IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV-2021-404-1889
[2021] NZHC 2897

UNDER	the Judicial Review Procedure Act 2016
BETWEEN	MURRAY BOLTON and WATI TALEI ZOING Applicants
AND	THE CHIEF EXECUTIVE OF THE MINISTRY OF BUSINESS, INNOVATION AND EMPLOYMENT Respondent
	DIRECTOR-GENERAL OF HEALTH Second Respondent
	MINISTER FOR COVID-19 RESPONSE Third Respondent

Hearing:	27 October 2021
Appearances:	J R Billington QC, JWH Little and J Lethbridge for the Applicants S Kinsler, E Watt and H Botha for the Respondents
Judgment:	28 October 2021
Reasons:	29 October 2021

JUDGMENT OF VENNING J

This reasons judgment was delivered by me on 29 October 2021 at 12:00 pm pursuant to r 11.5 of the High Court Rules 2016.

Registrar/Deputy Registrar

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Solicitors / Counsel:
Mr J R Billington QC and Mr JWH Little, Barristers, Shortland Chambers, Auckland
Ms J Lethbridge (applicants' instructing solicitor), Martelli McKegg, Auckland
Mr S Kinsler, Ms E Watt and Ms H Botha, Meredith Connell, Auckland

Introduction

[1] Murray Bolton and his partner Wati Zoing (the applicants) are scheduled to attend a board meeting in Boston on 11 and 12 November 2021. They applied for an exemption to the requirement under the COVID-19 Public Health Response (Isolation and Quarantine) Order 2020 (the IQ Order) that they be required to isolate at an MIQ facility on their return to New Zealand. The applicants sought approval to self-isolate at their home instead. On 17 October 2021 Andrew Milne, an Associate Deputy Secretary with the Ministry of Business Innovation and Employment (MBIE), declined the application. The applicants seek to judicially review that decision.

Background

[2] Mr Bolton is a very successful businessman. Since 1997 his focus has been primarily on direct investment in emerging New Zealand companies. One of these is Transaction Services Group (TSG) which he founded in 1994. TSG provides business management software and integrated payment solutions to various industries using New Zealand technology. It operates worldwide. Earlier this year TSG merged with Clearant, a United States based company, to form Xplor Industries (Xplor).

[3] Xplor has 180 plus employees in New Zealand and is a significant contributor to the New Zealand economy. It generates income of between $30 and $50 million annually. Xplor is preparing to list on either the New York Stock exchange or the NASDAQ. Mr Bolton sought the exemption to enable him to attend the two-day Xplor board meeting in Boston next month to discuss the listing. Mr Bolton is the only New Zealander on the board and the only person with a personal interest in ensuring the continued success and growth of the business in New Zealand.

[4] Mr Bolton is 73 years old. He has stayed in isolation and quarantine in an MIQ facility in the past. He has applied for but missed being selected in the ballot for a place in the pilot scheme recently introduced by the government for business people required to travel overseas.

The application for exemption

[5] On 24 September 2021 Mr Bolton's solicitors made an application on his behalf for an exemption from MIQ to enable him and his partner to attend the board meeting and to self-isolate on their return as opposed to staying in an MIQ facility. The application was made in a detailed letter. In support of the application Mr Bolton submitted:

(a) It was not necessary for him and his partner to quarantine in an MIQ facility to minimise the risk of transmitting COVID-19 into the community. Mr Bolton had proposed controls at least as stringent as those applying to others who may safely isolate at home including those who will take part in the government's business travel self-isolation pilot.

(b) Mr Bolton and his partner are fully vaccinated with the Pfizer vaccine. Their residence is large and gated. They would comply with all usual predeparture testing requirements and fly by private jet, as opposed to a commercial carrier.

(c) Mr Bolton is 73. His health would be better protected if permitted to isolate at home rather than in an MIQ facility, including because of the risk of contraction of COVID-19 at such a facility.

(d) There is a significant benefit to the New Zealand economy in permitting Mr Bolton to self-isolate at home. It would enable Mr Bolton to travel overseas for crucial business engagements that are in the interests of the country. Mr Bolton will not otherwise travel overseas because of the high likelihood he would not be able to secure an MIQ allocation for his return and his difficult experiences of MIQ in the past.

[6] Mr Bolton's solicitors addressed the application to the Director General of Health, the Chief Executive, MBIE and the Isolation Exemption team MIQ within MBIE.

