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 1407

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

On the papers

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:	15 June 2022

JUDGMENT OF MALLON J
(Declaratory relief, costs and corrections)

Declaratory relief

Introduction

[1] This judgment is the follow on from the substantive judgment in this proceeding delivered on 27 April 2022.[1] The substantive judgment determined that Grounded Kiwis was entitled to declaratory relief. It provided the parties with the opportunity to endeavour to agree to the wording of that relief or to provide submissions to the Court if they could not.[2]

[2] The parties were unable to agree the appropriate wording and have filed submissions in support of their respective positions. The key difference between them is whether the declaratory relief should encapsulate only those aspects of the MIQ system that were found to be an unjustified limitation on the right of New Zealand citizens to enter New Zealand, or whether it should encapsulate the full ratio of the case so that it also covers those aspects of the MIQ system that were not found to be an unjustified limitation on that right.

[3] To address this difference in position, the nature of the proceeding is important. It was primarily a claim that challenged particular aspects of the MIQ system, over a particular period of time, as breaching a right affirmed by the New Zealand Bill of Rights Act 1990.[3] The claim was brought by Grounded Kiwis, an advocacy group for New Zealanders impacted by these matters, and it sought declaratory relief by way of remedy.

The nature of the proceeding and the remedy

[4] Declaratory relief is one of the available remedies for a BORA breach.[4] Its purpose is to affirm and vindicate the right that has been breached.[5] It can be

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1 *Grounded Kiwis Group Incorporated v Minister of Health* [2022] NZHC 832. Abbreviations used in that judgment apply to this judgment as well.

2 At [433].

3 Section 18(2), the right of a New Zealand citizen to enter New Zealand.

4 *Manga v Attorney-General* [2000] 2 NZLR 65, (1999) 17 CRNZ 18, (1999) 5 HRNZ 177 (HC) at [144].

5 *Simpson v Attorney-General* [1994] 3 NZLR 667, (1994) 1 HRNZ 42 (CA) [*Baigent's Case*] at 692 per Casey J ("selection of the remedy which will best vindicate the right infringed will be a matter best left to a Judge …") and at 703 per Hardie Boys J ("the primary focus has been on providing an appropriate remedy to a person whose rights have been infringed").

contrasted with a declaration sought under the Declaratory Judgments Act 1908 where a person has done or desires to do any act, the validity or legality of which depends on the construction or validity of any legislation, and the Court may make a declaration determining the question of construction or validity.[6] Declaratory relief for BORA breaches is a public law remedy, intended to provide effective and appropriate relief which in this context involves identifying and publicly articulating the breach of the BORA right.[7]

[5] I therefore agree with Grounded Kiwis that the aim of the declaratory relief for the s 18(2) BORA breach is not to assist the public's understanding of the judgment. That was the purpose of the media release and the summary contained in the judgment and the full judgment is and remains the authoritative document. I also agree with Grounded Kiwis that some of the wording proposed by the respondents is not appropriate because it concerns aspects of MIQ that did not breach s 18(2) of BORA, and therefore the words are not aimed at providing a remedy for the breach found by the Court. The declaratory relief must still of course accurately capture the breach found.

[6] In addition to the BORA claim, the proceeding also alleged that the Chief Executive of MBIE made errors of law in the exercise of her powers relating to offline allocations in MIQ. The respondents submit that no useful purpose would be served by granting declaratory relief in relation to those errors. This is because the errors were addressed during the relevant period, the MIQ system is no longer in place and so there is no risk of a decision maker repeating those errors in the future and the declaration for the s 18(2) breach provides the necessary vindication.

[7] The starting point is that Grounded Kiwis succeeded in its claim that the chief executive had acted unlawfully in some respects and that declaratory relief should ordinarily follow. I consider that declaratory relief has utility even though the errors of law were rectified. The errors occurred in the context of a system that limited the right of overseas New Zealanders to enter their country. There was evidence of the

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6 Declaratory Judgments Act 1908, s 3.

7 *Manga v Attorney-General*, above n 4, at [119].

impact these errors had on some individuals. Declaratory relief on these errors serves to recognise this.

The appropriate wording

[8] Having considered the wording respectively proposed by the parties and the submissions they advanced in respect of that wording, I consider the wording that appropriately and fairly vindicates the right that was breached and the errors of law made is as follows:

