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

**I TE KŌTI MATUA O AOTEAROA**
**TĀMAKI MAKAURAU ROHE**

**CIV-2021-404-001569**
**[2022] NZHC 1333**

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| BETWEEN | DAVID JOHN HIGGS<br>Applicant |
| AND | MINISTER OF IMMIGRATION<br>First Respondent |
| | CHIEF EXECUTIVE OF THE MINISTRY OF BUSINESS, INNOVATION AND EMPLOYMENT<br>Second Respondent |

**CIV-2021-404-001510**
**CIV-2021-404-001472**

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| BETWEEN | MICHAEL JOHN WITBROCK<br>Applicant |
| AND | MINISTER OF IMMIGRATION<br>First Respondent |
| | CHIEF EXECUTIVE OF THE MINISTRY OF BUSINESS, INNOVATION AND EMPLOYMENT<br>Second Respondent |

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| Hearing: | 8 December 2021; further submissions 22 December 2021 |
| Appearances: | S Dalley and P Sundar for the Applicants (by VMR)<br>M Mortimer-Wang and S Perera for the Respondents (by VMR) |
| Judgment: | 8 June 2022 |

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**JUDGMENT OF WALKER J**

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*This judgment was delivered by me on 8 June 2022 at 12 pm*
*Pursuant to Rule 11.5 High Court Rules*
*Registrar/Deputy Registrar*

## Introduction

[1] The consequences of COVID-19 for governments and communities around the world extended well beyond health impacts. The New Zealand Government committed to an elimination response in recognition of the possibility that New Zealand's health system could be overwhelmed. New systems, policies and rules were established at speed to achieve the stated objective. Closing New Zealand's borders to most travellers on 19 March 2020 was an integral component of the elimination strategy. This closure was unprecedented and rapid. Border closures reverberated widely. Not only was entry permission closed to many holders of temporary entry class visas, but many people in New Zealand on temporary visas could not leave. For those who were still entitled to travel to New Zealand, the Government established a managed isolation and quarantine system.

[2] Unsurprisingly in the light of their impact, there have been many challenges to the measures adopted by Government. The three consolidated proceedings before this Court challenge decisions of the first respondent, the Minister of Immigration (the Minister), intended to deal with the consequences of the border closure. These decisions most directly impacted partners and families of New Zealand citizens and residents, and partners and families of temporary visa holders living in New Zealand.

[3] The first decision challenged is the Minister's recommendation to Cabinet to extend the temporary suspension of the ability of most non-New Zealand citizens or New Zealand residents to apply for a temporary entry class visa. The extensions were to the duration of reg 9A of the Immigration (Visa, Entry Permission and Related Matters) Regulations 2010 (Regulations). There have been multiple extensions. Michael Witbrock, the plaintiff in two of these proceedings, formally challenges the renewal in June 2021, by which reg 9A was extended to 6 February 2022, and the renewal on 22 November 2021, by which it was extended to 5 August 2022.[1]

[4] I refer to these impugned decisions as the suspension decisions.

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[1] Mr Witbrock is the plaintiff in CIV-2021-404-1472 and CIV-2021-404-1510. Mr Higgs is the plaintiff in CIV-2021-404-1569. I refer to both as the "plaintiffs" rather than as the "applicants" to avoid confusion of nomenclature.

[5] The second decision challenged is the Minister's certification of immigration instruction E13 which permits (but does not require) an immigration officer to lapse certain applications for temporary entry class visas received or unable to be processed during the period of border closure. Lapsing means the removal of an application from the cohort of active files to be processed and determined by Immigration New Zealand (INZ).

[6] I refer to this decision as the lapsing decision.

[7] At their heart, these challenges are about the scope of exceptions to reg 9A and E13, more particularly, the partnership exception. One of the temporary entry visa categories excepted from reg 9A is an application by any person who is applying for the visa on the basis that the person is a spouse, partner, or dependent child of a New Zealand citizen or a person who holds a residence class visa.[2] Instruction E13 in a similar fashion excludes the ability to lapse applications which are *based on* a relationship (partner or dependent child/ren) with a New Zealand citizen, residence class visa holder or temporary visa holder.

[8] INZ construes these exceptions as limited to 'partnership' visas, by type, and relies on existing instructions relating to partnership applications. INZ draws a distinction between applications based on a relationship (either partnership or dependent child) – that is, an application for a type of visa that requires them to meet partnership instructions, and applications for a temporary entry class visa in their own right. Those who are in genuine and stable relationships but do not live together do not satisfy INZ's criteria for partnership applications.

[9] This is a particularly acute problem for people from certain ethnic and religious backgrounds because their culture, society and/or religious beliefs do not allow partners to live together before marriage. It is similarly an obstacle for those living in countries which discriminate against same sex relationships and others in the LGBTQIA+ community. This is described in the plaintiffs' evidence as a "Catch-22"; couples must live together to meet the partnership visa requirements yet require a visa to be able to live together in New Zealand for cultural, societal or religious reasons.

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2 In addition, the holder of that residence class visa, must or may be granted entry permission under immigration instructions.

