NOTE: THE CONFIDENTIALITY OF THE NAME OR IDENTIFYING PARTICULARS OF THE APPLICANTS AND OF THEIR CLAIM OR STATUS MUST BE MAINTAINED PURSUANT TO S 151 OF THE IMMIGRATION ACT 2009.

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 3154

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

Hearing:	3 and 4 November 2021
Appearances:	W L Aldred, M R G van Alphen-Fyfe and T J Bremner for the Applicants R A Kirkness, A J Ewing and C M G Sykes for the Respondents
Judgment:	22 November 2021

JUDGMENT OF COOKE J

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[1] The applicants for judicial review are two Afghan nationals who were in the process of potentially obtaining New Zealand residency and coming to New Zealand to join family members already settled here at the time of the COVID-19 outbreak and the effective closure of New Zealand's borders. Since the closure of the borders the occupation of Afghanistan an international coalition has ended, the local Afghan Government has fallen, and the Taliban have taken control. The applicants are now in grave danger in Afghanistan. But the respondents have not granted them permission to come to New Zealand to escape the new Afghan regime given the border closure.

[2] The applicants challenge the decision-making that has led to that outcome. Although there are two applicants for judicial review they represent a wider group in similar circumstances. That group comprises the wider family of Afghan nationals that assisted the New Zealand Defence Force (NZDF) when New Zealand forces were in Afghanistan. The direct family members performed roles such as interpreters and

they have been resettled in New Zealand. The wider family members are now at peril due to their familial links with those who performed those roles.

[3] These proceedings were filed at the last stages of the withdrawal of the coalition forces from Afghanistan. I heard an urgent application for interim relief at the time when the last flights were leaving and declined the application.[1] This judgment now deals with the substantive application for judicial review.

The position of the applicants

[4] I first outline the position of the two applicants, although as I note there are others who are in a similar position. I have made orders suppressing the identity of the applicants and their families. There will also be a direction that the Court file may not be searched without the leave of a Judge.

Ebrahim and family

[5] The first applicants are Ebrahim, his wife Aila and their baby son Fawad.[2] Ebrahim's brother, Farid is a New Zealand citizen. Farid and his wife and family came to New Zealand in 2013. The wider family are Shi'a Muslim and part of an ethnic minority in Afghanistan known as the Hazara. In his affidavit Farid describes the persecution of Hazara people by the Taliban. This includes the Taliban killing Hazara because they were not regarded as true Muslim due to being Shi'a. He says that Hazara people have been massacred many times.

[6] Farid started working with the NZDF in 2006, and subsequently became an interpreter for them. His brother had started working for coalition forces at an earlier time. He describes the difficulties that were faced, including the risk of being killed by the Taliban. He explains that when the New Zealand Government closed their base in Afghanistan they asked to come to New Zealand and that he duly did so in April 2013 leaving his siblings behind.

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1 *Afghan Nationals v The Minister for Immigration* [2021] NZHC 2261.
2 The names used in this judgment are not the true names of those involved.

[7] In 2016 Farid applied for Ebrahim and Aila to become New Zealand residents under the Refugee Family Support category. This is a residence category for the wider family members of those who have been granted residency as refugees. They are granted residency to give wider family support for the refugees in New Zealand. The application was placed in Tier 2 rather than Tier 1 as Farid already had family in New Zealand.

[8] The application was selected for processing by INZ in January 2019. A formal residency application in the Refugee Family Support category was then lodged in May 2019. Immigration New Zealand (INZ) sought further information which was provided in June. After a further assessment in November 2020, INZ sought more information before the application could be assessed relating to Ebrahim's accommodation plan, and more information of his relationship with Aila. The additional information was sent in December. In the meantime INZ asked that a medical assessment be completed for the family members.[3]

[9] By email dated 9 December 2020 INZ advised that the application was the second in a queue awaiting allocation to an officer. The email then said:

> Due to COVID-19 border restrictions Immigration New Zealand ceased allocation and processing of any offshore applications, however, we have now been given the go ahead to be able to start allocating RFSC applications to officers. We have a heavy backlog of applications and at this stage we will endeavour to allocate as soon as an officer is available. I am unable to offer a definitive timeframe on this process at this time.
>
> Once allocated, the application can be processed just **no decision** can be made due to border restrictions.

[10] A decision on the application, and others in a similar state, have been placed on hold since that time.

[11] Farid explains the concern that he now has for Ebrahim, Aila and Fawad. He explains the risk to them generally as they are Hazara and of the Shi'a faith, both of whom are marginalised minorities in Afghanistan, but also because of the family association with NZDF and other allied forces. He says that the Taliban are

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[3] Fawad was later born in June 2021 and INZ were updated on this.

everywhere, that they get information from locals, and that they have a list of those who worked for allied forces including the NZDF. He explains that when the United States forces left Afghanistan his family left their home and fled to the mountains. Neighbours have since reported that the Taliban has searched their family home and taken everything.

[12] He says that the family is now back hiding in Kabul. They cannot go into the street. They have seen Taliban hitting people from their house. The Taliban are patrolling the area and the family are staying hidden. He says if they are found the Taliban will kill them straight away because they are Hazara people and a part of a family that helped NZDF. He explains that he speaks to his brother on the phone once a week, and when he is unable to speak to him he is worried that they have been killed.

Fatima

[13] The second applicant is Fatima. Her sister Fazela is a New Zealand citizen married to Iqbal. They and their family are Tajik, another ethnic minority in Afghanistan which is associated with what has been called the Northern Alliance. It is also an ethnic group that is oppressed by the Taliban.

[14] In her affidavit Fazela describes how Tajik have been oppressed by the Taliban in Afghanistan. She married Iqbal in 2002 after allied forces occupied Afghanistan. Iqbal then started working for NZDF in 2003 in a senior position as a translator. In his position he not only worked as a translator, but also became involved in the interrogation of Taliban. They moved to New Zealand in May 2014.

[15] Fazela has sponsored the application for Fatima. The application is also for Fatima to be granted residence under the Refugee Family Support Tier 2 category. It was made in November 2017. The application was chosen for processing in approximately July 2018 and the formal application was filed and received by INZ in November 2018.

[16] Additional information was sought, and a security check was sought and given. In April 2019 INZ asked for a medical certificate, and Fatima went through a series of

tests. A medical assessment then indicated that Fatima might not be appropriate for approval. A second medical report was obtained and provided on her behalf.

[17] The application was declined on 18 December 2020 on the basis that Fatima did not have an acceptable standard of health. An appeal was then lodged with the Immigration Protection Tribunal. By decision dated 5 May 2021 the Tribunal held that INZ had not declined the application fairly. The medical advice that INZ had relied upon was internally inconsistent, and inconsistent with subsequent advice that had been obtained. No reasons had been given for preferring the first report which the Tribunal held was unreliable. The Tribunal concluded that INZ had not reached a correct conclusion and required INZ to reconsider the application, cancelling the decision and referring the matter back.[4]

[18] After the decision of the Tribunal no active steps had been taken by INZ given the border closure.

[19] Fazela now describes the circumstances facing Fatima. She says that she is now a target. She escaped from Parwan province when it was captured by the Taliban. The family have three houses in Kabul but she cannot live in any of them. The Taliban searched one of those houses in August. When they did so they made inquiries about where Iqbal was. The Taliban know about Iqbal who was in prison between 1997 and 2001. The Taliban are taking action against the Tajik, including beheading people in the villages, shooting people and leaving them dead in the street. She says if Fatima is found she will be killed. She is sure of that because of her connection to Iqbal and his work with NZDF, and because she is Tajik.

The fate of the applications

[20] The respondents' evidence describes what happened with the processing of applications such as those relating to Ebrahim and his family, and Fatima.

[21] The National Manager (Business and Specialist) of Border and Visa Operations for INZ, Ms Stephanie Greathead first explains the practical difficulties that occurred

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4 *Re CM (Refugee Family Support)* [2021] NZIPT 206042.

with the closure of the borders surrounding the first COVID-19 lockdown in March 2020 which meant that applications were not processed. By May 2020 staff had returned to offices. But in June 2020 the view was taken that visas could not be granted because the applicants would not qualify for entry permission given a change to Immigration Instructions made in March.[5] Advice was given to all immigration officers on 19 June stating:

> The Border Entry instructions at Y4.50 mean that the New Zealand border is currently closed to most travellers to help stop the spread of COVID-19. Due to these instructions, almost all applications for entry permission must be refused. Therefore, while the border closure is in effect, an offshore visa application cannot be approved, unless the application is approved under the Restricted Temporary Entry Instructions at H5.

[22] Ms Greathead explains that by February 2021 INZ had processed the application for Ebrahim and his family to the furthest point, and that any further processing was on hold due to COVID-19. On 1 April INZ wrote to Ebrahim's lawyer advising that the legislation did not allow INZ to grant the visa until current border restrictions were lifted. She also explains that following the Tribunal's decision, Fatima's application has not been allocated to an immigration officer, but given that applications are allocated in the date order from the oldest application, and that it had been returned by the Tribunal, it would likely be prioritised for allocation ahead of other applications.