[7] On 7 October 2021 Philip Knipe, the chief legal advisor with the Ministry of Health, advised that the application would not be referred to the Director General. It would be dealt with in accordance with the standard process for applications for exemption. Mr Knipe advised the application was to be referred for consideration under, and in accordance with, clause 12 of the IQ Order.

[8] Despite that advice, it appears that as the form submitted with the letter was the form also used for applications for exemption under clause 14 of the IQ Order, Mr Milne initially considered the application under that clause. On 12 October 2021 he declined Mr Bolton's application for exemption from managed isolation. The reasons given for declining the application were set out in the following letter:

> 12 October 2021
>
> Application number: MIQ-19634-D1V4
> Applicant full name: Lisa Hopkins at Martelli McKegg Lawyers
> On behalf of Murray John Bolton and Wati Talei Zoing
>
> Tēnā koe Lisa
>
> Your application for exemption from managed isolation
>
> Thank you for your application on behalf of Murray John Bolton and Wati Talei Zoing.
>
> The purpose of managed isolation is to ensure people do not have COVID-19 before they return to our communities and are not placed in a position where they could transmit the virus. Exemption or early release from managed isolation can therefore only be approved for exceptional reasons.
>
> Having considered your circumstances and all of the information available, and balanced these against the risk to public health, I have determined, that unfortunately, your application on behalf of Murray and Wati must be declined. They are therefore required to complete 14 days in one of our managed isolation facilities.
>
> If you believe there are medical reasons which would mean Murray or Wati would be unable to complete 14 days in managed isolation then you are able to submit an application for a medical exemption. This will require documentation from a medical professional to be submitted with the application.
>
> …
>
> Ngā mihi nui

Andrew Milne
Associate Deputy Secretary Managed Isolation & Quarantine
Ministry of Business, Innovation and Employment

[9] That decision is not in issue in these proceedings, but it is relevant to the way the application under clause 12 was considered. Subsequently, Mr Milne reassessed the application under clause 12.

[10] On 17 October 2021, Mr Milne declined the application for exemption under clause 12 of the IQ Order as well, on very similar terms as shown in his letter of that date:

> 17 October 2021
>
> Application number: MIQ-19634-D1V4
> Applicant full name: Lisa Hopkins
> On behalf of: Murray Bolton and Wati Talei Zoing
>
> Tēnā koe Lisa
>
> **Your application for exemption from managed isolation**
>
> Thank you for your application on behalf of Murray Bolton and Wati Talei Zoing.
>
> The purpose of managed isolation is to ensure people do not have COVID-19 before they return to our communities and are not placed in a position where they could transmit the virus. Exemptions from managed isolation can therefore only be approved for exceptional reasons.
>
> Advice from medical experts and our managed isolation and quarantine team confirm that Murray's particular needs can be safely met within a managed isolation facility. Please note that we can accommodate their request to remain in an Auckland managed isolation facility and as per the current framework, all returnees can access the outdoor area once they have returned a negative day 0/1 COVID-19 test. Murray will be able to book daily exercise timeslots with the onsite team.
>
> Having considered Murray's circumstances and all of the information available, I have determined, that unfortunately, his application must be declined. Murray and Wati Talei are therefore required to complete 14 days in one of our managed isolation facilities.

The Judicial review application

[11] Mr Bolton and his partner seek to judicially review the decision. They raise four causes of action. First error of law. They say MBIE and the Director General have misconstrued clause 12 of the IQ Order. Next, they say MBIE and the Director

General failed to consider the actual grounds on which the request was based and other relevant considerations. In their third cause of action the applicants allege that, if clause 12 of the IQ Order is to be interpreted as the respondents say it should be, then it is ultra vires – the COVID-19 Public Health Response Act 2020 (the Act), is inconsistent with the Bill of Rights Act (NZBORA) and of no effect. Finally, they plead the respondents' decision was unreasonable in view of the matters advanced by the applicants in the application.

[12] The applicants seek: a declaration the decision was unlawful; an order permitting the applicants to self-isolate at their home rather than at an MIQ facility subject to compliance with all reasonable conditions; or, in the alternative, a direction to the first and second respondents to reconsider the MIQ exemption request and to take into account the matters referred to in the application. During the course of the hearing Mr Billington QC's focus was on the direction that the respondents reconsider the request.