**The parties**

[10] Mr Witbrock is a New Zealand citizen who married his husband in New Zealand. His husband, Yunli Lu, is a Chinese national who has a General Visitor Visa (GVV) application lodged with INZ. The application was lodged in November 2019 for a GVV because of their inability to meet the living together requirement. Mr Witbrock deposes to his understanding that INZ has accepted that the couple are in a genuine and stable relationship but is unable to grant Mr Lu a visa as INZ has suspended 'processing' of GVVs to offshore applicants. It is now in the process of lapsing visas of this type.

[11] I will return to this issue of precisely what reg 9A and instruction E13 in fact achieve later in this judgment but simply record at this point that none of the challenged decisions themselves suspend the processing of visa applications.

[12] Mr Lu requested a humanitarian exception to the border closure in April 2020 so that he could join Mr Witbrock. INZ denied his application. As at the time of hearing, the couple had been separated since 8 January 2020 due to COVID-19 constraints.

[13] Mr Lu and Mr Witbrock have not lived together during their two-year marriage. Even when the Chinese border is open to non-citizens, they say they will not be able to live together in China due to China's non-recognition of LGBTQIA+ relationships. Mr Witbrock states in his affidavit (made before the most recent extension):

> To an extent, I can understand the suspension on processing of certain visas when COVID-19 first hit New Zealand, however the suspension has been extended to February 2022. This delay and the endless uncertainty is very difficult to understand and causes further stress and strain on me as a New Zealand citizen. As a New Zealand citizen, I am entitled to no arbitrary interference with my right to family unity. I continue to be separated from my husband for arbitrary reasons.

[14] He also deposes to the personal impact on the couple should the type of visa application made by Mr Lu be lapsed. He says that even if Mr Lu can make another visa application when New Zealand's border opens, Mr Lu will have lost the place he held in the processing queue leading to greater uncertainty for an even longer period with ongoing deleterious impacts on both partners.

[15] David Higgs, the plaintiff in one of these proceedings has a partner with a GVV application lodged with INZ which, at the time of filing the proceeding, was about to be lapsed. In the exercise of INZ's discretion this will not be lapsed pending this substantive determination.[3] He has been separated from his partner for more than 18 months. He also describes the emotional impact of forced separation from his partner, and the sense of hopelessness consequent on any lapsing of the application.

[16] In some respects, the plaintiffs are advancing these claims in a representative capacity on behalf of the cohort of visa applicants and their partners affected by these measures. Katrina Armstrong-Myers, a licensed immigration advisor, has provided evidence. An advocate for families and partners separated by border closures, she says that in her day to day work she has come across hundreds of families separated by the decision to 'suspend visa processing' and hundreds who remain split because they cannot meet the living together requirements.

[17] Mr Witbrock challenges both the suspension decisions and the lapsing decision. Mr Higgs challenges only the lapsing decision. Given the substantially overlapping issues, I do not intend to distinguish between the three sets of proceedings save where necessary to do so.

[18] The second respondent is the Chief Executive of the Ministry of Business, Innovation and Employment (MBIE). INZ is a business unit within MBIE. No decision or action of INZ is directly challenged in these proceedings, as framed, but the relief which the plaintiffs seek extends to prevent INZ taking certain actions. The second respondent acknowledges that she is an appropriate party to the proceeding.

**Context and statutory framework**

[19] To put the plaintiffs' challenges in context, I briefly describe the immigration framework.

[20] The purpose of the Immigration Act 2009 (the Act) is to "manage immigration in a way that balances the national interest, as determined by the Crown, and the rights of individuals".[4] The control of New Zealand's border lies with the Crown. The

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3 *Higgs v Minister of Immigration* [2021] NZHC 2287 at [10].
4 Immigration Act 2009, s 3(1).

decision as to whether a non-citizen can enter and remain in New Zealand is the sole prerogative of the Executive.[5]

[21] Christine Hyndman, a Principal Policy Advisor with MBIE explains the various mechanisms for managing immigration in this way:

> Policy decisions by government inform settings, and those are translated into rules in various forms: at the highest level in the Immigration Act 2009 as primary legislation endorsed by Parliament, and also through regulations and immigration instructions (the latter of which are statements of government policy which are given the force of law by the Act).

[22] Within the immigration environment, the statements of government policy contained in immigration instructions are certified by the Minister under s 22 of the Act. The Minister's power to certify immigration instructions relates to a variety of matters. These instructions are rules and guidance for decisions by immigration officers. The rules and guidance, or criteria, for the grant of temporary entry class visas are set by these instructions. Relevantly, section 22 of the Act provides:

> **22 Immigration instructions**
>
> (1) The Minister may certify immigration instructions relating to—
>
> (a) residence class visas, temporary entry class visas, and transit visas:
>
> (b) entry permission:
>
> (c) conditions relating to resident visas, temporary entry class visas, and transit visas, including, without limitation, conditions relating to—
>
> (i) travel to New Zealand:
>
> (ii) the holder's ability to work or study in New Zealand or in the exclusive economic zone of New Zealand:
>
> (d) the periods for which each type of temporary entry class visa may be granted:
>
> (e) the types of temporary visas that may be granted, and the name and description of each type.
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> …
>
> (3) Applications for temporary entry class visas or transit visas that are made before any relevant immigration instructions take effect may be

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5 *Ye v Minister of Immigration* [2008] NZCA 291, [2009] 2 NZLR 596 at [116]-[117].

determined in accordance with those immigration instructions when those instructions take effect.