[23] As I will outline in greater detail below, a new type of temporary visa — called the Critical Purpose Visitor Visa (the CPVV) — had been created in 2020. In effect it was created because of the difficulty of dealing with exceptions to the COVID-19 border closure at the border on arrival, or at airports overseas when passengers were boarding aircraft. Creating a class of temporary visa that could be obtained by applicants in advance of travelling to New Zealand allowed exceptions to the border closure to be addressed in an orderly way. An application for a CPVV was made by providing an Expression of Interest for the grant of such a visa.

[24] The CPVV was not a visa created to address the position in Afghanistan, but for the purpose of granting exemptions to the COVID-19 border closure more

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5 Immigration New Zealand (INZ) Operational Manual "Y4.50 People who must be refused entry permission: novel coronavirus (COVID-19) outbreak" (19 March 2020) – see [55] below.

generally. The withdrawal of coalition troops, and the subsequent fall of the Afghan Government to the Taliban in August 2021 created an immediate issue concerning the potential evacuation of Afghan nationals. On 16 August 2021 Cabinet met and agreed to deploy aircraft to evacuate New Zealand citizens and residents along with approved Afghan nationals. The Cabinet met again on 19 August and considered which Afghan nationals would qualify for evacuation if space permitted, determining they would be those that already held a valid New Zealand visa. Using the power under s 61A of the Immigration Act 2009 (the Act) the Immigration Instructions were amended accordingly.[6]

[25] At the hearing of the interim relief application on 30 August I was advised that an appropriate pathway for the consideration of permission to enter New Zealand for the people in the position of the applicants was to respond to the expressions of interest for the CPVV. Ebrahim and his family and Fatima both applied for the CPVV visa by providing an expression of interest. But both have been declined for the reasons I will explore in greater detail below.

[26] The respondents' affidavits generally explain that the Government is well aware of, and concerned about the plight of those in Afghanistan. Steps have been taken in an attempt to address the situation, including by seeking to evacuate Afghan nationals with the rapid withdrawal from Afghanistan. 748 CPVV's were granted to Afghan nationals who met the Cabinet criteria. Around 259 of the persons granted visas have been evacuated to New Zealand at the time the respondents' evidence was sworn.

Relevance of fundamental rights

[27] The parties submissions addressed two preliminary questions on the applicability of international law obligations and the New Zealand Bill of Rights Act 1990 (the Bill of Rights). If applicable such international obligations and/or the Bill of Rights have the capacity to influence the interpretation issues that are at the heart of this challenge.

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6 Adding instruction Y3.30.a.xii. This was subsequently amended on 26 August.

[28] For reasons that I outline below it seems to me that the questions of interpretation are resolved in the applicants' favour irrespective of any potential applicability of obligations under international law, or arising under the Bill of Rights. For this reason I do not see these preliminary issues are important to the ultimate outcome of this challenge. I nevertheless accept that these are issues that should be addressed, albeit that I do so more briefly than I might have had they influenced the ultimate outcome.

International law obligations

[29] The applicants contend that the interpretation and application of the Act and Immigration Instructions should be influenced by the fact that New Zealand has international obligations to protect those in the position of the applicants. They say that international humanitarian law recognises a duty to protect a civilian population from harm arising during armed conflict, including duties under the Geneva Convention.

[30] Ms van Alphen Fyfe referred to commentators who refer to the obligation of States to protect civilian populations, including obligations that endure after the end of the armed conflict.[7] In addition to the Geneva Convention she also relied on other international obligations, including those arising under the International Covenant on Civil and Political Rights, the Convention on Elimination of All Forms of Discrimination Against Women, and the Convention on the Rights of the Child.

[31] Reliance was placed on the decision of the United Nations Human Rights Committee in *AS v Italy* where the Committee referred to links in a causal chain that made it possible for violations in another jurisdiction to become the responsibility of a State.[8] The Committee found Italy had breached the right to life under the International Covenant by failing to respond promptly to a vessel in distress notwithstanding that it was not in Italian waters.

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7 Marko Milonovic "The end of application of international humanitarian law" (2014) 96 (893) International Review of the Red Cross 163 at 174-175; Dieter Fleck *The Handbook of International Humanitarian Law* (4th ed, Oxford University Press, 2021) at 8.02; Emily Crawford "The Temporal and Geographic Reach of International Humanitarian Law" in Ben Saul and Dapo Akande (ed) *The Oxford Guide to International Humanitarian Law* (Oxford University Press, 2020) 57 at 60-62.

8 *AS v Italy* CCPR/C/130/DR/3042/2017 (Human Rights Committee, March 2020).

[32] In response Mr Kirkness for the respondents argued that nothing in the Geneva Convention could apply as the conflict in Afghanistan was a non-international armed conflict, it had come to an end, and that no obligation to protect civilians could apply to State party participation in an armed conflict after it had ceased. Those in Afghanistan were not within New Zealand's jurisdiction as a matter of international law, and territoriality was the normal requirement for jurisdiction. Whilst extra-territorial responsibilities could arise they did not in the present case.

[33] It is clear that a State such as New Zealand can have responsibilities to civilian populations during an armed conflict. Given the nature of the conflict in Afghanistan it is an obligation that would most likely arise as a matter of customary international law. I also accept that such obligations could potentially continue after the cessation of hostilities. But without finally determining the point the circumstances here seem to me to be too remote for there to be any continuing international law obligation on New Zealand to effectively protect those remaining in Afghanistan. New Zealand has left that jurisdiction, and in relation to its last personnel it was forced to do so in 2021. New Zealand might be thought to have a form of moral responsibility for the citizens of Afghanistan who assisted them in the years while they were there, but the suggestion there is an international law obligation to the wider family of those persons after hostilities have ceased stretches the argument on international humanitarian law obligations too far.

[34] These realities are reflected in the immigration decisions that are currently in play. The people in the position of the applicants do not qualify as refugees. Their potential resettlement in New Zealand is through the Refugee Family Support category which is principally designed to provide wider family support to refugees who have already been resettled in New Zealand. The withdrawal of coalition forces from Afghanistan, and the humanitarian crisis now faced there involves a significant change of circumstances for those in the position of the applicants. That is so for many people in Afghanistan given the human rights conditions that now exist. But I do not accept that this creates an international law obligation arising from the need to protect civilian populations during armed conflict.

[35] The position in *AS v Italy* involved a far closer, and immediate connection between the actions of Italy and those whose lives were at risk. I do not accept that the situation is sufficiently similar here for the reasoning to apply. There are now thousands of people in Afghanistan facing a human rights crisis. That does not seem to me to engage an international obligation on New Zealand.

Bill of Rights

[36] The parties were also in disagreement on whether the Bill of Rights applied in relation to the respondents' decisions. The respondents say the Bill of Rights has no application given that the people in the position of the applicants are overseas, and the Bill of Rights has no extra-territorial operation. The applicants disagree contending that the Bill of Rights does have extra-territorial operation, and that it applies in the circumstances of this case.

[37] The Bill of Rights applies to the executive branch, and to those exercising public functions, powers and duties imposed by law in accordance with s 3. It accordingly applies to the respondents. But the question is whether those in the position of the applicants can claim to be entitled to the rights set out in the Bill of Rights notwithstanding that they are not New Zealanders, and they are outside the jurisdiction.

[38] The applicants rely on New Zealand authorities that have accepted that the Bill of Rights may have extra-territorial operation. In *Young v Attorney-General* the Court of Appeal indicated that New Zealand officials could not avoid the application of the Bill of Rights simply by conducting inconsistent acts overseas.[9] Similarly in *Smith v Attorney-General* the Court of Appeal accepted that the Bill of Rights may have extra-territorial operation for similar reasons.[10] The respondents argue that these authorities are not comparable, and that Afghan Nationals in Afghanistan could not be properly considered to have rights under New Zealand's Bill of Rights.

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9 *Young v Attorney-General* [2018] NZCA 307, [2018] 3 NZLR 827 at [40].
10 *Smith v Attorney-General* [2020] NZCA 499 at [92].

[39] I accept the Bill of Rights can have some application here. It applies because New Zealand has chosen to apply the Act to the applicants, and address their circumstances under New Zealand law. New Zealand law must be interpreted and applied in accordance with the interpretative mandates set out in ss 4, 5 and 6 of the Bill of Rights. The proper interpretation of the Act cannot vary based on the physical location of the persons to whom is being applied. There is accordingly an assumption of personal jurisdiction over the applicants, and those exercising powers must do so in a manner that is consistent with the Act, as interpreted in accordance with the Bill of Rights. That means, for example, that the rights of natural justice referred to in s 27 are engaged.

[40] But the application of the Bill of Rights only arises to the extent that such jurisdiction has been assumed. I am not convinced that other rights in the Bill of Rights are materially engaged by the assumption of personal jurisdiction. The applicants rely on the right not to be deprived of life under s 8 of the Bill of Rights. I agree that there appears to be a threat to the lives of the people in the position of the applicants. I am less convinced that s 8 is engaged by the decision making under the Act in relation to the grant of permission to come to New Zealand. There might be an analogy with immigration decisions which involve deportation to countries that have the death penalty.[11] But the immigration decisions here still do not seem to me to engage the right not to be deprived of life except on such grounds as are established by law and are consistent with the principles of fundamental justice.