Statutory framework

[13] The IQ Order was made under the Act. The purpose of the Act is set out at s 4:

> **4 Purpose**
>
> The purpose of this Act is to support a public health response to COVID-19 that—
>
> (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.

[14] Part 2 of the Act provides for the making of orders by the responsible Minister. The Minister presently responsible for the administration of the Act is the COVID-19 Response Minister, the Hon. Christopher Hipkins. Section 9 provides for when the Minister may make an order. Relevantly it includes:

> (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
>
> …
>
> (d) before making the order, the Minister must be satisfied that the order is appropriate to achieve the purpose of this Act.

[15] The purpose of the IQ Order is set out at clause 3. It is:

> **3 Purpose**
>
> The purpose of this order is to prevent, and limit the risk of, the outbreak or spread of COVID-19 by—
>
> (a) setting out the requirements for people who must be isolated or quarantined in accordance with this order (for example, on arrival in New Zealand), including risk-based provision for when isolation or quarantine ends; and
>
> (b) restricting entry to any managed isolation or quarantine facility (MIQF) to persons who are approved, authorised, or required to enter.

[16] The particular clause in issue in the present case is clause 12.

> **12 Place of isolation or quarantine**
>
> (1) A person's place of isolation or quarantine means the high-risk MIQF or low-risk MIQF that is allocated to the person—
>
> (a) by the chief executive of MBIE; and
>
> (b) after a suitably qualified health practitioner determines, in accordance with any guidelines provided by the Director-General, whether the person should be allocated a high-risk MIQF or low-risk MIQF.
>
> (2) However, a medical officer of health may instead determine for any reason (for example, for medical evacuation) that a person's place of isolation or quarantine is any other facility or place.
>
> (2A) In determining that a person's place of isolation or quarantine is any other facility or place under subclause (2), the medical officer of health must consider—

(a) relevant individual and operational implications; and

(b) whether the other facility or place is able to meet the person's particular physical or other needs.

(3) A medical officer of health need not consider making a determination under subclause (2) for a person if the chief executive of MBIE—

(a) consults, and considers the advice of, a suitably qualified health practitioner or of a person who is registered or licensed as an equivalent health professional overseas; and

(b) determines that the person does not have particular physical or other needs that require another type of facility or place.

[17] Clause 12 can be contrasted with clause 14, under which the chief executive of MBIE may permit a person to leave their room at MIQ in certain specified circumstances or for an exceptional reason.

[18] The way the various government entities approach exemptions from MIQ in practice is set out on websites operated by MBIE and the Ministry of Health. On the MBIE website there is a section dealing with general exemptions from managed isolation, a section which deals with specific exemptions for medical reasons and a section dealing with specific exemption for exceptional circumstances. The sections are almost exclusively directed at exemptions under clause 14 from the need to stay the entire 14 days at an MIQ facility rather than an exemption from an MIQ facility entirely.

[19] The Ministry of Health description of MIQ in the exemptions process on its website is brief. It refers to the need for exceptional circumstances, and international medical evacuations and directs people who are unable to stay at MIQ because of their medical or physical needs to MBIE.

The evidence

[20] A number of the background facts are not in issue. Mr Bolton has sworn three affidavits. In the first he identified the relevant background to the application and set out the reasons why it was necessary for him to travel to Boston to attend the two-day board meeting in person. Mr Bolton's evidence about that is supported by the evidence of Sir Ralph Norris, a very experienced and successful businessman. I accept that it

is not practical to suggest that Mr Bolton should attempt to attend such a crucial two-day board meeting other than in person. Also, the meeting is significant and potentially important to the New Zealand economy.

[21] Mr Bolton then set out why he had not applied for a spot in MIQ. He identified the lack of capacity of MIQ rooms and the uncertainty associated with the balloting process, both of which are matters of public record. Mr Bolton also has experience of MIQ from a previous business trip. His position is that at his age, 73, he is not willing to subject himself to the uncertainty associated with when he might be able to return to New Zealand and the risks associated with MIQ (if he was able to get a place) on his return.

[22] In his first updating affidavit, Mr Bolton provided a copy of the decision of 12 October 2021 and noted that Sir Ian Taylor had been granted permission to trial a self-isolation system on his return to New Zealand from a business trip.