(4) Subsection (3) does not apply to applications for temporary entry class visas subject to restricted temporary entry instructions.

(5) The kinds of matters that may constitute immigration instructions for the purposes of this Act are as follows:

(a) any general or specific objectives of immigration policy:

(b) any rules or criteria for determining the eligibility of a person for the grant of a visa of any class or type, or for entry permission, being rules or criteria relating to the circumstances of that person or of any other person (a *third party*) whose circumstances are relevant to the person's eligibility, including (without limitation) rules and criteria about how any status or approval may be obtained or lost by the third party:

(c) any indicators, attributes, or other relevant information or matters that may or must be taken into account in assessing a person's eligibility for a visa or entry permission:

(d) any statement of, or rules or criteria or process for determining, the number or categories or ranking of persons or classes of persons whose applications for visas of any class or type or entry permission may be granted at any particular time or over any particular period:

(e) any rules or criteria for the lapsing of applications in respect of which no decision to grant a visa has been made:

(f) any matters relevant to balancing individual eligibility for a visa or entry permission against the overall objectives or requirements of immigration instructions:

(g) any requirements relating to documentation, consultation, or other evidence or information required to assess a person's eligibility for a visa or entry permission:

(h) any statement of the conditions or types of conditions that may be imposed upon a visa of any particular class or type, and the circumstances in which or classes of persons in relation to whom the conditions may be imposed:

(i) the nature and extent of the discretion that immigration officers may exercise in making a decision on any visa.

…

(8) Immigration instructions certified by the Minister under subsection (1)——

(a) are statements of Government policy.

[23] INZ's Operational Manual (the Manual) contains the instructions certified pursuant to s 22. As policy documents, these instructions are working documents but also legal instruments through s 22 of the Act. The usual approach to interpretation is applicable. That is, the legal principles of interpretation of text in light of purpose. Interpretation must be consistent with the purposes of that part of the Act under which the policy is made, consistent with usual principles of administrative law and consistent with the rights and freedoms in the New Zealand Bill of Rights Act 1990 (the Bill of Rights Act).[6]

[24] Anyone travelling to New Zealand who is not a New Zealand citizen requires the grant of a visa and the grant of entry permission. These are distinct and separate. Each is governed by its own criteria against which eligibility is determined.[7] Entry permission generally refers to decisions made by immigration officials at the time of arrival at the New Zealand border. The grant of entry permission is not automatic merely because an individual holds a temporary entry class visa.

[25] There are three classes of visa:[8]

(a) Temporary entry class visas;

(b) Residence class visas; and

(c) Transit visas.

[26] A temporary entry class visa is a visa that provides for a temporary stay in New Zealand but no right to stay permanently. This distinguishes a temporary entry class visa from a residence class visa.[9] A person granted a temporary entry class visa who is offshore, is entitled to travel to New Zealand and apply for entry permission. If

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6 *Chamberlain v Minister of Health* [2018] NZCA 8, [2018] 2 NZLR 771 at [41]. The Court of Appeal in *H v Minister of Immigration* [2020] NZCA 562 compared the approach in *Chamberlain* and the approach in *Patel v Chief Executive of the Department of Labour* [1997] NZAR 264 (CA) at 271. Though the opening words of the statement in *Patel* suggest a less strict approach to interpretation of government policy, the Court of Appeal said, read as a whole, it can be seen that there is in fact no real difference between the two approaches.

7 *Afghan Nationals v Minister of Immigration* [2021] NZHC 3154 at [62].

8 Immigration Act 2009, s 70.

9 Immigration Act 2009, ss 74 and 77.

entry permission is granted, they are then entitled to stay in New Zealand during the currency of the visa in accordance with the conditions of their visa.[10]

[27] Types of temporary entry class visas include visitor visas, work visas, and student visas. Within these types, there are also specialised or targeted categories.

[28] Relevant to the present context are immigration instructions E4.5.20 and E4.5.30 which contain policy statements relating to partnership visa applications. They read:

> **E4.5.20 Evidential requirements for partners**
>
> a. If a partner is included in an application, or is applying in their own right as the partner of a temporary entry class visa holder, a New Zealand citizen, or residence class visa holder, the following must be provided:
>
> i. evidence of their relationship, and
>
> ii. evidence that demonstrates they are living together with that partner in a genuine and stable relationship (E4.5.35 sets out the types of evidence that are required).
>
> b. Where a person is applying for a temporary entry class visa on the basis of partnership, their partner must provide a completed *Form for Partners Supporting Partnership-based Temporary Entry Applications (INZ 1146)*.
>
> c. Despite (a) above for the purposes of visitor visa instructions, where an application includes a partner as a secondary applicant, a declaration from both parties may be accepted as evidence that they are living together in a genuine and stable partnership (see E4.5.35(b)).
>
> …
>
> **E4.5.30 Definition of 'living together'**
>
> For the purposes of these instructions:
>
> a. the principal applicant and their partner are considered to be living together if they are sharing the same home as partners (as defined in E4.1.20).
>
> b. Living together does not include:

[10] Immigration Act 2009, s 77.

i. time spent in each other's homes while still maintaining individual residences; or

ii. shared accommodation during holidays together; or

iii. flatmate arrangements; or

iv. any other living arrangements that are not reflective of the factors set out at E4.5.35(a).