Ouster clauses

[41] The Act includes ouster clauses which appear to restrict the ability to bring judicial review proceedings. With respect to the applications for residency the Act provides:

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[11] See, for example, *Khadr v Canada* [2010] 1 SCR 44; and *Minister of Justice v Kim* [2021] NZSC 57 in relation to the rights under s 9 of the Bill of Rights.

Appeals in relation to residence class visas

187 Rights of appeal in relation to decisions concerning residence class visas

(1) There is a right of appeal to the Tribunal against a decision concerning a residence class visa in the following circumstances:

…

(8) A person may bring review proceedings in a court in respect of a decision in relation to a residence class visa except if the decision is in relation to—

(a) the refusal or failure to grant a residence class visa to a person outside New Zealand; or

(b) the cancellation of a resident visa granted outside New Zealand before the holder of the visa first arrives in New Zealand as the holder of the visa.

[42] A similar provision exists in s 186(3) in relation to temporary entry class visa decisions. Further applications for the CPVV were made by responding to an expression of interest, and the Act also provides:

191 No appeal or review rights in relation to invitations to apply

(1) No appeal lies against a decision of the Minister or an immigration officer on any matter in relation to whether to issue an invitation to apply for a visa, whether to a court, the Tribunal, the Minister, or otherwise.

(2) No review proceedings may be brought in any court in respect of any refusal or failure of the Minister or an immigration officer to issue an invitation to apply for a visa or to revoke an invitation if an invitation is issued.

[43] On the face of these provisions the applicants would not be able to proceed with their judicial review claims. They are outside New Zealand such that their challenge to the visa decisions appears to be caught by s 187(8)(a) and s 186(3)(a), and the relevant CPVV decisions involved an alleged failure by the respondents to offer an invitation to apply for such a visa within s 191(2).

[44] The respondents seek to rely on these provisions. Mr Kirkness and Ms Ewing argued that, properly interpreted, they prevent the Court from granting judicial review relief in relation to the individual applicants, although they did not prevent the Court addressing the questions of law that have been argued in this proceeding, and from

giving more general declaratory relief. Ms Aldred argued that these provisions did not prevent the Court granting relief extending to the individual applicants.

[45] The effect of ouster or privative clauses has been addressed in a number of leading New Zealand authorities.[12] In *H (SC52/2018) v Refugee and Protection Officer* the Supreme Court said that Courts should be "slow to conclude that an ouster provision precludes applications to the High Court for judicial review alleging unlawfulness of any kind" and went on to find in that case:[13]

> … the privative clause does not prevent the Court from exercising its supervisory jurisdiction to ensure that the requirements of the Act are met and the applicant's claim is considered lawfully. Since the decision of the Court of Appeal in *Bulk Gas Users Group v Attorney-General*, it has been settled law that a privative provision does not necessarily prevent scrutiny of a decision based on an error of law on the part of the decision-maker that is otherwise reviewable. The Court may strike out review proceedings where the Court is satisfied that the available appeal rights provide a more appropriate pathway to a remedy than might otherwise have been sought in the review proceedings. But for the reasons given, the deprivation of first instance determination as required by the statute could not be remedied by the alternative pathway of appeal in the present case.

[46] A similar approach has been adopted in the United Kingdom. In *R (Privacy International) v Investigatory Powers Tribunal* the United Kingdom Supreme Court held that such clauses can only protect legally valid decisions.[14]

[47] I understand the authorities to mean that ouster clauses cannot be interpreted to exclude the Court's jurisdiction in its entirety. It is the constitutional function of the Court to ensure that the rule of law is observed. Decision makers must exercise powers lawfully, and cannot act above the law. So such clauses are not to be taken to mean that statutory decision makers are entitled to act inconsistently with the legislation from where they derive their power. That must be beyond Parliament's intent, and perhaps even its competence. As Lord Carnwath said in *Privacy International*:[15]

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12 *Bulk Gas Users Group v Attorney-General* [1983] NZLR 129 (CA); *Tannadyce Investments Ltd v Commissioner of Inland Revenue* [2011] NZSC 158, [2012] 2 NZLR 159; *H (SC5 2/2018) v Refugee and Protection Officer* [2019] NZSC 13, [2019] 1 NZLR 433.

13 *H (SC 52/2018) v Refugee and Protection Officer*, above n 12, at [63] and [78] (footnotes excluded).

14 *R (Privacy International) v Investigatory Powers Tribunal* [2019] UKSC 22, [2020] AC 491.

15 At [144].

> … consistently with the rule of law, binding effect cannot be given to a clause which purports wholly to exclude the supervisory jurisdiction of the High Court to review a decision of an inferior court or tribunal, whether for excess or abuse of jurisdiction, or error of law. In all cases, regardless of the words used, it should remain ultimately a matter for the court to determine the extent to which such a clause should be upheld, having regard to its purpose and statutory context, and the nature and importance of the legal issue in question; and to determine the level of scrutiny required by the rule of law.

[48] So an application to the Court, be in declaratory judgment or judicial review proceedings, which properly raises the question whether the statute is being complied with engages the Court's constitutional role. This does not mean that no effect is given to clauses such as those in issue here. Here Parliament is indicating through these provisions that applications for judicial review are not part of the scheme for the making of immigration decisions, and the rights of appeal from such decisions. The Court must respect this aspect of the legislation — this is also part of the rule of law. A judicial review challenge to individual immigration decisions will be struck out if it falls within the terms of the ouster clause, and is in the nature of an appeal of an individual case of the kind Parliament intended to exclude.

[49] But that cannot exclude a challenge that involves an allegation that the statute is not being properly applied. It is for the Court to decide whether a particular judicial review challenge falls within the area of legitimate protection contemplated by an ouster clause. That is itself a question of law for the Courts. In the present case the Court must consider whether a challenge is to individual decision making that Parliament has indicated should not be part of the scheme, or alternatively that it engages its constitutional function to correct a failure to properly apply the law.

[50] The dividing line will not always be easy to draw. But it is not difficult in the present case. The two applicants are part of a larger group whose applications have been declined, or not granted, because of what is alleged to be significant misinterpretations of the Act and associated Immigration Instructions. The challenge is not a de facto appeal of an individual case brought as a judicial review proceeding. In their submissions counsel for the respondents accepted it was permissible and appropriate for the Court to decide on the proper meaning and effect of the legislation in much the same way as a declaratory judgment proceeding. But they nevertheless argued that no relief could be given in relation to any individual cases. I do not accept

this is a dividing line which identifies the limits on the legitimate role of the Court. When the interpretation of the legislation is properly in issue it may be necessary to consider individual cases in order to properly address that issue. The relief the Court then grants to reflect what it has found will likely then address the individual case. Doing so still involves the legitimate role of the Court in upholding the rule of law. I approach the present case on that basis.

First challenged decisions: Failure to issue residence visas in Refugee Family Support Category

[51] The applicants first challenge the decisions of INZ declining to issue them with the residency visas because of the changes made to Immigration Instructions arising from the COVID-19 border closure and the effect of those changes on the processing of their residency visa applications.

The border closure

[52] On 30 January 2020 the Director-General of the World Health Organisation declared COVID-19 a public health emergency of international concern. New Zealand's first case of COVID-19 was reported on 28 February. On 11 March the World Health Organisation declared COVID-19 a global pandemic.

[53] Decisions were then made by Cabinet relating to immigration. The primary means by which the Act implements Government policy in relation to immigration is through Immigration Instructions established under s 22. Those Instructions set the rules for the decisions made under the Act, including rules on the issue of visas, both temporary and permanent visas, and other decision making, such as the decision made by immigration officials at the border to allow persons who are not New Zealand citizens to enter New Zealand, which is called "entry permission".[16]

[54] On 19 March 2020 Cabinet met and agreed that the border should be closed due to the COVID-19 threat, albeit that exceptions could be addressed on a case by case basis, including for humanitarian reasons.

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16 Immigration Act 2009, s 4.

[55] This decision was given effect to by the Minister of Immigration certifying an amendment to the Immigration Instructions relating to entry permission. Y4.50, which regulates when people must be refused entry permission due to the COVID-19 outbreak, was amended with effect from 19 March 2020 to the following effect:

a. Entry permission must be refused to any person, except a person listed in Y4.50(b), who is not otherwise dealt with under Y4.1. and who is:

   i. the holder of a temporary entry class visa

   ii. a person described under Schedule 2 of the Immigration (Visa, Entry Permission, and Related Matters) Regulations 2010 (visa-waiver travellers, including Australians)

   iii. the holder of a residence class visa whose visa was granted offshore and who is arriving in New Zealand for the first time.

b. The following persons must be granted entry permission:

   i. Those listed in Y3.10(a)

   ii. The partner, legal guardian or any dependent children who are travelling with a New Zealand Citizen or a person listed at Y3.10(a)

   iii. Australian citizens or a person who holds a current permanent residence visa (including a resident return visa) issued by the Government of Australia, where New Zealand is their primary place of established residence

   iv. Diplomats accredited to New Zealand and currently resident in New Zealand.

c. A person subject to (a) above may still be granted entry permission by an immigration officer as an exception to instructions (see Y4.45), for reasons including but not limited to:

   i. Humanitarian reasons

   ii. Essential health workers as confirmed by the Ministry of Health

   iii. Other essential workers as defined by the New Zealand Government

   iv. iv. Citizens of Samoa and Tonga for essential travel to New Zealand

   v. Partners or dependants of a temporary work or student visa holder, and currently resident in New Zealand where the temporary work or student visa holder is currently in New Zealand.

