

**ORDER PROHIBITING PUBLICATION OF NAMES OR IDENTIFYING
PARTICULARS**

**IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY**

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

**CIV-2021-485-493
[2021] NZHC 2261**

UNDER the Judicial Review Procedure Act 2016,
Part 30 of the High Court Rules 2016 and the
Immigration Act 2009

IN THE MATTER of an application for judicial review

BETWEEN AFGHAN NATIONALS
Applicants

AND THE MINISTER FOR IMMIGRATION
First Respondent

CHIEF EXECUTIVE OF MINISTRY OF
BUSINESS, INNOVATION AND
EMPLOYMENT
Second Respondent

Teleconference: 30 August 2021

Appearances: W L Aldred and M R G van Alphen-Fyfe for the Applicants
R A Kirkness, A J Ewing and C M G Sykes for the Respondents

Minute: 30 August 2021

**RESULTS JUDGMENT OF COOKE J
(Application for interim relief)**

[1] These proceedings first came to my attention on the afternoon of Friday 27 August. At that stage a draft statement of claim was attached to a memorandum of counsel seeking an urgent judicial telephone conference.

[2] The proposed proceedings challenge decisions of the respondents to stop processing visa applications for certain Afghan nationals having New Zealand associations, and then not address the position of unprocessed visa applications when evacuating Afghan Nationals from Afghanistan following the withdraw of United States forces and their allies from Afghanistan, and the fall of the local Afghan Government to Taliban forces.

[3] I scheduled a telephone conference on Saturday 28 August at 3 pm, at which stage agreed directions were given for an urgent hearing. The applicants did not press more urgent action at that time in light of the indication from the respondents that the process of considering related temporary entry applications would proceed this week.

[4] This afternoon counsel for the applicants made contact with the Court indicating there were circumstances that would give rise to an urgent application for interim orders. In light of that I scheduled a telephone conference at 8 pm this evening. Counsel for the applicants then filed a memorandum, and a proposed affidavit from Angela Marie Smith, the Legal Services Manager at the Community Law Centre Waikato addressing the circumstances of six Afghan Nationals. They had made residency applications from March 2018, with the last received 12 May this year.

[5] It is said that each of these six people are at or near Kabul airport, or were on last information made available about their location. It is said that they are unable to be evacuated in association with the last remaining flights by United States aircraft scheduled for 31 August in the absence of visas being issued.

[6] The application for interim relief seeks orders from the Court that the visas be issued. I heard the application at this evening's hearing.

[7] I have decided to decline the application. These are not the full reasons which I will issue should that be required, but I capture the essence of the reasons why I have declined the application, recognising that a decision is required tonight.

[8] Interim orders under s 15 of the Judicial Review Procedure Act 2016 can be granted when the applicant has a position to preserve and the circumstances justify the

grant of interim relief. Whether there is a position to preserve should not be given a narrow interpretation. I accept that each of the applicants has a position to preserve. Before the processing of their visa applications was suspended they had an expectation that the applications would be granted if the criteria for the grant of an application were satisfied. In some cases the applications were ready for a decision when processing was suspended. In those circumstances I accept that interim orders would preserve the applicants' ability to obtain effect relief should their judicial review challenge succeed.

[9] I also accept that they have an arguable case. As I understand the allegations the applications were no longer processed because the introduction of the Covid-19 border controls meant that the applicants would not be able to enter New Zealand if their applications were granted. But when the evacuation attempts commenced only those who had actually been granted visas qualified for evacuation. I accept that there is an argument that this outcome is not rational. The visa applications were not processed because the applicants could not enter New Zealand, and yet they were not eligible to be evacuated because they did not hold a visa. That is a catch 22 that may not be consistent with the lawful exercise of the statutory powers.

[10] I also accept that there are other considerations in the applicants' favour. They are obviously in a perilous situation, and their lives are at risk. It may be that they will not be able to be evacuated from Kabul airport. That will depend on the circumstances on the ground, and whether flights can be accessed. But if the applicants were denied a chance at evacuation because of a failure to process visa applications that may be thought to be unreasonable. Moreover if it later transpired that they did not meet the criteria for the grant of a visa their position in New Zealand could no doubt be reviewed.

[11] But there are nevertheless some powerful countervailing considerations. The first is that the difficult situation arising from Afghanistan and the plight of the group of people including the applicants is something that has been considered directly by the respondents. I was provided with a copy of a document prepared for the Cabinet Covid Committee on 19 August 2021 where the Minister of Immigration updated other Ministers. In that document a proposal was made that the group to be evacuated from

Afghanistan only include New Zealand citizens, residents and those with visas. The position of those who had applied to come to New Zealand was addressed with the document recording:

There are also Afghanistan citizens who have visa applications that have not been processed. I do not consider it is a priority to fast track processing for this group at this point as part of the short-term emergency response. We could explore this option later.

[12] Matters have developed since that time, but the point is that the Ministers have considered who should be eligible for the evacuation efforts, and the focus has been on those who already had the right to enter. That could be said to be an arbitrary cut-off, but in such difficult circumstances hard decisions need to be made.

[13] Secondly Mr Kirkness advised, and it has been subsequently confirmed by an affidavit from Mr James Munro of Foreign Affairs that has been sworn, that evacuation from Kabul airport is now effectively closed to other than US nationals. The New Zealand Defence Force operation ceased on 26 August, and that the US operation is finishing on 31 August (ie tomorrow) and Foreign Affairs were advised on 27 August that New Zealand evacuees may not now be included on the remaining US flights. Given these circumstances any interim orders will not appear to have any realistic effect.

[14] Finally, the Court would not have been prepared to make orders, even interim orders, directing that visas be issued (temporary or otherwise). All that I would have been prepared to consider is a direction that the respondents urgently make decisions on the grant of temporary visas on humanitarian grounds. The Court is simply not in a position to assess whether the grant of visas is appropriate as it does not have all the necessary information (even if it had been appropriate for the Court to make such an order). Given the limited time available it is unrealistic to expect proper consideration to be given to the applications in the short timeframe contemplated.

[15] The reality is that the applicants are among a larger group in humanitarian peril. I have been advised that there have been approximately 600 expressions of interest

with respect to temporary entry. A decision has been made to seek to address the plight of these people by other means. It was and is not anticipated they can be evacuated from Kabul airport. It is hoped that they may find another way out of Afghanistan. And the respondents are in the process of addressing applications to allow them to come to New Zealand if they are able to, and if they meet the relevant criteria.

[16] I am satisfied from the assurances I have been given that the plight of these people has been considered by Ministers, and difficult decisions have been made. It is not appropriate for the Court to cut across these decisions by way of interim relief. For these reasons I have decided to decline the application.

Cooke J

Solicitors:
Stout Street Chambers and Brandon Street Chambers for the Applicants
Crown Law, Wellington for the Respondents