[29] Ms Hyndman discusses the nature of immigration policy in her affidavit. She describes the need to balance a number of competing objectives, including the security and safety of New Zealand, individual rights, international obligations and the economic wellbeing of the country. She explains that the system is managed by setting rules of general application that apply to all persons and which reflect policy. Those rules are supplemented by appropriate individualised approaches to ensure as far as possible that there is a correct and fair result in individual cases. This includes by permitting principled, individual exceptions to the rules to avoid individual injustice.

[30] Ms Hyndman's evidence discusses the requirements of the partnership visa and how it fits into New Zealand's immigration policy. There are different pathways to obtain a visa, with different criteria for each. One such pathway is to apply based on an applicant's partnership to a New Zealand citizen or resident. Generally, partners of New Zealanders would apply for a temporary entry class visitor visa (based on partnership) or a temporary entry class work visa (also based on partnership). The instructions relating to each set out particular criteria to meet but they also all include the need to meet partnership requirements.

[31] Partnership requirements are a creation of policy rather than the Act. The objective of this category of visas, and the supporting immigration instructions, is to strengthen families and communities while reinforcing Government's overall objectives. The core requirements relating to partnership are that an immigration officer must be satisfied that the applicant is living together with their partner in a genuine and stable partnership.[11] The living together requirement is further prescriptively defined in E4.5.30. In short, the principal applicant and their partner are considered to be living together if sharing the same home, as partners. It does not

[11] Immigration New Zealand *Operational Manual* (26 May 2022) at [E4.5.25] and [E 4.5.30].

include time spent in each other's homes while still maintaining individual residences or shared accommodation during holidays together, flatmate arrangements or any other living arrangements that are not reflective of the factors set out in E4.5.35(a).

[32] Ms Hyndman explains the policy imperative behind setting a threshold for recognising a relationship. New Zealand has set the requirements for recognition as including "living together" irrespective of whether the couple is married, in a civil union, or in a de facto relationship. She says that this criterium represents a balance between ensuring that persons in genuine partnerships can be granted partnership-based visas, and reducing the opportunities for misuse or fraud. From a policy perspective, fraud in the partnership space is a particular concern for INZ. There exists a market for such visas where people can and do enter into commercial arrangements with New Zealand citizens or residents falsely claiming to be in a partnership to obtain a visa. Criteria such as the "living together" requirement aims to reduce the incidence of fraudulent applications.

[33] Ms Hyndman acknowledges that one of the key tensions in setting partnership policy is that some of the criteria aimed at reducing the incidence of misuse risks being unresponsive to relationship diversity. This includes where, due to cultural or legal factors outside a couple's control, they will struggle to meet all of the partnership requirements, including the living together requirement.

[34] She says that INZ recognises this and tries to reduce the impact of the partnership criteria on those persons who are assessed as being in genuine relationships but cannot meet all of the criteria by the following mechanisms:

(a) The culturally arranged marriage visitor visa (CAM). This is a special class of visitor visa. It is based on relationship which allows people who have married, or are intending to marry a New Zealand citizen or resident, to be granted a visitor visa provided the marriage follows an identified and recognised tradition where arrangements for the marriage are made by persons other than the parties to the marriage.

(b) Immigration officers have the ability under the Act to grant a visa of a type different to the one a person applied for.[12]

(c) Immigration officers also have the ability to grant a temporary entry class visa as an exception to Instructions. In short, waiving a requirement in instructions such as the living together requirement.[13]

[35] I pause to note that granting exceptions to instructions is not a preferred route for INZ. INZ's policy since November 2019 for alternatives to partnership visas is represented by Internal Administration Circular (IAC) 19/10 which relevantly states:

> **Processing guidance for partnership-based applications**
>
> 12. Where a person has applied for a partnership-based work or visitor visa under general requirements, but cannot demonstrate they meet one or more of those requirements, including living together, immigration officers should refrain from granting partnership-based visas as exceptions to instructions except in truly exceptional cases. The regular grant of visas as exceptions undermines the integrity of partnership instructions.
>
> 13. Instead, if a couple appear to be genuine and credible but cannot demonstrate they meet the living together requirements, immigration officers may consider granting a general visitor visa for the purpose of a family visit; this is provided for under section 45(2)(b) of the Immigration Act 2009 (the Act), as reflected in instructions at E3.1(b)(ii). Granting a visa under section 45(2) is not necessarily an exception to immigration instructions as applicants should be assessed against general visitor visa instructions (ie they are 'bona fide applicants', they meet general visitor visa requirements such as funds and onward travel) before a general visitor visa is granted. Applicants should only be granted visas (including general visitor visas) as exceptions to instructions when their personal circumstances are truly exceptional and when immigration instructions are not being met.