[56] Instruction Y4.50(a)(iii) would apply to those in the position of the applicants as they would be being granted a visa while they were offshore, and then entering New Zealand for the first time. The exceptions under Y4.50(b) were not applicable to them. I will address the potential application of the exception in Y4.50(c) in greater detail below.

[57] Other Immigration Instructions in force at this time contemplated a person making an application for border entry when arriving at the border (emphasis added):

> **Y3.5.1 Considering an application for entry permission**
>
> a. Immigration officers must consider the application for entry permission in accordance with:
>
> i. the requirements of the Immigration Act 2009 and immigration regulations; and
>
> **ii. the Border Entry instructions in force at the time the application is made or any general instructions given by the chief executive; and**
>
> iii. any relevant special direction.

[58] On the face of it this meant that Y4.50(a)(iii) would apply to people in the position of the applicants when seeking entry permission on arrival, apparently confirming that they should be denied entry. It is this change that led to the advice to all immigration officers telling them that applications could not be granted because entry permission needed to be refused quoted at [21] above.

The issue

[59] The first question is whether INZ has acted lawfully in declining to process and issue the residence visas sought by the applicants because of Y4.50 of the Immigration Instructions.

[60] Residence visas are granted under s 45 of the Act. The effect of the grant of the visa is explained (emphasis added):

> **43 Effect of visa**
>
> (1) A visa (other than a transit visa) granted outside New Zealand indicates that—

(a) the holder of the visa has permission to—

(i) travel to New Zealand in accordance with the conditions of the visa (if any); and

(ii) apply for entry permission; and

(b) at the time the visa is granted, there is no reason to believe that the holder will be refused entry permission if the holder's travel is consistent with the conditions of the visa relating to travel; and

(c) if the holder is granted entry permission, the holder has permission to stay in New Zealand in accordance with the conditions of the visa (if any).

…

[61] Here the respondents say that they could not grant the residence visas because there was reason to believe that the applicants would not be granted entry permission given Y4.50. For that reason s 43(1)(b), which is effectively a pre-condition for the grant of a visa, could not be satisfied.

[62] Entry permission is a separate requirement that applies at the border. It is dealt with under Part 4 of the Act in ss 107–113A. It is the decision made by an immigration officer on arrival — for example at the airport when arriving passengers go through customs and immigration. Even if a visa is held the immigration officer needs to grant entry permission in accordance with applicable Immigration Instructions.

[63] Instruction Y4.50(a) purports to prevent those holding residence visas granted offshore entering New Zealand for the first time from being granted such permission. If it applied to those in the position of the applicants, officials processing the applicants' visa applications could legitimately conclude that s 43(1)(b) could not be satisfied.

[64] Visa applications are addressed in accordance with the Residence Instructions that were in place when the application was made. The Act provides:

72 Decisions on applications for residence class visa

(1) Where the Minister or an immigration officer makes any decision in relation to an application for a residence class visa, that decision must be made in terms of the residence instructions applicable at the time

the application was made and any discretion exercised must be in terms of those instructions.

…

[65] This is also confirmed in the part of the Act that deals with entry permission. The Act provides (emphasis added):

> **108 Decisions on entry permission in relation to residence class visa holders**
>
> …
>
> (5) If the holder of a resident visa arrives in New Zealand for the first time as the holder of the visa and the visa was granted outside New Zealand,—
>
> (a) the Minister or, subject to any special direction, an immigration officer may, in his or her discretion,—
>
> (i) grant entry permission to the person; or
>
> (ii) refuse entry permission to the person; and
>
> (b) the Minister may, by special direction, impose further conditions on the visa, or vary or cancel any conditions that would otherwise apply to the visa.
>
> (6) **The Minister's or immigration officer's decision under subsection (4)(a) or (5)(a) must be made, and any discretion exercised, in terms of the residence instructions applicable at the time the person applied for the visa.**
>
> …

[66] The applicants' argument is that these provisions, and particularly s 108(6), make it clear that the Instructions relating to the grant of a residence visa are those that were applicable at the time that the application was made, and that the mandate in Y3.5.1(a)(ii) is *ultra vires*. The respondents disagree. They argue that the sections referred to above only give protection in relation to the rules for granting the visa. The entry permission Instructions are not so protected, and can be subsequently changed to prevent entry (and accordingly to prevent the grant of the visa given s 43(1)(b)).

[67] The people in the position of the applicants have had residency applications before INZ for some time. Ebrahim and Alia's application was filed in 2016, and was selected for processing by INZ in January 2019. Fatima's application had been made

in November 2017 and was selected for processing in approximately July 2018. INZ had processed their applications to a late stage when they took the view that the border was now "closed" such that the applications could not be granted because of the combined effect of the new Y4.50(a)(iii) and Y3.5.1(a)(ii). The applicants contend that this is not lawful. They say that there is a clear legislative scheme that those applying for residency are entitled to have their applications determined in accordance with the Instructions, including those concerning entry permission, that were in place at the time the application was made. That is because those applying for residency are in the process of re-establishing their lives as New Zealand residents, and are required to go through an extensive process to obtain a residency visa. They are entitled to have the certainty of knowing what the rules are before embarking on that process.

[68] The respondents contend that that cannot be what Parliament intended. Mr Kirkness referred to the approach to statutory interpretation outlined by the Court of Appeal in *Northland Milk Vendors Association Inc v Northern Milk Ltd*,[17] as explained in an article by Sir Douglas White.[18] This approach to statutory interpretation focuses on making the legislation work as Parliament must have intended. As I have said in a number of cases I agree with this general approach, particularly with legislation that forms part of a statutory scheme.[19] It is an approach that is not limited to situations where gaps in the legislation need to be filled. But I doubt that the formulation of the approach to statutory interpretation makes a great deal of difference to the interpretation issues here. It is still a matter of identifying the intent of Parliament by considering the text of the enactment in light of its purpose and context.[20]

[69] In the present case the ultimate issue is whether the applicants are correct that the provisions of the Act are intended to give residency applicants the security of knowing that their applications will be dealt with in accordance with the rules in place when their application was made, or whether the respondents are correct to say that

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17 *Northland Milk Vendors Association Inc v Northern Milk Ltd* [1988] 1 NZLR 530.

18 Douglas White "A personal perspective on legislation: Northern Milk Revisited – Stale or Still Fresh?" (2016) 47 VUWLR 699 at 702.

19 See, for example *Lindsay v Commissioner of Inland Revenue* [2021] NZHC 830, (2021) NZTC 25-004 at [15].

20 Legislation Act 2019, s 10.

the Act preserves the ability to change those rules to prevent entry because of changed circumstances. The correct interpretation arises from the text of the Act, interpreted in light of its purpose and context, thereby making the Act work as Parliament must have intended.

INZ's argument

[70] The respondents' argument is based on the definition of Residence Instructions contained in s 4. That is:

> **residence instructions** means immigration instructions certified under section 22 that relate to the grant of residence class visas

[71] The respondents emphasise the concluding words. They say that s 108(6) is only referring to residence instruction that "relate to the *grant* of residence class visas" (emphasis added) and not those that relate to entry permission. They also argue that the Act would not be working as Parliament would have intended if this is not the meaning given to the provisions. Mr Kirkness argued that the respondents must have the power to change the rules in order to prevent entry because of changed circumstances such as the crisis arising from the COVID-19 pandemic. He referred to two examples where it would be appropriate to decline a person entry permission because of a change to the entry Instructions notwithstanding that the person held a residence visa. The first was a situation where an individual was added to the list of people that the United Nations Security Council had determined should not be allowed to travel to other countries. The list in Y4.10 includes people associated with terrorist organisations (such as Al-Qaida and the Taliban) or who are from particular countries subject to sanctions (such as North Korea). He argued that the government must be able to prevent entry of a person who had been added to the list. His second example was a person travelling from a country that had had an outbreak of a serious infectious disease, such as Ebola. Again, he argued that the respondents must be able to stop such entry if the scheme was to work sensibly as Parliament must have intended.

Assessment

[72] I do not accept these arguments for a series of related reasons.

[73] First, the fact that s 108(6) is in the part of the Act dealing with entry permission is a clear indication that it is referring to the Residence Instructions concerning such permission. There is a separate provision to the same effect in s 72(1) in relation to the grant of a visa. When I asked Mr Kirkness why s 108(6) would exist in the part of the Act concerning entry permission he suggested that there would be circumstances when the officer making entry permission decisions would need to know which Residence Instructions applied. He referred to Y4.25(b) of the Instructions as an example, which relates to declining entry permission to a person who no longer met the requirements of the visa held (for example because a job was no longer available).

[74] I do not agree that this suggestion, or the example answers this point. The example given relates to a condition of the visa, and it does not turn on the version of the Residence Instructions to be applied. More generally s 108(6) is unlikely to be explained by such obscure or uncommon situations. It clearly appears to be confirming the general principle also referred to in s 72(1). It is very difficult to interpret s 108(6) as not applying to Residence Instructions in relation to entry permission given its wording, and the repetition of the principle it sets out in the part of the Act dealing with such permission.

