch, especially as [he travels] round the world with [his] job and [sees] the varied and successful methods used by other border authorities.”

Appendix five – legislative framework

The COVID-19 Public Health Response Act 2020 (the COVID-19 Act)	
4 Purpose ²⁰⁰	<p>The purpose of this Act is to support a public health response to COVID-19 that—</p> <ul style="list-style-type: none">(a) prevents, and limits the risk of, the outbreak or spread of COVID-19 (taking into account the infectious nature and potential for asymptomatic transmission of COVID-19); and(b) avoids, mitigates, or remedies the actual or potential adverse effects of the COVID-19 outbreak (whether direct or indirect); and(c) is co-ordinated, orderly, and proportionate; and(ca) allows social, economic, and other factors to be taken into account where it is relevant to do so; and(cb) is economically sustainable and allows for the recovery of MIQF costs; and(d) has enforceable measures, in addition to the relevant voluntary measures and public health and other guidance that also support that response.
9 Minister may make COVID-19 orders ²⁰¹	<ul style="list-style-type: none">(1) The Minister may make a COVID-19 order in accordance with the following provisions:<ul style="list-style-type: none">(a) the Minister must have had regard to advice from the Director-General about—<ul style="list-style-type: none">(i) the risks of the outbreak or spread of COVID-19; and(ii) the nature and extent of measures (whether voluntary or enforceable) that are appropriate to address those risks; and(b) the Minister may have had regard to any decision by the Government on the level of public health measures appropriate to respond to those risks and avoid, mitigate, or remedy the effects of the outbreak or spread of COVID-19 (which decision may have taken into account any social, economic, or other factors); and(ba) the Minister must be satisfied that the order does not limit or is a justified limit on the rights and freedoms in the New Zealand Bill of Rights Act 1990; and(c) the Minister must have consulted the Prime Minister and the Minister of Justice, and may have consulted any other Minister that the Minister of Health thinks fit; and(d) before making the order, the Minister must be satisfied that the order is appropriate to achieve the purpose of this Act. <p>...</p>
11 Orders that can be made under this Act ²⁰²	<ul style="list-style-type: none">(1) The Minister ... may in accordance with section 9 or 10 (as the case may be) make an order under this section for 1 or more of the following purposes:<ul style="list-style-type: none">(a) to require persons to refrain from taking any specified actions that contribute or are likely to contribute to the risk of the outbreak or spread of COVID-19, or require persons to take any specified actions, or comply with any specified measures, that contribute or are likely to contribute to preventing the risk of the outbreak or spread of COVID-19, including (without limitation) requiring persons to do any of the following:<ul style="list-style-type: none">...(vi) be isolated or quarantined in any specified place or in any specified way:<ul style="list-style-type: none">...(viii) report for and undergo a medical examination or testing of any kind, and at any place or time, specified and in any specified way or circumstances:<ul style="list-style-type: none">...(x) satisfy any specified criteria before entering New Zealand from a place outside New Zealand, which may include being registered to enter an MIQF on arrival in New Zealand:<ul style="list-style-type: none">...
<p>From 20 November 2021 the Act included provisions concerning the allocation of places in MIQF:</p>	
32K Chief executive responsible for operation of managed isolation allocation system	<ul style="list-style-type: none">(1) The chief executive is responsible for the operation of the managed isolation allocation system.(2) The chief executive must ensure that the managed isolation allocation system does not at any time permit the issue of more confirmed allocations than the number of available allocations.
<p>Section 32L provided that the Minister must determine the apportionment between the issue of online and offline allocations.</p>	
32M Online allocations	<ul style="list-style-type: none">(1) Online allocations to MIQFs may be issued on a basis that the Minister decides.(2) In making a decision under subsection (1), the Minister must take into account—<ul style="list-style-type: none">(a) the right of New Zealanders under section 18(2) of the New Zealand Bill of Rights Act 1990 to enter New Zealand; and(b) the need to mitigate, so far as possible, the social, economic, and other impacts of COVID-19.(3) The basis on which online allocations to MIQFs are issued may—<ul style="list-style-type: none">(a) distinguish between different classes of persons entering New Zealand (for example, between New Zealanders and non-New Zealanders); and(b) prioritise allocations as between different classes of persons; and(c) reserve for a particular class, or any classes, of persons a specific proportion of allocations.
32N Offline allocations for individuals and groups	<ul style="list-style-type: none">(1) Offline allocations to MIQFs may be issued to persons who meet the eligibility criteria determined by the Minister.(2) An offline allocation may be—<ul style="list-style-type: none">(a) an individual offline allocation:(b) a group offline allocation.(3) In determining the eligibility criteria under subsection (1), the Minister must take into account—<ul style="list-style-type: none">(a) the right of New Zealanders under section 18(2) of the New Zealand Bill of Rights Act 1990 to enter New Zealand; and(b) the need to mitigate, as far as possible, the social, economic, and other impacts of COVID-19.(4) The chief executive must determine individual offline allocations on the basis of the eligibility criteria determined under subsection (1) for those allocations.

²⁰⁰ COVID-19 Public Health Response Act 2020 (as enacted 13 May 2020). Subsections (ca) and (cb) were introduced on 6 August 2020.

²⁰¹ Subsection (1)(ba) was introduced on 6 August 2020.

²⁰² Section 11(1)(x) was introduced on 6 August 2020 to permit an order that required a confirmed place in a MIQF before being permitted to enter New Zealand.

- (5) The Minister must determine group offline allocations on the basis of the eligibility criteria determined under subsection (1) for those allocations.
- (6) The chief executive must publish on the responsible agency's Internet site—
 - (a) the eligibility criteria determined under subsection (1) for individual offline allocations and group offline allocations; and
 - (b) approved group offline allocations.