[36] IAC 19/10 also records INZ's view that persons "do not need to apply for a partnership-based visa when they do not believe they meet relevant immigration instructions". Instead, persons can choose to apply for a GVV. Ms Armstrong-Myers points out that IAC 19/10 effectively encouraged applicants who could not meet the living together requirement to apply for a GVV.

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12 Section 45(2)(b).
13 Section 76(1).

[37] The plaintiffs understandably argue that IAC 19/10 effectively shuts the door to the prospect of the 'exception route' though it was a policy instruction made before the COVID era and its impacts were known. Ms Hyndman's riposte is that the motivation for the approach recorded in IAC 19/10 is to encourage the use of alternative pathways *where they exist* rather than granting exceptions to partnership instructions and is necessarily informed by what other pathways exist. Even after border closure and the impact of reg 9A, certain other pathways still exist. This includes a new critical purpose visitor visa, or the CAM visa. There are also other pathways that turn on the exercise of absolute discretion.[14] Materially, she deposes that INZ has not adopted a blanket approach of declining to issue border exceptions or partnership visas as exceptions to instructions. On the contrary, each request for an exception to instructions is considered on its merits.

**New Zealand's border response to COVID-19 and impact on immigration rules**

[38] Jock Gilray, National Manager (Community) of Border and Visa Operations at INZ explains in his evidence the evolution of the relevant border controls in response to the COVID-19 pandemic.

[39] On 30 January 2020, the World Health Organisation declared COVID-19 a public health emergency of international concern. Immigration was one of the earliest sectors in New Zealand impacted by the pandemic.

[40] On 19 March 2020, shortly after the first case of COVID-19 was detected in New Zealand, the Government closed the border to most travellers. The Minister described the approach in a later Cabinet paper as:

> "…a critical component of the Government's COVID-19 elimination strategy…[which] seeks to protect jobs for New Zealanders, balance the needs of humanitarian and family reunification entrants with economic entrants (with high thresholds for both groups) and to allow people with unique skills and talents to enter to support time critical projects or to realise substantial economic benefits."

[41] The result of the border closure was that only particular categories of people would be granted entry permission. The border closure was achieved by an

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14 Section 61A.

amendment to instruction Y4.50, certified by the Minister. There have been various iterations of Y4.50. Between 30 July 2021 and 30 November 2021, Y4.50 provided:

> **Y4.50 People who must be refused entry permission: (COVID-19)**
>
> a. Entry permission must be refused to any person, except a person listed in Y3.30 (a), who is not otherwise dealt with under Y4.1 and who is:
>
> i. the holder of a temporary entry class visa (except as provided for by Y3.30 (b))
>
> ii. a person described under Schedule 2 of the Immigration (Visa, Entry Permission, and Related Matters) Regulations 2010 (visa-waiver travellers)
>
> iii. the holder of a residence class visa whose visa was granted offshore and who is arriving in New Zealand for the first time (except as provided for by Y3.30 (a)).
>
> b. 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. Critical 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. A person who holds a visitor, work or student visa and:
>
> - is ordinarily resident in New Zealand; and
> - is the partner or dependent child of a work or student visa holder who is in New Zealand.
>
> vi. Marine crew arriving by the Maritime border.

[42] One of the operational impacts of border closure was that the ability of offshore persons to apply for temporary entry class visa holders continued despite the effective border closure. INZ was receiving approximately 2,000 such applications each month following the 19 March 2020 border closure. This led to four issues:

(a) INZ continued to receive application fees for those visa applications and applicants continued to pay third party immigration advisors to prepare and submit applications.

(b) INZ's view was that s 43(1)(b) of the Act meant that INZ could not grant a temporary entry class visa to a person offshore where there was reason to believe the holder would be refused entry permission. A reason to believe that entry permission would not be granted covered virtually all temporary entry class visa holders.

(c) As Y4.50 did not limit the ability to apply for temporary entry class visas, such applications continued to come in yet were almost certainly going to be declined. This inconsistency of message was problematic.

(d) INZ was receiving applications it had to process, yet could not grant, which required significant operational resource at the same time as INZ was trying to address other impacts of COVID-19 on the immigration system.

*Regulation 9A – a solution?*

[43] To implement legislative change necessary to address these various COVID related pressures in the immigration framework, the Immigration (COVID-19 Response) Amendment Act 2020 (the Amendment Act) was enacted. The Amendment Act inserted s 401A into the Act. This empowering provision supplements the general regulation-making power in s 400 of the Act. Section 401A makes clear that the Minister has the power under s 400 of the Act to make regulations prohibiting persons offshore from applying for temporary visas where reasonably necessary to manage the effects or deal with the consequences of the three things stipulated. It reads:

> **401A Regulations relating to suspending ability to make applications for visas and expressions of interest**
>
> (1) Without limiting the generality of section 400, regulations made under that section may suspend the ability of all persons, or of any class of persons, who are outside New Zealand to—
>
> (a) apply for a particular class or type of visa; or

(b) submit an expression of interest in obtaining an invitation to apply for a particular class or type of visa.

(2) Subsections (3) to (7) apply to regulations made for the purposes of subsection (1).