[75] Secondly, it is clear that Residence Instructions are immigrations Instructions, and that under s 22(1)(b) those Instructions are to deal with entry permission. The Act then contemplates how such Instructions are to be classified:

> **23 Immigration instructions classified as residence instructions, temporary entry instructions, or transit instructions**
>
> (1) The Minister must classify immigration instructions as—
>
> (a) residence instructions; or
>
> (b) temporary entry instructions (and, if appropriate, as restricted temporary entry instructions); or
>
> (c) transit instructions.
>
> (2) To avoid doubt, any temporary entry instructions are not residence instructions, regardless of whether the granting of a visa or entry permission under those instructions may affect eligibility for, or otherwise relate to, the grant of a residence class visa

[76] As Ms Aldred submitted, this means that the Instructions relating to entry permission for residence visa holders must be classified as "Residence Instructions". Ms Aldred accepted that Instructions could be within more than one of the categories in s 23(1), but what the section makes plain is that the Instructions relating to entry permission for those holding a residency visa were required to be classified as "Residence Instructions". This further indicates that s 108(6) is referring to the Instructions concerning entry permission so classified as Residence Instructions.

[77] Thirdly, the concluding words of the definition of "Residence Instructions" in s 4 cannot carry the significance attributed to them in light of these other provisions. The Instructions which concern entry permission for those holding residence class visas will still be the Instructions that "relate to" the grant of residence class visas on the ordinary meaning of those words. An officer deciding whether to grant a residence class visa will still need to be satisfied that the person satisfies the entry permission requirements for that visa. Moreover had Parliament intended to establish such an important proviso to the principle that those applying to be a New Zealand resident would have their applications addressed in accordance with the Instructions that were in place when the application was made it would have done so in far clearer terms. It has, in fact, done the opposite through s 108(6).

[78] Fourthly, as Ms Aldred submitted, the practical problems arising from Mr Kirkness's two examples are not practical problems at all. The Instructions concerning entry permission can provide that people on United Nations list will be refused entry even if their name is added later — the applicable instruction is still the one that existed at the time an application was made. The rules themselves will not have changed. Indeed that appears to be the case in relation to Y4.10 — it provides that a designated individual or specified entity who may be declined entry is someone named on the list of persons held by INZ and "includes" those then listed. Such a rule could also be formulated for entry of people coming from a country which has an infectious disease. That "rule" need only be in the Residence Instructions made at the time when the applications are lodged.

[79] I also see some significance in the terms of s 23(2) quoted above. This sub-section was introduced by Parliament following the decision of this Court in

New Zealand Association for Migration and Investments Inc v Attorney-General.[21] There Randerson J addressed the similar regime that existed under the Immigration Act 1987. He concluded that a change to what would now be regarded as temporary entry instructions was to be regarded as a change to the policy for the grant of residence visas. This meant that changes made to those instructions after the residence visa application has been filed could not be used to deny entry. Parliament then passed an amendment to reverse the effect of this decision.[22] That change is now reflected in s 23(2). Significantly, the amendment is limited to providing that changes to *temporary* entry instructions do not amount to changes to the Residence Instructions. The approach of Randerson J will still be correct for changes to Residence Instructions, including instructions about entry permission which have been classified as Residence Instructions.

Conclusion

[80] The Act requires decisions in relation to residence visas, including entry permission decisions, to be made on the basis of the Instructions in place when the application for residency is made. It follows from the above that Y3.5.1(a)(ii) of the Instructions, which is to the contrary effect, is *ultra vires* as it is inconsistent with the Act. The decisions of the second respondent not to complete the processing and grant of residency visas because of the effect of Y3.5.1(a)(ii) and Y4.50 have been unlawful. They have ceased granting the applicants' resident visa applications because they have wrongly concluded that these applications cannot be granted because of the "closure" of the border. But just like other New Zealand residents, the applicants will be allowed to enter New Zealand once a residence visa is granted. There is accordingly no basis to deny granting the visa because of the border closure. The effect of the moratorium on granting their visas involves a misinterpretation of the Act. The applicants are entitled to the protections afforded to them by the Act as a matter of law.

[81] Any decision preventing those in the position of the applicants from coming to New Zealand would need to be made by Parliament. As Ms Aldred submitted, when

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21 *New Zealand Association for Migration and Investments Inc v Attorney-General* HC Auckland, M1700/02, 16 May 2003.

22 Immigration Amendment Act 2015, see Immigration Amendment Bill (No 2) Explanatory Note 62-1 at 2.

Parliament has considered the impact of COVID-19 when amending immigration legislation, it has not taken the step that the respondents contend for here.[23]

[82] This means that the first respondent must now complete the processing of the applications and make the decisions that are now required under the Act. Based on the material before the Court this will likely involve the grant of the residence class visas to the applicants whose cases have been explained to me, although of course the final decisions are for the statutory officers to make. I will address what relief may be appropriate given the circumstances below.

Second challenged decisions: Failure to issue critical purpose visitor visas on humanitarian grounds

[83] The above conclusions are sufficient to dispose of this judicial review challenge. The decisions of the second respondent leading to a failure to process and make decisions on the applicants' residence visas in the Refugee Family Support category are unlawful.

[84] But it remains appropriate to address the alternative grounds of challenge. They involve allegations that even if the border closure prevented the grant of entry permission (and accordingly the grant of the visa given the effect of s 43(1)(b)) there were exceptions to the border closure for humanitarian reasons which applied to persons in the position of the applicants. It is alleged that the second respondent has erred in law in failing to lawfully address the circumstances of the applicants under those exceptions.

[85] As indicated above, there was an exception to Y4.50(a) which allowed the grant of entry permission for humanitarian reasons under Y4.50(c)(i). The applicants challenge the failure to assess their applications under this provision. I will address this basis for challenge later in the judgment as the third ground of challenge. But the applicants also challenge INZ's approach to the humanitarian exception to the CPVV, and there were more extensive submissions addressed to the exception in the CPVV, and I will address that issue first before returning to the third ground of challenge.

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[23] See Immigration Act 2009, sch 1AA, pt 1 of cl 3, as inserted by s 17 of the Immigration (COVID-19 Response) Amendment Act 2020.

The humanitarian exception to the CPVV

[86] The evidence of the respondents explain the background to the CPVV. It was recognised that there needed to be exceptions to the border closure implemented with the COVID-19 measures, and such exceptions were provided for in Y4.50. A practical problem was identified with this approach, however. The problem was described in the following way in INZ's recommendations to the Minister of Immigration on 27 March 2020:

> 13. The current approach requires people to attempt to board a plane en route to New Zealand in order to be considered as an exception. People will only know if they have been considered as an exceptional case once they are checking in, arguably at a very late stage after considerable time and expense. This is problematic for several reasons. For those who do meet the exceptions criteria, they have no assurance until after the travel has been booked, paid for, and are checking in. The current process does not provide access to pre-vetting a traveller to check that they meet the exceptions criteria in advance of travel.

[87] This led to the creation of the CPVV — in effect a temporary visa that could be obtained in advance of travel to allow exceptions to the COVID-19 border closure.

[88] This new visa was implemented by a change to H5 of the Immigration Instructions. Individuals seeking a CPVV first had to lodge an expression of interest, and then receive an invitation to apply for the visa. The list of critical purposes for travelling to New Zealand included one arising from humanitarian considerations. The relevant Instruction provided:

> **H5.30.25 Humanitarian reasons**
>
> a. Humanitarian reasons are exceptional circumstances of a humanitarian nature that make it strongly desirable for the applicant to travel and enter New Zealand.
>
> b. When considering whether a person has humanitarian reasons for travelling to New Zealand, immigration officers must consider the purpose of these instructions and the strong public interest in protecting the health of New Zealanders and supporting Government agencies' response to the risks posed by the COVID-19 situation.
>
> c. Relevant factors when considering if humanitarian reasons justify the grant of a visa under these instructions include:
>
> i. the applicant's connection to New Zealand

ii. the applicant's connection to the place they are currently located

iii. whether New Zealand is their primary place of residence, and their period of absence from New Zealand

iv. whether the applicant has any alternative options

v. the impact of not granting a visa and entry permission to the applicant.

[89] At the hearing of the interim relief application the respondents indicated through counsel that it might be appropriate for the applicants to apply for such a visa given their situation. The applicants duly provided an expression of interest in accordance with the Instructions. But they were then declined. By letters dated 1 September 2021 the applicants were advised that they did not meet the requirements of H5.30.25.

INZ's approach

[90] The approach of INZ involved an interpretation of H30.25 that excluded those in the position of the applicants from qualifying for the exception. It was not altogether clear, however, precisely what that interpretation has been. The decision paper leading to the 1 September letter declining Fatima's application stated:

> • The wording of the "humanitarian" test in restricted temporary entry instructions requires exceptional circumstances of a humanitarian nature that make it strongly desirable for the applicant to travel to and enter New Zealand". While it is clear that there is a humanitarian crisis in Afghanistan, this is not in itself exceptional. Nor do these circumstances make it strongly desirable for the applicant to travel to and enter New Zealand specifically.
>
> **Decision**
>
> I have considered the strong public interest in protecting the health of New Zealander and supporting Government agencies response to the risks posed by the COVID-19 situation. I do not consider that submitter's circumstances are exceptional circumstances of a humanitarian nature that make it strongly desirable for the applicant to travel to and enter New Zealand. Exceptional humanitarian circumstances are well outside the normal run of circumstances and while they do not need to be unique or very rare, they do have to be truly an exception rather than the rule.