[23] In his second updating affidavit, Mr Bolton attached the decision letter of 17 October 2021 and also attached further correspondence from his lawyers with MBIE's solicitors in which his lawyers had set out further steps the applicants intended to take to reduce the risk of infection and to ensure they were monitored at home. Mr Bolton also attached press releases which confirmed the current situation of COVID-19 spreading in the community as opposed to from MIQ.

[24] Mr Bolton also filed an affidavit from Sir Raymond Avery, a professional pharmaceutical scientist. In Sir Raymond's opinion, the applicants have a higher risk of contracting COVID-19 in an MIQ facility than if they were self-isolating at home with the precautions they propose. Sir Raymond also confirmed the efficacy of the JUPL monitoring solution (which is to be used by Sir Ian Taylor), and which the applicants propose to use.

[25] The respondents have filed affidavits by Mr Knipe and Mr Milne. Mr Knipe confirmed that the Director General of Health declined to become involved in the application and that it was referred back through the "normal processes".

[26] Mr Milne was the decision maker. It is apparent from his affidavit that the respondents regard clause 12 as being confined to consideration of the applicant's health needs as the only basis for granting an exemption.

[27] Mr Milne noted that no medical evidence had been tendered in support of the application, but a limited medical assessment was carried out and regard was also had to information Mr Bolton had previously provided in January 2021. Mr Milne was advised that Mr Bolton's medical needs could be met in MIQ. He rejected Mr Bolton's concerns regarding the risk of in-facility transmission of COVID-19 as he did not consider that risk to be significant. Nor did it provide a basis for an exemption. Mr Milne also rejected the concerns Mr Bolton had raised concerning his age. He did not consider that provided a basis for an exemption either. Finally, he rejected the non-health related "concerns". He did not consider they constituted a basis for an exemption. He then issued the letter of 17 October 2021 declining the application.

Submissions

[28] Mr Billington submitted it is clear from both MBIE's and the Ministry of Health's advice to the public about exemptions on their respective websites that the government and MBIE treat exemptions under clause 12 of the Order as confined to those with medical needs. As noted, that is confirmed by Mr Milne's affidavit.

[29] Mr Billington submitted that in approaching the matter that way, the decision maker had construed the exemption test too narrowly and had failed to undertake any form of proportionality or balancing exercise. Properly construed, clause 12 required consideration of factors and needs other than the medical needs of the applicant.

[30] Mr Billington noted the brevity of the decision letter. He submitted the decision maker erred by failing to consider whether the proposed precautions would adequately mitigate the further risk of community transmission of the virus. Nor did MBIE consider the economic factors raised in the application.

[31] Next, Mr Billington submitted that MBIE made an error of law in that it asked the wrong question and failed to undertake a proportionality analysis. It had also failed to take any account of relevant considerations such as the need not to unreasonably

constrain the applicants' rights to freedom of movement, their need to avoid contracting COVID-19 in an MIQ facility, and the broader economic considerations identified in the application. MBIE had failed to balance those considerations against the degree of risk to the community of the spread of the virus involved in the applicants' proposal, particularly in the present circumstances prevailing in the community.

[32] Mr Billington submitted that the applicants' approach to the application of clause 12 was available on the text and was most consistent with the NZBORA.

[33] The respondents' position is that MBIE's delegate, Mr Milne, considered all the relevant matters that he was required to consider in making his decision. He took advice from a health practitioner and considered Mr Bolton's health needs. He was entitled to conclude Mr Bolton's health needs could be met in a MIQ facility. Next, Ms Watt submitted that Mr Milne had also considered a number of non-health related issues but determined they were not relevant. In short, the respondents say that Mr Milne took all mandatory relevant matters into consideration.

[34] Ms Watt submitted that clause 12 involved a threshold assessment under clause 12(3) before any substantive decision was required under clause 12(2). She submitted that the applicants' argument for a broader interpretation of "needs" in clause 12 beyond medical or health needs was not available.

[35] Ms Watt submitted that the high threshold for unreasonableness was not met in this case.

[36] Ms Watt then addressed the matters raised by Mr Bolton to support the application for exemption. First, she submitted the risk of in-facility transmission of COVID-19 was not high. Next, while accepting Mr Bolton's age increased his risk, she submitted his vaccination status significantly reduced the risk.