(3) The regulations may—

(a) provide for different periods of suspension for different classes of people and different classes and types of visa; and

(b) without limiting the generality of the manner in which persons may be classified, classify persons by reference to all or any of the following:

(i) the country or place from which they are travelling or have travelled (whether it be their original or an intermediate point of departure):

(ii) whether or not they hold, or are required to hold, any particular type of travel or immigration documentation, by whomever issued:

(iii) any other type of visa that they hold or have applied for:

(iv) any other factor that is relevant to containing or mitigating the outbreak of COVID-19 or its effects; and

(c) without limiting the generality of the manner in which classes or types of visa may be classified, classify classes or types of visa by reference to all or any of the following:

(i) in the case of a temporary visa, the name and description of the visa as provided in the immigration instructions:

(ii) whether an application for the visa is required by or under the regulations to be made online:

(iii) any specific information or evidence that is required by the regulations or the immigration instructions to be provided in order for an application for the visa to be made.

(4) The Minister must not recommend the making of the regulations unless satisfied that doing so is reasonably necessary to manage the effects, or deal with the consequences, of—

(a) the outbreak of COVID-19; or

(b) measures taken under this Act or any other enactment to contain or mitigate the outbreak of COVID-19 or its effects; or

(c) any other measures (whether in New Zealand or elsewhere) to contain or mitigate the outbreak of COVID-19 or its effects.

(5) A suspension may be for a period not exceeding 3 months specified in the regulations.

(6) If the requirements of subsection (4) continue to be met, regulations may from time to time be made under section 400 that extend the period of a suspension already in force for a further period not exceeding 3 months.

(7) An extension referred to in subsection (6) may only be made before the end of the period to be extended.

(8) This section is repealed immediately after the expiry of the 12-month period that starts on the date on which the Immigration (COVID-19 Response) Amendment Act 2020 comes into force.

[44] Following enactment of s 401A, Ministry officials worked towards development of what was to become reg 9A. Cabinet considered a draft regulation in early July 2020. The Minister took reg 9A in its final form to Cabinet on 27 July 2020.

[45] The Immigration (Visa, Entry Permission, and Related Matters) Amendment (Covid-19 – Applications and Fees) Regulations 2020 (2020 Regulations) came into effect on 10 August 2020. It inserted reg 9A into the Immigration (Visa, Entry Permission, and Related Matters) Regulations 2010. Regulation 9A as it stood at the hearing of these applications provided:

**9A Suspension of ability to apply for certain visas**

(1) The ability to apply for a temporary entry class visa is suspended for all persons who are outside New Zealand, except for any person who—

(a) is applying for the visa on the basis that the person is a spouse, partner, or dependent child of—

(i) a New Zealand citizen; or

(ii) a person who holds a residence class visa and who, as the holder of that visa, must or may be granted entry permission under immigration instructions; or

(aa) is in, and intends to travel from, the Cook Islands or Niue; or

(b) is a member of, or associated with, a scientific programme or expedition under the auspices of a Contracting Party to the Antarctic Treaty (within the meaning of the Antarctica Act 1960) or is a person to whom section 5 of the Antarctica Act 1960 applies; or

(c) is applying for a person who is, for the time being, accorded privileges and immunities under—

(i) the Vienna Convention on Diplomatic Relations in accordance with the Diplomatic Privileges and Immunities Act 1968; or

(ii) the Vienna Convention on Consular Relations in accordance with the Consular Privileges and Immunities Act 1971; or

(d) is applying for a person who is a member of the officially recognised accompanying family of a person described in paragraph (c); or

(e) is applying for a Recognised Seasonal Employer limited visa under immigration instructions; or

(f) may, by virtue of COVID-19 immigration instructions, apply for the visa if invited to do so and holds a current invitation to apply for the visa.

(1A) *[Revoked]*

(2) In this regulation, ***dependent child***, in relation to a person, means a child who is totally or substantially reliant on the person or the person's spouse or partner for financial support, regardless of whether the child lives with the person or the person's spouse or partner (or both).

(3) The period of the suspension under this regulation starts on 10 August 2020 and ends at the close of 6 February 2022.

(4) This regulation is revoked at the close of 6 February 2022.[15]

[46] Mr Gilray explains that reg 9A was designed to address the problems arising from the closure of the border by Y4.50 by stopping the continued receipt of applications for temporary entry class visas. It carries over the same exceptions present in Y4.50. He states:

> Permitting applications to be made for visas in circumstances where the border closure means the holder could not expect to get entry into New Zealand presents risk to New Zealand's international reputation. INZ could be seen as encouraging persons to apply (and to pay INZ the relevant application fees) in circumstances where it knows there was no clear path to enter New Zealand.
>
> Further, the effectiveness of reg 9A (and the border closure) depends on clear lines being drawn. This can be seen in reg 9A through the fact it refers only to classes of visa (temporary class visas, or visas based on relationships (i.e partnership and dependent children). The other exceptions are also 'black and white' categories such as diplomatic status or membership of Antarctic

[15] The expiry date in sub-paragraphs (3) and (4) has changed following periodic renewal. On 5 February 2022, the expiry date of the regulation was automatically extended to 5 August 2022.