The COVID-19 Public Health Response (Air Border) Order (No 2) 2020 (the **Air Border Order**)

This imposed requirements on persons arriving in New Zealand by air. Its purpose was “to prevent, and limit the risk of, the outbreak or spread by COVID-19” by imposing these requirements.²⁰³

It was amended several times. As relevant, from 7 September 2020, it required all arrivals to New Zealand to report for and undergo medical examination and testing for COVID-19 as soon as practicable on arrival at the designated security area.²⁰⁴ It also required that arrivals be isolated or quarantined in accordance with the Isolation and Quarantine Order with some exemptions.²⁰⁵

As at 3 November 2020, it also required that the person have a “confirmed allocation” to enter a MIQF and to produce evidence of that.²⁰⁶ A “confirmed allocation” meant a confirmed allocation in the managed isolation system ...²⁰⁷ The “managed isolation allocation system” meant “a Web-based managed isolation allocation system operated on behalf of the New Zealand Government”.²⁰⁸

From 9 April 2021 to 20 November 2021, a “confirmed allocation” meant “the meaning given by clause 15H of the COVID-19 Public Health Response (Isolation and Quarantine Order) 2020” (see below).²⁰⁹ Evidence of a “confirmed allocation” included “written evidence of a confirmed allocation (for example, a voucher)”.²¹⁰ A “managed isolation and allocation system” was defined as “the meaning given by clause 15 H of the COVID-19 Public Health Response (Isolation and Quarantine Order 2020” (see below).²¹¹

The COVID-19 Public Health Response (Isolation and Quarantine) Order 2020 (the **Isolation and Quarantine Order**)

This set out the requirements for people who must be isolated or quarantined and restrictions on entry to a MIQF. The purpose of the Isolation and Quarantine Order was to prevent, and limit the risk of, the outbreak or spread of COVID-19 by setting out those requirements and imposing those restrictions.²¹²

It was amended several times. As relevant, from 6 September 2020 it required a person to isolate or quarantine for 14 days and to report for testing as directed by a medical or health protection officer.²¹³ From 13 November 2021 the period was amended to seven days if the chief executive of MBIE was satisfied that the person met “low risk indicators” (a defined term that included whether the person had a negative result from a test).²¹⁴

Also relevant, from 6 September 2020 it provided that a person must not enter MIQF unless “they are authorised or required by law to enter the MIQF”.²¹⁵

From 9 April 2021 to 20 November 2021, it defined “confirmed allocation” as meaning “a confirmed allocation issued under the managed isolation system to a low-risk MIQF.”²¹⁶ A “managed isolation allocation system” was defined as “a managed isolation allocation system operated by or on behalf of the New Zealand Government.”²¹⁷ A “low-risk MIQF” meant “an MIQF designated ... for the purposes of isolation and quarantining people in a way appropriate for people with a low risk of transmitting COVID-19.”²¹⁸

From 9 April 2021 to 20 November 2021 it contained details of how a person could obtain a “confirmed allocation” for MIQF as follows:

15J Issue of confirmed allocations

- (1) A person may obtain a confirmed allocation by—
 - (a) registering on the managed isolation allocation system online portal and obtaining a voucher (**an online allocation**); or
 - (b) applying to the chief executive in the form approved by the chief executive and submitting supporting evidence (**an offline allocation**).
- (2) The Minister must determine the apportionment between the issue of online allocations and offline allocations.

15K Online allocations

- (1) Online allocations to low-risk MIQFs may be issued on a basis that the Minister decides.
- (2) In making a decision under subclause (1), the Minister must take into account—
 - (a) the right of New Zealanders to enter New Zealand; and
 - (b) the need to mitigate, so far as possible, the social, economic, and other impacts of COVID-19.
- (3) The basis on which online allocations to low-risk MIQFs are issued may—
 - (a) distinguish between different classes of persons entering New Zealand (for example, between New Zealanders and non-New Zealanders); and
 - (b) prioritise allocations as between different classes of persons; and
 - (c) reserve for a particular class, or any classes, of persons a specific proportion of allocations.

15L Offline allocations

- (1) Offline allocations to low-risk MIQFs may be issued to persons meeting the criteria decided by the Minister and published from time to time by the chief executive on MBIE's Internet site.
- (2) A person may apply to the chief executive for an offline allocation and the chief executive must, as soon as is reasonably practicable, determine that application.
- (3) If the chief executive is satisfied that an application meets the criteria, the chief executive may issue to the applicant an offline allocation to a low-risk MIQF.

From 20 November 2021 online and offline allocations were provided in the Act rather than in the Isolation and Quarantine Order 2020 and further detail about them was included.

²⁰³ Clause 3.

²⁰⁴ Clause 8(2).

²⁰⁵ Clause 8(3).

²⁰⁶ Clause 8(2A)(a). The Air Border Order in force from 3 November 2021 provided a specific exemption from the requirement to have a confirmed allocation for diplomatic and consular officials, the New Zealand Defence Force and aircrew members. From 15 January 2021 there was also a specific exemption for arrivals by air from Antarctica.

²⁰⁷ Clause 4.

²⁰⁸ Clause 4.

²⁰⁹ Clause 4(1).

²¹⁰ Clauses 4(1)(a) and 8(2A).

²¹¹ Clause 4(1).

²¹² Clause 3.

²¹³ Clauses 8, 9 and 10.

²¹⁴ Clauses 4, 8, 9 and 10.

²¹⁵ Clause 17(1)(b).

²¹⁶ Clause 15H.

²¹⁷ Clause 15H.

²¹⁸ Clause 4(1).