

'Inevitable that the system would operate unjustly': Grounded Kiwis fight against MIQ ends in High Court win

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Kiwi Nick Khin says getting an MIQ spot for his son returning to NZ from Las Vegas to study was even more difficult than him getting into University. Video / Nick Khin

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The Grounded Kiwis have won their historic case against the MIQ system.

Justice Jillian Mallon released her decision this afternoon and found that although MIQ was a critical component of the Government's elimination strategy, the combination of the virtual lobby and narrow emergency criteria meant New Zealanders' rights to enter their country was infringed.

"In some instances in a manner that was not demonstrably justified in a free and democratic society," Justice Mallon said.

The decision, which spanned hundreds of pages, outlined the judge's decision.

She found that the MIQ system didn't allow for individual circumstances to be considered and prioritised, and examples of extreme delays were not prioritised.

The MIQ booking system did not allow for individuals, and the prioritisation of returning citizens, due to the "virtual lobby" that operated as a lottery and the criteria for emergency allocation was narrow and too tightly set.

The proceeding was focused on the restrictions placed on New Zealand citizens over the period from September 1 last year to December 17.

Justice Mallon said the Government failed to show why an online system couldn't have prioritised New Zealand citizens or those who had faced significant delay.

She said the respondents failed to show why a technical solution was not available to allow a person to keep their place in the queue or provided other priority criteria.

"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," Justice Mallon said.

"It was inevitable that the system would operate unjustly in some individual cases because of this."

It was cited by Justice Mallon 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," she said.

It was acknowledged by Justice Mallon, however, that the undertaking of MIQ was substantial and set in place to make sure New Zealanders returned safely, and the health of kiwis at home was prioritised.

Over 200,000 people had entered the MIQ system since its inception.

"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," Justice Mallon said.

"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 Spokesperson Alexandra Birt spoke with Open Justice this afternoon in reaction to the outcome and said the group was delighted, but for many, it has been an emotional, and bittersweet, day.

"We posted on our Facebook group with the outcome, and seeing all the responses coming through brings back for a lot of people the trauma of what they went through trying to get back to NZ," Birt said.

"For this to be legally recognised as a system that breaches rights has been a very important step in terms of processing what happened to them."

Birt said the decision has set a precedent, and that "from a precedent perspective it's very important and the Government knows they need to do better."

The next step in the process is seeking relief from the court in the form of a declaration.

"We are hoping that from a relief perspective we will be able to get the recognition we have sought this whole time from the Government, that they should have done better and should have protected the rights of NZ citizens to enter their country," Birt said.

Lead defence lawyer for the Grounded Kiwis, Paul Radich QC, spoke with Open Justice and said further time needs to be taken to consider the court's detailed decision, but that the group was pleased with the outcome.

"The consequences for New Zealand citizens stranded overseas while our borders were closed to all but a small number of people have been devastating – so much so that the point needed to be tested so that this will not happen again," Radich said.

Grounded Kiwis took their fight for judicial review of the Government's MIQ system to the High Court at Wellington in February this year.

They claimed the Government acted unlawfully, unreasonably and in breach of the Bill of Rights that states every New Zealand citizen has the right to enter New Zealand.

At the time of the hearing, Birt said the group wanted an acceptance that MIQ failed Kiwis abroad, leaving people attempting to return home traumatised and stripped of their rights.

Despite the decommissioning of MIQ facilities and the booking system earlier this year, they say their case is still valid, particularly with news that health officials told the Government [MIQ was no longer justified](#) in November last year.

The High Court decision was released today by Justice Mallon, who at the end of the two-day judicial review on February 15 predicted a delay due to the sheer volume of information involved in the complicated hearing.

During the judicial review, Radich QC spoke about the real impact the MIQ system had on New Zealanders and read aloud statements that detailed the anguish and distress many felt through the process.

One woman was left stranded overseas, unable to return home to bury her only son when he died from a medical event. Another was unable to be there while her son underwent cancer treatment.

Multiple families had been separated for months if not years and some suffered emotional distress so extensive from their attempts to return home that ongoing psychiatric support is needed.

One man spent 10 hours a day refreshing the website to try and secure his spot in MIQ, sleeping with headphones just so he would know when to jump online. For this, he suffered serious sleep deprivation.

Some had to give up altogether because of the negative toll the system was having on their mental health and wellbeing.

Crown lawyer Aedean Boadita-Cormican, acting on behalf of the Government, defended the system in court and said MIQ was created as something that was fair to all Kiwis at home and abroad under extreme circumstances.

This comes as a win alongside other historic judicial reviews relating to Covid-19 including the High Court ruling that the [first nine days of the 2020 lockdown were unlawful](#).

The Government is also [appealing a High Court decision](#) that determined vaccine mandates imposed on the New Zealand Defence Force and police were an unjustified incursion on the Bill of Rights.

Political parties react

The Grounded Kiwis court ruling is a victory for the many Kiwis who wanted to come home and couldn't because of the lottery of human misery that was the MIQ system, National Party Covid-19 Response spokesman Chris Bishop said.

"Justice Mallon has found that the MIQ system did not sufficiently allow individual circumstances to be considered and prioritised where necessary and it operated as an unjustified limit on the right of New Zealand citizens to enter their country," he said.

"The judge has said there were other ways the MIQ system could have worked, such as a points system, as recommended by the National Party.

Bishop said it was a mystery why the Government instead insisted on a largely one-size-fits-all system that didn't prioritise people returning home, even those in desperate situations.

"Month after month, New Zealanders were shocked at the extraordinary suffering inflicted on many people because of the MIQ lottery," he said.

"People couldn't return to be with loved ones in the final stages of their lives.

"We now have judicial confirmation of state-sponsored cruelty that was the MIQ lottery."

Covid-19 Response Minister Chris Hipkins, however, said MIQ was "always the least worst option" to help prevent the spread of Covid-19 in New Zealand.

"We welcome the Court's determination that the requirement for returnees to undergo MIQ was lawful and was not an unjustified infringement of New Zealanders' right to come home," he said.

"The Court also ruled that the requirement for people entering the country to isolate was lawful and was reasonable and proportionate even when, from mid-October 2021, those in the community who had the virus and their close contacts were able to self-isolate at home."

Hipkins did accept the court's ruling that the virtual lobby system said the Government infringed on New Zealand citizens' right to enter the country.

"We are carefully considering the Court's decision," he said.

ACT leader David Seymour said MIQ was "an exercise in cruelty" that excluded up to a million people from our team of six million.

"It's insane that the only way people could come home was from relentlessly refreshing their browsers, and the lobby made no difference to the cruel calculus of too many people, not enough spaces," he said after the court's decision today.

"The system was inflexible and illogical, people wanted to come for many reasons - family reunions, deaths of loved ones, the arrival of new babies, to fill jobs, and just being with family and friends. Our government kept them locked out to fight over a tiny number of MIQ spaces."

Seymour said he was often told of cases seeking exemptions.

"It appeared there was no rhyme or reason to who was successful but political fallout or the potential for it seemed to be a factor," Seymour said.

"The Government owes all those who were stuck in limbo overseas an apology.

The Green Party said tight border restrictions were a crucial part of protecting people, but the Government should have prioritised a fairer way to manage the risks.

"We had been consistent in calling for a more compassionate approach to the MIQ system, including a trial of MIQ prioritisation for those who urgently needed to come home for health or visa reasons," the party's Covid-19 Response spokesman Teanau Tuiono said.

In October, Green MP Julie Anne Genter, who was pregnant at the time, wrote to Hipkins asking him to extend the MIQ emergency application criteria to cover pregnant people and their partners.