> research programmes where persons' inclusion or exclusion can be clearly framed. Framing the regulation in terms of application type is the only feasible option for clear administration. The alternative would be to frame suspensions or exceptions by reference to factual circumstances. That would mean that each application would need to be examined by an immigration officer in order to determine whether it could be accepted which would not be administratively workable.

*Certification of E13*

[47] Regulation 9A did not respond to the "on-hand" applications received but not processed before it came into effect. INZ's view is that it is not legally able to grant visas after the border closure because there was a reason to believe the holder of a visa would be refused entry permission under instruction Y4.50. It relies on s 43(1)(b) which provides:

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

[48] In February 2021, INZ estimated it had on hand approximately 39,000 entry visa applications that it could not grant. Consequently, INZ had to make a choice between retaining the applications it could not grant or finding a way to allow them to be lapsed. When an application is lapsed, INZ no longer has to do any further processing or make any decision with regard to the application. It is more efficient than processing each application individually.

[49] Mr Gilray deposes that lapsing has no prejudicial effect on any applications those applicants may make in the future. This is not an understanding shared by the plaintiffs. The plaintiffs are concerned that, once lapsed, a fresh application re-joins the queue of applications at the end, thus losing its place. Mr Gilray responds to this concern in this way:

> [95] …it is not a pure first in, first out approach, although date is one aspect as are risk and value characteristics. A general approach is to filter out the low touch, low complexity work as a priority, noting this makes up the bulk of the

> volumes and INZ has the ability to batch/bulk process this type of visitor visa general application. So lower complexity work is generally processed faster.
>
> [96] For a general visitor visa where there is a relationship aspect identified, this would generally require a higher degree of scrutiny/effort. In addition, I note that applications that are not lapsed are likely to be treated as complex, owing to the need to seek updated information. Applicants are required to demonstrate that they meet the rules and criteria of a visa at the time of the decision. If and when the border restrictions are lifted, any applicant would need to demonstrate that their circumstances had not changed such that they continue to meet the rules and criteria of the visa for which they applied.
>
> [97] How resources are allocated across the relevant office/network at the time, including through any general instruction of the Chief Executive under s 26 of the Act on the order and manner of processing, will ultimately decide how long the visa may take to process (and what that means from a queue perspective). The result is that while date of application is one metric and informs processing order, complexity also plays a significant part such that there is no identifiable "queue" for an applicant to lose a place in.

[50] Mr Gilray explains that lapsing was the preferred means in order to address the concern that the original purpose of the intended visit would no longer be valid and in almost all cases INZ would require updated evidence to process the application. There would then need to be individualised approaches to all of the applicants to resubmit updated evidence. Further, INZ continues to hold the application fees for those applications and was receiving enquiries and requests for refunds from applicants seeking to withdraw their applications due to the border closure. This was exacerbated by continued uncertainty about when the border might open. Once the border opened, the tens of thousands of applications would require a significant devotion of resource to process which would exceed INZ's capacity. He identified the priority was to find a way to action refunds at the requisite scale in a manner that is fair and consistent and that a lapsing programme accompanied by a special direction (to deal with refund requests) enabled this to occur.

[51] Officials provided a briefing paper to the Minister on 22 February 2021, seeking his approval in principle to lapse, or return, and refund those applications falling within the relevant categories. The Minister agreed in principle the following day that on hand temporary visa applications from offshore applicants that cannot be considered under an exception category and cannot therefore be granted, may be lapsed and the associated fees refunded.

[52] The operational policy team within MBIE prepared a briefing paper dated 23 June 2021. On 24 June 2021, the Minister agreed to certify instruction E13 and to sign a special direction to implement the decision of 23 February 2021 to lapse, or return, certain applications and refund associated fees and levies.

[53] Various teams within INZ began actively lapsing applications and processing refunds for the applications from 6 July 2021. As at 10 November 2021, INZ estimated that approximately 40,460 applications will be lapsed under instruction E13. Of this number, 24,144 are visitor visa applications. INZ contends that it cannot identify which of these visitor visa applications fall within the cohort identified by the plaintiffs without a "page-turn" of every application.

*Extension of reg 9A*

[54] In September 2020, the Minister submitted a paper to Cabinet proposing to extend the suspension by a further three months to 8 February 2021. The supporting briefing paper explained that until the suspension came into effect, INZ was continuing to receive increasingly large numbers of ageing applications which it was unable to approve or decline. Continuing suspension would enable INZ to focus on the efficient processing of visas for those who had been granted exemptions or exceptions allowing them to travel to New Zealand.

[55] On 5 October 2020, Cabinet agreed to extend the suspension to 8 February 2021. Cabinet also noted that the Minister considered that suspension should be continued further and that this was and continued to be reasonably necessary to manage the effects, or deal with the consequences of, the outbreak of COVID-19.

[56] On 20 November 2020, the Minister agreed to propose to Cabinet that the suspension on the ability to apply for most offshore temporary entry class visas be extended for a further three months, to 7 May 2021. Again, briefing papers were prepared by Ministry officials. These largely replicated earlier briefing papers.