[37] Ms Watt then noted the various other exemptions or special cases that Mr Bolton had referred to. She noted that the object of the business pilot was to assist the development of policy rather than to benefit the business travellers who qualified

for it. Next, she argued that the actual risk of permitting someone such as Mr Bolton to self-isolate could not be assessed in the absence of pilot projects. As to the benefit to the New Zealand economy, she submitted that Mr Bolton could still attend the board meeting and make contingency plans. In her oral submissions she suggested that if the board meeting was important enough, Mr Bolton could travel to it and stay at a home overseas until he obtained a placement in MIQ.

[38] Finally, Ms Watt submitted that the applicants had not established any breach of NZBORA. Their rights under s 18 were impacted but the rights were not absolute. As s 5 of NZBORA establishes, protected rights are subject to justifiable limits.

Analysis

[39] The difference between the parties arises from their differing approaches to the correct interpretation of clause 12 of the IQ Order. The applicants submit that MBIE's decision making powers under the clause 12 are not confined to consideration of an applicant's medical needs. Rather, they say, a broad view of "other needs" should be taken and that MBIE is required to consider whether, in the circumstances, the applicants' other needs would permit them to isolate or quarantine at a place other than at an MIQ facility. In making that assessment MBIE is required to consider the applicants' need to attend the board meeting overseas, the need to enjoy rights conferred by the NZBORA, the need to avoid contracting COVID-19, and to balance those needs against the degree of risk to the community of further spread if the application was granted. In other words, MBIE is required to undertake some form of proportionality analysis.

[40] On the other hand, the respondents say that clause 12 is health based and that the respondents' obligation is to consider whether the applicants' particular health needs can be meet by MIQ. If they can be, then no exemption is available under clause 12 of the IQ Order.

[41] The starting point is how clause 12 of the IQ Order is to be interpreted. It is awkwardly drafted. Clause 12(1) provides for the default position that a person arriving in New Zealand will be isolated or quarantined in either a high risk or low risk MIQ facility depending on the decision of a health practitioner. However, under

clause 12(2) a medical officer of health may instead determine "for any reason" that a person may isolate in any other place (which could be, as in the present case, their own home). In making such a determination, under clause 12(2A) the medical officer of health must consider the relevant individual and operational requirements and whether the other facility is able to meet the person's particular physical or other needs.

[42] If the clause ended at that point, the applicants' case would be relatively straight forward. Clause 12(2) provides a very general discretion by reference to "for any reason". "Individual implications" could readily include consideration of more than simply medical considerations. "Other needs" in clause 12(2A)(b) is general. The applicants have provided a number of good reasons and relevant material to support their application for an exemption and to be permitted to self-isolate at their home in order to meet their needs, which includes the need for Mr Bolton to attend the board meeting, as well as the other needs identified above.

[43] However, clause 12(3) then goes on to provide that the medical officer of health need not consider making a determination under clause 12(2) if the Chief Executive of MBIE (in practice a delegate) consults and considers the advice of a health practitioner and determines that the person does not have particular physical or other needs that require they isolate or quarantine at another facility or place. Mr Milne said the purpose of clause 12(3) was to prevent the medical officer of health being overwhelmed with applications. While I agree with Mr Billington's point that it is not for Mr Milne to interpret the clause, it is plainly intended to act as a filtering exercise.

[44] The "need" in the "need not" phrase in clause 12(3) is an auxiliary verb. When the phrase is read in context, it means that the medical officer of health would not be required to consider an application for an alternative place for isolation and quarantine under clause 12(2) if MBIE has determined that the applicant does not have particular physical or other needs that require isolation or quarantine at another type of place.

[45] However, clause 12(3) is a filter, rather than a threshold an applicant must satisfy, or a gate through which they must pass, before the medical officer of health can (or is entitled to) consider their application under clause 12(2). Even if MBIE determined that an applicant's physical or other needs did not require isolation or

quarantine at another place, that would not prevent the relevant medical officer of health considering such an application under clause 12(2) if for any reason he or she considered it appropriate to do so. Put another way, while the wording of clause 12(3) would justify the medical officer of health not making a determination under clause 12(2), it does not prevent him or her from doing so.

[46] On that analysis, the principal issue that arises in the construction of clause 12 is the meaning to be given to the phrase "other needs" in clause 12(3). I consider it to be broader than just medical needs, as submitted by the respondents.