[91] This suggests that INZ was adopting the somewhat surprising suggestion that the circumstances faced by those in the position of the applicants — which include a

threat of death arising, at least in part, because of their families association with NZDF — were not exceptional circumstances of a humanitarian kind.

[92] A fuller understanding of the approach is provided by Jock Gilray, the National Manager (Community) of Border and Visa Operations of INZ. He said:

> 54. INZ's approach to Immigration Instruction H5.30.25 is based on the requirement that the individual must have exceptional circumstances that make it "strongly desirable for the person to travel to and enter *New Zealand*", as opposed to any other country in the world.
>
> 55. The fact that an individual is from a country affected by war or social unrest is not, by itself, considered to meet that test. This is because many people within the country in question would be equally affected by the prevailing circumstances which could not, therefore, be considered exceptional. In addition, while an individual might be motivated to leave their own country, it does not necessarily follow that New Zealand is the country that they should travel to.
>
> 56. Having an extended family member living in New Zealand is also not in and of itself considered sufficient grounds for approval. The CPVV applications that have been approved under the humanitarian category have often involved situations such as a New Zealand family member needing the physical or emotional support of the applicant, e.g. due to family death or terminal illness.

[93] This better explains the approach, particularly in light of the examples in paragraph 56. Contrary to the suggestion in the decision paper it is not because the humanitarian considerations were not sufficiently exceptional. Rather INZ have interpreted the instruction to necessitate the relevant humanitarian circumstances to arise *in New Zealand*. The humanitarian crisis in Afghanistan did not establish such qualifying circumstances — there were thousands of people facing the crisis in that country. What made the application relevant was some exceptional factor of a humanitarian kind within New Zealand, such as a death or terminal illness of the applicant's family in New Zealand.

[94] This approach is confirmed by the contemporaneous documents. A "humanitarian calibration meeting" was held by INZ on 19 August 2021, a few days before the interim relief application in this proceeding, and some two weeks before the standard form letters declining the applications were sent. It recorded that those attending had a "robust discussion". The minutes record:

> SEIO's discussed established Humanitarian EOI considerations and that there has been no change in the way that these requests are considered. It is noted that the circumstances must be exceptional for approval to travel to New Zealand and be consistent with the approach already used in humanitarian considerations. SEIO's noted that the instructions have strong focus on a need to be traveling into New Zealand for humanitarian reasons, not the nature of circumstances that may be making people want to leave where they currently are. **Considerations will be made regarding what may be making a person wish to leave their current circumstances, but the focus remains on the need to travel into New Zealand for a humanitarian purpose that exists here.**
>
> (emphasis added)

[95] This requires factors *within New Zealand* that provide a humanitarian purpose for the applicant to come to New Zealand. So if the applicant is coming to support a family member who is facing extremely difficult circumstances in New Zealand (such as a death, or a person dying) then there is potentially a humanitarian reason to allow entry. The fact that the applicant also escapes the perils in Afghanistan is not the focus. That is either irrelevant, or at least not qualifying in itself.

Immigration New Zealand's argument

[96] The respondents argued that INZ's approach was the correct one. Mr Kirkness argued that the approach to interpreting immigration instruction was similar to that adopted for statutory interpretation, but contended on the basis of the decision of the Court of Appeal in *Patel v Chief Executive of the Department of Labour* that the purpose of the Instructions was of greater importance as the Instructions were a working document designed to provide guidance on decisions intended to implement policy.[24] The respondents then emphasised that the Instruction was not designed to create a general exception on humanitarian grounds, but rather an exception relevant only to the particular COVID-19 border closure. It was a limited exception to allow people to come to New Zealand in particular notwithstanding COVID-19, and accordingly a focus on the particular circumstances prevailing in New Zealand. It was not directed to wider suffering, or intended to address that wider suffering. This was further reflected in the fact that it was only a temporary entry exception, and that H5.25.1(a)(v) contemplated onward travel by that person, and accordingly entry only

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[24] *Patel v Chief Executive of the Department of Labour* [1997] NZAR 264 (CA) at 271.

for a limited time. Those factors influenced the meaning to be given to the exception, and the criteria specified in H5.30.25(c).

Assessment

[97] I do not accept the respondents' submissions, and conclude that the interpretation adopted by INZ is erroneous.

[98] It is apparent from paragraph H5.30.25(a) that there are three inter-related elements to the Instruction. First there must be exceptional circumstances, second they must be of a humanitarian nature, and thirdly those circumstances must make it strongly desirable for the applicant to travel and enter New Zealand. That follows a similar structure to the assessment of humanitarian considerations explained by the Supreme Court in *Ye v Minister of Immigration*.[25]

[99] The word "humanitarian" has a reasonably well understood general meaning in the immigration context. In *Ye* the Supreme Court observed that it was unnecessary and undesirable to attempt to define the compass of the word.[26] It has a natural meaning, and should not be given a narrow or technical interpretation. A person facing persecution to the point of severe mistreatment and even death clearly raises humanitarian circumstances. Given the nature of these factors in the present cases they are of an exceptional kind — permission is being sought in order that the applicants can avoid the quite profound and compelling humanitarian consequences arising for them in Afghanistan.

[100] I agree with the respondents' general point that there is a required connection between such circumstances and the desirability of them coming to New Zealand in particular. The exceptional circumstances of a humanitarian kind must be circumstances that justify the person being allowed to enter New Zealand notwithstanding the COVID-19 restrictions on entry. As the respondents submitted it is not a more general humanitarian exception. There are very many people around the world who could make a case for leaving their own country because of humanitarian

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25 *Ye v Minister of Immigration* [2009] NZSC 76, [2010] 1 NZLR 104.
26 At [34].

circumstances. The circumstances must provide the reason why it is desirable from them to come to New Zealand in particular.

[101] But this does not mean that the humanitarian circumstances must arise only *within* New Zealand. Here there is an obvious reason for the applicants to be allowed to come to New Zealand in particular. The reason why they face peril in Afghanistan is, at least in significant part, because their families assisted New Zealand military forces when they were part of the allied forces occupying Afghanistan. This factor has created a serious risk for them — in other words it is a key part of the reasons why there are exceptional circumstances of a humanitarian kind. The peril they face may also be because of the interrelated point that they are part of a persecuted ethnic minority, but the key justification for being allowed permission to come here arises from risk to their personal safety arising from the help their family has given New Zealand. Indeed it might be thought that New Zealand has a kind of moral responsibility to address the peril faced by such persons. That is reflected in H5.30.25(a). These circumstances are clearly of a humanitarian kind, they are exceptional, and they provide reasons as to why the persons should be given permission to travel and enter New Zealand in particular as an exception to the COVID-19 border closure.

[102] There is a further factor that satisfies the requirement that the humanitarian circumstances of an exceptional kind make it desirable to allow the applicants' entry into New Zealand. That is that the applicants have applied for, and were on the cusp of being granted residency in New Zealand to allow them to join their family here under the Refugee Family Support category when the border was closed. Were it not for the border closure their applications to move to New Zealand could have been finalised. They have since been faced with the humanitarian crisis in Afghanistan, and have compelling reasons to be granted an exemption that allows them to travel to New Zealand in particular given their intention to re-settle here.

[103] To interpret the instruction so that the humanitarian circumstances must arise solely within New Zealand is inconsistent with both the wording and apparent intent of the policy. Nothing in the instruction suggests that the humanitarian circumstances have a geographical element. There would also be no reason to contort the wording

to do so given the connection to New Zealand that is required to justify the exception that I have explained. Moreover INZ's interpretation leads to perverse results. Two applicants in Afghanistan facing persecution and death would be treated differently if the New Zealand family member of one of them happened to have had a recent bereavement. It should be the persecution and potential death in Afghanistan, which partly arises from the applicants' associations with New Zealand, that provide the qualifying circumstances.

[104] The error in INZ's approach is further confirmed by a consideration of the relevant factors set out in H5.30.25(c). Those factors mandate a broader inquiry that would not be relevant on INZ's interpretation. For example, it would not matter what the applicants' connection was to the place they were currently located under (ii), or whether they had alternative options under (iv) if the enquiry was solely concerned with humanitarian considerations arising from within New Zealand.

[105] The applications made here seem to me to be squarely within the criteria in H5.30.25(c). In particular:

(a) They have a strong connection with New Zealand under (i) given the assistance their family provided NZDF in Afghanistan and the increased risk to their personal safety that this has caused, and also given that they were in the process of obtaining residency visas in order to move from Afghanistan to join their resettled family in New Zealand.

(b) Their connection with Afghanistan under (ii) is now both tenuous, and dangerous because of this connection to New Zealand and the need to flee that country.

(c) New Zealand is not their primary place of residence under (iii), but it is intended to be in accordance with the applications that appear to have been on the cusp of being granted when this instruction blocked their entry.