> **Declaratory relief**
>
> This declaratory relief relates to the period between 1 September 2021 and 17 December 2021 (being the period at issue in the proceeding and referred to as "the relevant period"). It concerns the right that a New Zealand citizen has to enter New Zealand affirmed by s 18(2) of the New Zealand Bill of Rights Act 1990. It relates to requirements imposed under the COVID-19 Public Health Act 2020 (the Act) or the COVID-19 Public Health Response (Air Border) Order (No 2) 2020 and the COVID-19 Public Health Response (Isolation and Quarantine) Order 2020 made under the Act.
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> **The first declaration**
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> During the relevant period:
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> (a) overseas arrivals were required to have a place in a managed isolation and quarantine facility (MIQF) before entering New Zealand;
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> (b) demand for places in a MIQF exceeded supply;
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> (c) the virtual lobby (an online system) was the main pathway through which overseas New Zealand citizens could exercise their right to enter their country;
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> (d) the virtual lobby did not prioritise places in MIQ on the basis of New Zealand citizenship, nor on a New Zealand citizen's need to enter New Zealand or the delay they were experiencing in exercising their right;
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> (e) an offline system for emergency places in MIQF (the emergency allocation system) was an inadequate mechanism to address the deficiency of the virtual lobby system (referred to in (d) above) because the criteria for emergency places were tightly prescribed, strictly and, in some respects*, incorrectly and inflexibly interpreted;
>
> (f) the MIQ system did not have an adequate mechanism for determining whether a New Zealand citizen was experiencing unreasonable delays that were disproportionate to any public health risk they might present.

> The combination of the virtual lobby and the emergency allocation system meant that the MIQ system, because and to the extent that it did not allow New Zealand citizens facing unreasonable delays to be considered and prioritised where necessary, operated as an unjustified limit on the right of New Zealand citizens to enter their country. It inevitably meant that in some instances that right could be breached.
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> * See the second declaration at (a) and (b).
>
> **The second declaration**
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> The Chief Executive of the Ministry of Business, Innovation and Employment erred in law in the exercise of her powers under the COVID-19 Public Health Response (Isolation and Quarantine) Order 2020 in that:
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> (a) in relation to emergency allocations in MIQ, prior to 25 September 2021 the criteria that required all emergency allocation applications to be submitted within 14 days of a person's departure in order for the application to be considered, was misinterpreted through a practice by which a departure date was inaccurately estimated from the arrival date when the departure date was not provided;
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> (b) in relation to emergency allocations in MIQ, prior to 22 November 2021 the criteria that required there to be "no other option" but to return to New Zealand was misinterpreted by applying it only to persons presently liable to deportation and requiring a particular and narrow form of evidence of that liability;
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> (c) in relation to group allocations in MIQ (another offline system for allocations in a MIQF), prior to 20 November 2021 allowing decisions on those allocations to be made by the Minister for COVID-19 Response acting with a Ministerial Group (the Border Exceptions Ministerial Group) rather than making those decisions by herself as required by the COVID-19 Public Health Response (Isolation and Quarantine) Order 2020.

[9] I grant declaratory relief in these terms.

Costs

[10] The parties have reached agreement on the issue of costs. No order is sought from the Court given that agreement.

Corrections

[11] The parties were invited to point out any typographical errors in the lengthy substantive judgment that could be corrected pursuant to the "slip" rule. Three typographical errors were identified as follows:

Error	Correction
Paragraph [132(b)] refers to "Feb 2021".	Paragraph [132(b)] should refer to "Feb 2022".
Paragraph [197] states that "Grounded Kiwis argued that less drastic measures were available".	Paragraph [197] should state that "Ms Taylor argued that less drastic measures were available".
Paragraph [384] refers to "25 September 2020".	Paragraph [384] should refer to "25 September 2021".

[12] I agree that these constitute "clerical mistakes" under r 11.10(1)(a) of the High Court Rules 2016. They will be corrected in the judgment available online along with a missing "are" in the first line of [344].

[13] Additionally, the parties are agreed that three further factual matters, which are not contentious, could also be adjusted under the slip rule to accurately reflect the evidence. These are:

Error	Correction
Paragraph [158] refers to a "New Zealand citizen".	The correct reference at paragraph [158] is to "a New Zealand permanent resident", as referred to in the affidavit of [HW], Exhibit HRW-1 and the Respondent's submissions at footnotes 208 and 233.
Paragraph [261] states that Grounded Kiwis "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 reference to "citizens" should be replaced with "people", as HW is not a citizen, as per the affidavit of [HW], Exhibit HRW-1 and the Respondent's submissions at footnotes 208 and 233.
Paragraph [412] states that 40 per cent of emergency applications were processed.	Paragraph [412] should state that 60 per cent of emergency applications received were processed, with 40 per cent of applications not having been processed. This aligns with the evidence in paragraph [127][8] of the affidavit of Kathryn Rush, which notes: "[i]mportantly, 5,352 applications were not processed or cancelled following communication with the applicant (almost 40% of applications received)".

[8] The parties' joint memorandum referred to [147] but the correct affidavit reference is [127].

[14] These corrections potentially could be made as "an error arising from an accidental slip" under r 11.10(1)(a). I agree that they are accidental errors made when stating the evidence that was before me that do not alter the thoughts and intentions reflected in the substantive judgment. As these errors require rewording of sentences in the judgment as issued, my preferred practice would be to issue an addendum to the judgment. However, as the substantive judgment is now to be read with this judgment setting out the declaratory relief, the table at [13] above suffices to alert readers to them.

Mallon J