[47] The phrase "other needs" in this context is referred to in clause 12(2A)(b) as well as in clause 12(3). In considering how it is to be interpreted and also the general interpretation of clause 12, it is necessary to consider its text and the purposes of the IQ Order itself, and its empowering legislation.[1] The purpose of the Act is to support a public health response to COVID-19 that, inter alia, prevents and limits the risk of spread of the virus, is proportionate, and allows social, economic and other factors to be taken into account. The purpose of the IQ Order itself is to prevent and limit the risk of the spread of the virus. None of those purposes require the references in clause 12 to "other needs" to be read down to be solely restricted to the medical, i.e. physical or mental health, needs of the applicant. The phrase "other needs" under clause 12(2A) (b) and 12(3) is readily capable of extending to a person's need to avoid contracting COVID-19 and their need to exercise their individual rights under NZBORA. A broad interpretation would also permit consideration of the requirement for Mr Bolton to attend the board meeting which in turn necessarily leads to consideration of his other needs on his return to New Zealand.

[48] While clause 12(2) refers to the example of a medical evacuation as a reason for determining a person's place of isolation or quarantine in another facility or place, that is only one example. The phrase remains broad – it is not qualified for example by words such as "medical" or "emergency". The wording that follows in clause 12(2A) requires consideration of individual "implications". Such implications need not be limited to medical issues.

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1 Interpretation Act 1999, s 5(1).

[49] Next, while I acknowledge Ms Watt's observation that the decision maker is a medical officer of health, the fact he or she has such a role is consistent with the overall purpose of the IQ Order which is to limit the spread of COVID-19. The considerations may be looked at through a public health lens but that does not mean that the decision maker is limited to considering the individual's health needs and is not required to consider other relevant information concerning the applicant and their circumstances under clause 12(2). Again, the purpose of the IQ Order is said to be to provide a response to COVID-19 that, inter alia, prevents and limits the risk of spread of the virus, is proportionate, and allows social, economic and other factors to be taken into account.

[50] Essentially the respondents' argument is that clause 12(3) means that if MBIE receives advice from a health practitioner that the applicant's health needs can be met in MIQ (or put another way, that they do not have any particular health needs that cannot be met in MIQ), then MBIE does not need to take into account any further considerations and no further consideration by a medical officer of health under clause 12(2) is required either.

[51] I consider that clause 12(3) can be interpreted in a broader way than the respondents argue for. A more purposive interpretation of clause 12(3) would be to acknowledge there are the two separate aspects to it in subclauses (a) and (b). Clause 12(3)(a) engages the requirement to consult and consider the advice of a health practitioner, which is clearly directed at consideration of the applicants health requirements, but (b) adds a further layer and requires MBIE to also consider whether there are particular other needs of the applicant, i.e. other than health considerations, which require isolation in another place. That gives more purpose to clause 12(3)(b) than the respondents' approach. If it was intended to restrict the consideration in the way the respondents argue for, the wording could have been "particular physical or *medical needs*" as opposed to the more general "physical or *other needs*".

[52] If the broader approach was taken and the other needs support the case for isolation or quarantining in another place, then, logically, the matter would then be referred to a medical officer of health (as the primary decision maker under clause 12) to make the final decision under clause 12(2). As noted, the decision directing a

person to isolate or quarantine at any other place under that clause can be made "for any reason". I agree with Mr Billington's submission that it does not make sense to give such a wide discretion to the primary decision maker but then to confine the types of applications they may be required to consider by restrictively interpreting clause 12(3).

[53] The respondents suggest that such an interpretation will lead to an overwhelming number of applications for exemption. But clause 12(3) will still apply as a filter on the number of applications for exemptions from MIQ. It can reasonably be expected that few will combine the features and other needs that have been identified in the present case.

[54] Next, other clauses in the IQ Order are relevant. For example, clause 14 sets out the basis upon which a person may leave their place of isolation or quarantine. The considerations for an exemption under clause 14 are not restricted to consideration of the applicant's medical needs.

[55] I consider that a broader approach to the interpretation of the relevant phrases used in clause 12 of "any reason" and "other needs" is, at the least, an available interpretation. Given that, the phrases should be given the interpretation most consistent with the NZBORA if possible.

[56] Section 18 of the NZBORA provides that:

> **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.