(d) They have limited options but to follow through on their intention to move to New Zealand, now with urgency, under (iv).

(e) And the impact of not granting a visa and entry permission is to require them to face the peril to their lives under (v).

[106] The requirement of H5.25.1(a)(iv) is not an answer to these considerations. This is a requirement for an officer to be satisfied that the person meets onward travel requirements. The respondents say this demonstrates that such permission was only ever intended to be temporary. But this is only a requirement for "visitors". Here the applicants were, and are in the process of being granted residency in New Zealand. The Instructions must be able to be interpreted and applied to make them work in a sensible way. An applicant who is in the process of being granted New Zealand residency does not need to meet the requirements for onward travel that are required of a visitor if the Instructions as a whole contemplate them remaining in New Zealand. It can only be referring to *relevant* onward travel requirements. Here the persons are given temporary entry for humanitarian reasons in a way that will allow the processing of their residency visa applications to be completed.

[107] Overall the errors of INZ can be described in a number of ways. First, the proposition in the standard form letter that the applicants' circumstances did not qualify as "exceptional" is flawed — the circumstances are clearly exceptional. Similarly the position that the only relevant humanitarian circumstances are those that arise within New Zealand, and cannot arise from circumstances faced by the applicant offshore, is misconceived — the required connection with New Zealand arises from the concluding words of H5.30.25(a), not a geographical limit on the humanitarian considerations. Finally the failure to address the key aspects of that connection — the fact that the peril is faced at least in part because of the applicants families' assistance to New Zealand forces in Afghanistan, and that they were in the process of being granted residency and moving to New Zealand when the borders were closed — involves a failure to apply the relevant considerations arising from the instruction. Those factors clearly correspond to the considerations mandated by H5.30.25(c) which have not been lawfully applied.

[108] INZ has misinterpreted and misapplied H5.30.25(c). For these reasons also the respondents' decisions are unlawful. This provides an alternative basis for the Court to grant relief in this case.

Third ground of challenge: Failure to grant residence visas under the humanitarian exception

[109] There is a further alternative ground upon which the applicants contend that the respondents' decisions have been unlawful. That is that the respondents have failed to apply the separate humanitarian exception that exists within Y4.50 itself.

[110] Again this is a further argument in the alternative. The applicants have succeeded on their first ground of challenge, and they have also succeeded on their alternative ground of challenge in relation to the CPVV. This is a further alternative basis for challenge.

[111] If Y4.50(a) did legitimately close the border to those granted a residence visas and entering for the first time, there were separate exceptions within Y4.50 itself. In particular it went on to provide:

> c. A person subject to (a) above may still be granted entry permission by an immigration officer as an exception to instructions (see Y4.45), for reasons including but not limited to:
>
> i. Humanitarian reasons
>
> ii. Essential health workers as confirmed by the Ministry of Health
>
> iii. Other essential workers as defined by the New Zealand Government
>
> iv. Citizens of Samoa and Tonga for essential travel to New Zealand
>
> v. Partners or dependants of a temporary work or student visa holder, and currently resident in New Zealand where the temporary work or student visa holder is currently in New Zealand.

[112] As indicated above, the CPVV was created because of a difficulty that arose from having to apply these exceptions at the airport on departure, or on arrival into New Zealand. It was felt necessary to create a visa — the CPVV — that a person

could obtain in advance of that travel to allow entry into New Zealand notwithstanding the COVID-19 border closure.

[113] But the creation of that separate visa did not include any repeal of Y4.50(c). Those exceptions remained in place to be assessed on their merits. It follows that those considering the applicants' resident visa applications, and applying s 43(1)(b) would need to take into account that a person being declined entry permission under Y4.50(a) may nevertheless qualify for an exception under Y4.50(c). If the person was likely to qualify for such an exception there would not be a basis to decline the visa.

[114] It is apparent that INZ did not consider whether this exception applied in the case of the applicants. There are no contemporaneous documents suggesting that they did so. The memorandum referred to in [21] above only referred to the potential exception in H5, and the only record of consideration of an exception arose from the CPVV decisions that I have referred to.

[115] That is confirmed by Mr Gilray's evidence who said:

> *Why Y4.45 is not individually applied to visa applicants by immigration officers*
>
> 33. INZ made an operational decision to pause processing applications by offshore applicants who are affected by New Zealand's border closure, as immigration officers are unable to grant a visa to an offshore person in these circumstances. I understand this operational decision will be covered in another affidavit, and I do not describe it in detail here. The relevant point for my purposes is that immigration officers are not expected to, and do not, proactively consider whether a particular offshore applicant might qualify for a humanitarian exception to the border closure under Immigration Instruction Y4.45. There are four main reasons for this.
>
> 34. First, there is now a specific category of visa through which an individual can request a border exception, namely the CPVV. Information about the CPVV is published online on INZ's website. The expectation is that individuals who may qualify to be invited to apply for a CPVV will make an EOI.
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> 35. Second, as a practical matter, it would be difficult for an immigration officer to monitor proactively the circumstances of all individual offshore applicants on an ongoing basis to determine whether their individual circumstances might qualify for an exception to the border closure at a particular point in time.

> 36. Third, by granting a visa to a person outside New Zealand, an immigration officer is indicating for the purposes of s 43 of the Act that "at the time the visa is granted, there is no reason to believe that the holder will be refused entry permission". If a particular offshore applicant could only be granted entry permission as an exception to immigration instructions, the immigration officer necessarily has reason to believe that person will be refused entry permission (i.e. they will be refused entry permission on the basis of immigration instructions, which is why they must seek an exception).
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> 37. Fourth, as explained above, an application for entry permission is determined when a person enters New Zealand's border control area by a specific category of immigration officers within INZ (i.e. border officers). Different immigration officers assess a person's visa application. This division of labour means that a border officer will not necessarily be familiar with the considerations that an immigration officer who assesses visa applications would be aware of, and vice versa.

[116] None of these factors provide an explanation for not addressing the residence visa applications in accordance with law. The only legitimate reason that has been put forward for why a visa might not be processed and issued arises under s 43(1)(b), namely that this is reason to believe that the holder will be refused entry permission. It is not appropriate to apply only Y4.50(a) when addressing that section, or to place a moratorium on making such decisions because of Y4.50 without considering its full terms.

[117] I also accept Ms Aldred's criticisms of the passage from Mr Gilray's evidence. The point made by Mr Gilray in paragraph 33 of his evidence quoted above that immigration officers were not expected to and did not proactively consider the exception seems to be an acceptance that s 43(1)(b) was not applied in the manner required. And in terms of the four reasons provided:

(a) The fact that there was a CPVV did not mean that Y4.50(c) was not to be addressed when considering the residence visa applications under s 43(1)(b). A decision was made to leave both avenues in place. In any event the CPVV decisions were not made for the applicants until 1 September 2021, and accordingly does not explain why the applications were not processed and granted in 2020.[27]

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[27] See, for example, the email of 9 December 2020 at [9] above.

(b) It is not a matter of proactive monitoring on an ongoing basis as Mr Gilray says in paragraph 35. Rather it is a matter of considering, in the process of addressing the applicants' resident visa applications, whether they were likely to be permitted entry such that the visa could be granted. It simply formed part of the required assessment of the residence visa applications.

(c) The suggestion in paragraph 36 is an obvious error of law. The exception in Y4.50(c) forms part of the Immigration Instructions. The officer processing the visa application must consider that instruction as a whole. If he or she is satisfied that the exception was likely satisfied, then there is no reason to conclude that entry permission will be declined under s 43(1)(b).

(d) Finally, the fact that different officers will deal with the grant of the visa and the grant of entry permission on arrival is an inherent feature of the regime. The only significance of this is that it is important for the officer processing the visa application to give appropriate consideration to the applicability of the exception. You would not want an applicant granted a visa to be subsequently turned away at the border. If the visa granting officer is satisfied that the exception applies this will be highly influential for the more busy officer at the border. This is not a reason to fail to address the exception at all. Quite the opposite.

[118] The respondents otherwise argue that the applicants did not meet the humanitarian exception for similar reasons to those advanced in relation to the exception to the CPVV. For similar reasons I do not accept those arguments. The language of this exception is more open-ended, and simply focused on whether there are humanitarian reasons to allow an exception. Such circumstances arose here for the reasons I have explained. The more precise terms of H5.30.25(c) favour the grant of the exception. Those considerations do not form part of the exception here, but there is also no reason to interpret the humanitarian exception so that it applies only with respect to humanitarian considerations arising within New Zealand. There are

profound humanitarian considerations associated with the pressing need for the applicants to be allowed to come to New Zealand.

[119] For these reasons I also uphold the third ground of challenge. INZ erred in failing to consider and grant permission for the applicants to come to New Zealand under this exception.

Additional grounds of challenge raised by the applicants

[120] The applicants raise a number of other grounds of challenge to the respondents' decisions. Given my conclusions above I do not address these matters as fully. But it is nevertheless appropriate to provide my essential conclusions on these arguments.

Breach of natural justice

[121] The applicants contend that the people in the position of the applicants had a right to natural justice, that the delay on making decisions and the effective moratorium on processing the applications was unreasonable, that the applicant did not have visas at the time of the evacuation from Afghanistan as a consequence, and that this was unjustified to the point of involving a breach of natural justice.[28]

[122] I accept that the applicants' challenge could be formulated in this way. But as is often the case in judicial review the grounds overlap. Success under one ground can often be re-described using the language of another. The grounds of judicial review are not like alternative causes of action — all the alternative formulations address the same ultimate question: whether there has been a failure to make decisions in accordance with law.

[123] Here the applicants' successful grounds of challenge can be legitimately described as involving a breach of natural justice, or procedural impropriety. Another way that they can be described is that there has been an unlawful moratorium on the granting of visas. But in judicial review it is appropriate to drill down as far as possible to the errors that have led to the law not being complied with. So whilst there has been procedural unfairness to the applicants in the approach adopted by INZ, and the errors

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[28] *Vea v Minister of Immigration* [2002] NZAR 171 (HC) at 182.

can be described in that way, the reason for that unfairness is the misinterpretation of the Act and Instructions that I have explained in the first, second and third grounds of challenge. So whilst I accept that there may be validity in the argument as advanced, nothing is gained in upholding a further ground of judicial review on this basis.

The five day window

[124] As explained when the humanitarian crisis arose from the collapse of the coalition occupation of Afghanistan, Cabinet Ministers met to decide what to do about evacuation. The Minister of Immigration, the Hon Kristopher Faafoi explains in his affidavit that the unfortunate reality was that New Zealand was never able to commit to evacuating all who wished to leave Afghanistan and that difficult decisions had to be made. On 19 August 2021 a decision was made by Cabinet that "people in Afghanistan with a valid New Zealand visa can be included in exit flights if space permits, and granted a border exemption to enter New Zealand". The Minister's notes of discussion with his Cabinet colleagues also record:

> There are also Afghanistan citizens who have visa applications that have not been processed. I do not consider that 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.

[125] When these decisions were given effect by amendments to the Immigration Instructions, the exception to Y4.50(a) allowed entry under Y3.30 to:

> xii. Persons who were in Afghanistan on 15 August 2021 and who either hold a valid temporary entry class visa or a residence class visa which was granted when the person was offshore and the person is arriving in New Zealand for the first time.

[126] This amendment to Y3.30 was made effective on 22 August. The applicants' point is that this exception, as worded, did not exclude additional persons being granted a visa after 15 August. The requirements as worded simply required the people to be in Afghanistan on 15 August, and that they hold a valid visa granted offshore at the time of entry for the first time.

[127] On 26 August the applicants' solicitors, Community Law Waikato wrote to the Minister pointing this out. An amendment to the Instructions was then immediately made. The substituted instruction effective 27 August read:

> xii. Persons who were in Afghanistan on 15 August 2021 and who on 19 August 2021 held and continue to hold either a valid temporary entry class visa or a residence class visa which was granted when the person was offshore and the person is arriving in New Zealand for the first time.

[128] The applicants contend that between 22 and 27 August the applicants were improperly excluded by the respondents.

[129] I accept that on the wording of the 22 August version of the instruction the applicants were not excluded from obtaining entry permission. That was clearly not intended, however and the instruction was promptly changed when the drafting error was identified. I do not see that there is significance placed on the five day period the error existed, and neither could there be any real criticism of the interpretation placed on the 22 August version by INZ during that period given the obvious intent of the amendment.

[130] For these reasons I see no substance to this ground of challenge.

Challenge to Cabinet decisions

[131] Finally the applicants challenge the decisions made by Cabinet in August 2021 which resulted in these changes to the Immigration Instructions. The implementation of the decisions made by Cabinet utilised s 61A of the Act. The applicants say that the decisions of the Cabinet were irrational, involved failing to take account of relevant considerations (such as the grave risks for those in the position of the applicants), and a failure to consider international obligations given the plight of those involved.

[132] Ms van Alphen-Fife argued that decisions of this kind were susceptible to judicial review. She accepted that there were policy consideration and matters of political judgment involved, but referred to the observation of Randerson J in *New Zealand Association for Migration Investments Inc v Attorney-General* that even in that context the Court would not forgo "… its proper constitutional role on judicial

review of ensuring that the decision maker has acted in accordance with law, fairly and reasonably".[29]

[133] I accept that the fact that a decision is made by Cabinet, involving high level questions of policy and political judgment, does not make it immune from judicial review. But before the Court will intervene there needs to be a basis upon which such decisions can be identified as not being in accordance with law. The Court does not simply apply legal criteria — such as relevant/irrelevant considerations, unreasonableness, irrationality — to political decision making. There needs to be a basis upon which the decision making is subject to legal limits.

[134] It is not uncommon for political decision making of this kind to result in, or be implemented by legal decisions, such as those made under a statute. If a statutory decision is made by a group considering political matters then it must still meet the requirements of the law. An example is *Quake Outcasts v Minister for Canterbury Earthquake Recovery* where Cabinet Ministers made certain decisions concerning earthquake recovery having high policy components which were subsequently implemented under a statute.[30] The decisions were found to be unlawful for failure to comply with the requirements of that statute.

[135] Here the decisions made by the Cabinet Ministers were implemented by amendments to the Immigration Instructions under s 61A of the Act which allows the Minister to grant a visa of any type by the Minister's own volition, by special direction. If the applicants could identify some requirements of law arising from the decisions as so implemented under the statute such that the decisions were not in accordance with law, judicial review would follow. But no such error has been identified. In particular:

(a) The Cabinet Ministers essentially made emergency evacuation decisions. They were deciding who should be included in the evacuation flights if space permitted. This was not a decision under the

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29 *New Zealand Association for Migration Investments Inc v Attorney-General*, above n 21, at [158].

30 *Quake Outcasts v Minister for Canterbury Earthquake Recovery* [2015] NZSC 27, [2016] 1 NZLR 1.

Act, but a decision based on political imperatives, international relations, and humanitarian concerns. Whilst such decisions could still be subject to legal limits given the consequential changes to Immigration Instructions issued under the Act, nothing has been put forward to demonstrate that the decisions were beyond what was legitimately determined from a legal point of view.

(b) The evacuation decisions did not have the consequential legal consequences for the applicants that the respondents have suggested. The errors of the respondents have included the conclusion that they did. For the reasons I have already addressed in the first, second and third grounds of challenge the applicants remained entitled to have their applications for residency (or, in the alternative, for temporary entry) addressed in accordance with the Act and Instructions. INZ has failed to do so. They will now be required to do so. Through the success on those first three grounds of challenge the requirements of the law and the proper scrutiny by the Court of the decision making by the respondents, has occurred.

[136] In short there is no independent ground of judicial review associated with the decision of the Ministers that arises. This ground is accordingly dismissed.

Conclusion and remedies

[137] This case involves most unusual circumstances. The crisis caused by the COVID-19 pandemic has coincided with a humanitarian crisis in Afghanistan. COVID-19 has given rise to a need to prevent people entering New Zealand, yet the humanitarian crisis has given rise to the opposite need. Those circumstances may explain the errors made by INZ, as at a general level the position was difficult.

[138] The applicants have nevertheless demonstrated that INZ has failed to properly address their applications in accordance with law. In particular the applicants were entitled to have their applications for residency in the Refugee Family Support category determined in accordance with the Residence Instructions in existence at the time they made their application, including the Residence Instructions that addressed

the question of entry permission. The changes to the Instructions in relation to permission introduced with the COVID-19 border closure from 2020 should not have been applied to them, and the failure to finally determine their residence visa application as a consequence was unlawful. Those in the position of the applicants had just as much of a right to enter New Zealand as other New Zealand residents once their visas were granted.

[139] Moreover, the Instructions in relation to border entry contemplated an exception to allow entry for humanitarian reasons, and this exception was not even considered in relation to the applicants notwithstanding they had a compelling case for entry on this basis. The reason why the exception was not considered was, at least in part, due to INZ's misinterpretation on the scope of the humanitarian exception.

[140] Furthermore the applicants were wrongly denied Critical Purpose Visitor Visas because of a misinterpretation of the humanitarian exception contained in the Instructions for that Visa. Those exceptions were not limited to humanitarian considerations arising within New Zealand and clearly applied to the circumstances raised by the applicants.

[141] The applicants are accordingly entitled to relief. Given the relief sought in the second amended statement of claim dated 3 November 2021 I grant the following:

(a) a declaration that instruction Y3.5.1(a)(ii) is *ultra vires* to the extent that it requires the border entry Instructions for residence class visa holders to be those in effect at the time the entry permission is sought, rather than those in force when the applicant applied for a residence visa;

(b) an order in the nature of mandamus that the second respondent promptly consider and determine the applicants' residence visa applications in accordance with law and in light of this judgment;

(c) a declaration that the second respondent erred in law by failing to make determinations on the applicants' visa applications, including because of a failure to consider Y4.50(c)(i);

(d) a declaration that the respondents erred in law in declining the applicants' Critical Purpose Visitor Visa applications by reason of a misinterpretation of H5.30.25; and

(e) leave to the parties to apply in relation to the nature and scope of the relief.

[142] The applicants are also entitled to costs. If costs cannot be agreed I will receive a memorandum from the applicants (no more than 10 pages plus a schedule) which may be responded to by the respondents (no more than 10 pages plus a schedule).

Cooke J

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