[57] As the full bench of this Court said in *Borrowdale v Director General of Health*:[2]

> [95] As others have notably said, the NZBORA is a "Bill of reasonable protection for rights".[3] The rights presently in issue are not absolute and "must accommodate the rights of others and the legitimate interests of society as a whole",[4] including the wider interest in protecting public health. This is confirmed by the express framing of the equivalent provisions of the ICCPR, discussed above. So the critical question must be what limitations on those rights can be justified in light of the public health interests in play – that is what s 5 requires to be asked and demands to be answered. Section 5 thus remains central to our inquiry, and s 6 must be read subject to it. That is the continued effect of the *R v Hansen* majority decisions, which are binding on us.
>
> …….
>
> [97] So the relevant NZBORA question here is whether the limitations of rights resulting from the actual exercise of the s 70(1)(f) or (m) powers were necessary, reasonable, and proportionate.[5] And that assessment depends on the particular (public health emergency) circumstances to which the exercise of power responds…..

[58] Similarly, at a high level, the issue in this case is whether the limitation of the applicants' rights resulting from the application of the IQ Order are necessary. The limits to the freedom of movement by requiring isolation and quarantine may well be justified to avoid the risk of spread of COVID-19. That is expressly recognised in the empowering statute. Section 9 of the Act confirms that in making the IQ Order the Minister must be satisfied that the Order does not limit, or is a justified limit, on the rights and freedoms in the NZBORA.[6]

[59] However, at the micro or individual level there is a difference between requiring isolation in an MIQ facility and requiring isolation in a person's own home. To the extent the IQ Order can be interpreted in a way that the restrictions on the rights are minimised, that interpretation should be adopted. For example, the objective of the IQ Order will be met if the decision maker can be satisfied that the needs of the

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2 *Borrowdale v Director General of Health* [2020] NZHC 2090, [2020] 3 NZLR 864.

3 Paul Rishworth "Interpreting and Invalidating Enactments Under a Bill of Rights: Three Enquiries in Comparative Perspective" in Rick Bigwood (ed) The Statute: Making and Meaning (LexisNexis, Wellington, 2004) at 277; and *R v Hansen* [2007] NZSC 7, [2007] 3 NZLR 1 at [186] per McGrath J.

4 *R v Hansen* at [186].

5 As assessed under s 5, using the proportionality test from *R v Oakes* [1986] 1 SCR 103, confirmed in *R v Hansen* [2007] NZSC 7, [2007] 3 NZLR 1 at [104].

6 COVID-19 Public Health Response Act 2020, s 9(ba).

applicant (not restricted to health needs) can be met by the applicant self-isolating at home in a way and on conditions that prevent and limit the risk of the outbreak or spread of COVID-19. If they cannot be satisfied that purpose will be met, then the application would properly be declined.

[60] It is a matter of balancing competing considerations. In *Taylor v Chief Executive of Dept of Corrections*,[7] the Court of Appeal discussed the concept of proportionality and balancing when considering the application of s 5 of NZBORA and a justified limit on the relevant right. In particular, the Court considered whether the concept applied to decisions applying legislation that limited the right. In the event the Court adopted a balancing approach, noting that it was attracted to the view that s 5 of NZBORA required at least some form of proportionality analysis in the context of the administrative decision that was under challenge before it.

[61] For the above reasons, I consider that the phrase "other needs" as it is used in clause 12 is to be interpreted more broadly and is not restricted to just the health needs of the applicants. When considering the application for exemption MBIE was required to consider more than simply whether the applicants' medical and health needs could be met in an MIQ facility when purporting to make its decision under clause 12(3) of the IQ Order. It was required to consider their other needs raised by the application.

Error of law

[62] It is apparent from Mr Milne's affidavit that he did not take such a broad view when considering Mr Bolton's application. In referring to clause 12 he refers to it as "the health exemption". Next, he says that clause 12 involved consideration of whether the health needs could be met within an MIQ facility.

[63] The decision of 17 October 2021 declining the applications is brief. It is also incorrect when it says that exemptions can only be approved for "exceptional reasons". That is not the wording of clause 12. The word "exceptional" is only used in clause 14. Of itself, that could amount to an error of law sufficient to vitiate the decision. If, as the letter suggests, the decision maker approached the matter on the basis the

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7 *Taylor v Chief Executive of Dept of Corrections* [2015] NZAR 1648 at [76]-[86]

applicants had to make out an exceptional case, then that was incorrect. It was not required by clause 12.

[64] Mr Milne's confusion is carried through into his affidavit where, at paragraph 5.45, and in reference to the his determination under clause 12, he said: "The question I need to consider when making decisions under clause 14 is whether Mr Bolton had physical or other needs that could not be met in a MIQF". While the reference to clause 14 may be a typographical error, it reflects Mr Milne's approach to the application under clause 12. He apparently brought the same consideration to the application under clause 12 as applied to the exceptional circumstances requirement under clause 14. His focus was entirely on Mr Bolton's medical needs.

[65] In short, by taking the above limited approach to the interpretation and application of clause 12, the decision maker fell into error.

Failure to take into account relevant considerations

[66] The other side of that same coin is that as a consequence, MBIE failed to take into account relevant considerations. While Mr Milne says he considered the risk of in-facility transmission of COVID-19 and Mr Bolton's age, it is apparent that he did not consider the applicants' proposals regarding self-isolation in detail, if at all. There is no reference in the decision to them, nor any consideration of them under the discussion of clause 12 in his affidavit. He did not consider the rigorous precautions the applicants proposed taking and failed to consider the efficacy of those proposals in meeting the objective of the IQ Order. Importantly, nor did Mr Milne consider the economic factors raised in the application. Consistent with his approach, he dismissed the non-health related concerns as he did not consider them as constituting a basis for an exemption.

[67] Next, the context of the application was important and does not appear to have been given consideration. The relevant circumstances that apply to the consideration of an application under clause 12 in October 2021 are quite different from the circumstances that applied when the IQ Order was made in September 2020 and are even different from those that applied in January 2021 when Mr Bolton last applied.

At that time few New Zealanders were vaccinated, the country was pursuing an elimination strategy and there was no COVID-19 in the community.

[68] That is no longer the case. The Prime Minister's more recent statements on the issue confirm that New Zealand is now in the process of phasing out the elimination strategy it initially followed in response to COVID-19. COVID-19 is in the community. The situation in New Zealand is now quite different to what it was when the IQ Order was made.

[69] The respondents have accepted the applicants' pleading that the government's position is that it is now not reasonable or necessary to exempt only those with an urgent medical need from the requirement to quarantine at an MIQ facility. As at 24 October 2021, 143 people were isolating at home.

[70] The respondents also accept that the government's position is that it is in the interests of New Zealand to facilitate overseas travel by New Zealand business people as long as this does not create a significant risk of community transmission of COVID-19.

[71] There is no evidence that the above matters were considered by Mr Milne.

[72] The decision maker failed to take into account the above relevant considerations.

[73] In the circumstances it is unnecessary to consider the remaining causes of action as the Court is satisfied the application must succeed on the above grounds.

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

[74] During the course of the hearing reference was made to clause 26 of the COVID-19 Public Health Response (Air Border) Order (No 2) 2020. Mr Kinsler suggested that an overriding discretion rested with the Minister under that clause. To the extent necessary the applicants had sought approval under that Air Border Order in the letter of application. As at the date of the hearing no decision had been

communicated to the applicants under that Order. In the absence of a decision there is nothing for the Court to engage with on that matter.

Result

[75] The first respondent's decision of 17 October 2021 declining the applicants' application for an exemption under clause 12 of the IQ Order is set aside.

[76] The respondents are directed to reconsider the request for exemption under clause 12 of the IQ Order.

[77] In that reconsideration, the respondents are expressly required to consider, amongst other relevant considerations:

(a) the need for Mr Bolton to attend the board meeting in Boston; and

(b) the need of the applicants to enjoy rights conferred by the New Zealand Bill of Rights Act 1990, including the right to freedom of movement and as citizens to enter New Zealand without unreasonable limitation; and

(c) the need of the applicants to avoid the risk of contracting COVID-19 at an MIQ facility, including in view of any characteristics that may make them especially vulnerable to COVID-19, including age;

and balance those considerations against the degree of risk to the community of further spread of COVID-19 involved in the applicants' isolating or quarantining at a place other than an MIQ facility taking into account:

(d) the precautions the applicants may propose to take or other conditions that may be imposed on them; and

(e) their vaccination status; and

(f) the prevailing circumstances within the community at the present time.

Costs

[78] The applicants are to have costs on a 2B basis against the respondents.

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Venning J