[57] In December 2020, the Minister submitted a paper to Cabinet seeking a further extension of three months to reg 9A.

[58] On 20 December 2020, the Cabinet Business Committee agreed to continue the suspension for a further three months to 7 May 2021. Before the expiry, the Office of the Minister submitted a paper asking Cabinet to agree to extend the suspension by a further three months to 6 August 2021. The briefing paper supporting that decision further explained that the legislative ability to make further extension was to be repealed on 16 May 2021 but that Cabinet had agreed to amend the Amendment Act to extend the repeal of this and other immigration COVID-19 powers.

[59] On 8 April 2021, the Cabinet Legislation Committee agreed to extend the suspension by a further three months to 6 August 2021.

[60] The Immigration (COVID-19 Response) Amendment Bill was introduced in April 2021. The resulting Immigration (COVID-19 Response) Amendment Act 2021 came into effect on 10 May 2021. It extended the repeal date of the government's temporary powers relating to visas, inserted by the Amendment Act. The extension was by two years to 15 May 2023. It also extended the maximum duration of any regulation such as reg 9A from three to six months.

[61] On 6 May 2021, the Minister agreed to direct officials to issue drafting instructions to the Parliamentary Counsel Office to make amendments to the regulations to extend the suspension. This was the suspension due to expire on 6 August 2021. In June of the same year the Minister agreed to submit a paper to Cabinet seeking its approval to certain changes to the regulations, including extending for a further six months to February 2022 the suspension on the ability of persons offshore to apply for most temporary entry class visas.

[62] On 10 June 2021, the Cabinet Legislation Committee agreed to extend the suspension of applications to 5 February 2022. This was further extended on 21 November 2021 to expire in August 2022.

[63] In respect of each renewal of reg 9A, the associated briefing papers repeated the same concerns and objectives. The Minister acknowledges that each extension of regulation 9A had the objective of addressing the same circumstances and the motivation has remained consistent since reg 9A was promulgated.

**Procedural History**

[64] The three sets of proceedings were commenced on 21 July 2021 and consolidated. Mr Higgs sought interim relief. The application was heard by Jagose J who declined relief on 31 August 2021 on the basis that interim orders were not necessary to protect his position.

[65] On 22 November 2021 the judgment of Cooke J in *Afghan Nationals v Minister of Immigration* was released.[16] On 25 November 2021, the plaintiffs sought leave to file amended statements of claim adding a new ground of challenge. The new ground challenges the vires of immigration instruction Y3.5.1(a)(ii) relying on the *Afghan Nationals* case. Some other minor amendments were also made.

[66] The respondents consented to the introduction of the new cause of action provided leave was reserved to file short supplementary evidence after the hearing, if required. The Court records its gratitude to counsel for the responsible position taken.

[67] I granted leave on that basis.

[68] An amended statement of claim was filed by Mr Witbrock on 2 December 2021. This was to capture a further renewal of reg 9A on 22 November 2021 by which the suspension for non-exempt temporary visas was extended to 5 August 2022. As it merely brought the Court up to date, no leave was required.

[69] After the hearing, the parties filed a joint memorandum dated 17 December 2021 to update the Court. The memorandum advised that the Minister certified further immigration instructions on 9 December 2021. The new instruction E7.1(c)-(e) clarifies the policy intent of the Act with respect to decision making for the grant of a visa or entry permission for temporary visa applications. The material addition to E7.1 is:

> c. An immigration officer determining a temporary application from a person who is offshore must have no reason to believe that person would be refused entry permission, if the visa is granted.
>
> d. In making the determination set out at (c) above, the immigration officer should take into account:

[16] *Afghan Nationals v Minister of Immigration* [2021] NZHC 3154.

i. for applications subject to temporary entry instructions, the most recent version of the relevant Border Entry instructions.

ii. for applications subject to restricted temporary entry instructions, the relevant Border Entry instructions in effect at the time the application was made.

e. An immigration officer making the determination set out at (c) above is not required to consider whether the applicant is likely to be granted entry permission as an exception to instructions.

[70] The plaintiffs consider the new immigration instructions are directly relevant to the ultra vires ground of review and the respondents' opposition, though they do not replace any instruction traversed at the hearing. Neither party sought to make further submissions on the new instructions.

[71] Mr Mortimer-Wang filed a memorandum dated 22 December 2021confirming that the respondents did not seek to file further evidence. They were content to rely on the evidence and submissions already filed. They also filed amended statements of defence on the same date.

**The Grounds of Challenge**

[72] There are three pleaded grounds of challenge:

(a) Immigration instruction Y 3.5.1(a)(ii) is ultra vires and erroneously relied on to justify suspension of applications;

(b) Failure to consider obligations under international human rights conventions to which New Zealand is a party led to an error of law;

(c) Failure to consider the discriminatory impact as required by s 19 Bill of Rights Act 1990 led to an error of law.

[73] I pause to note that there is a disjunct between the plaintiffs' submissions and the challenge to the effect of reg 9A. Both the pleadings and written submissions challenge the Minister's suspension decisions as if they suspended the *processing* of non-exempt temporary visas as well as the *ability to apply* for offshore temporary class visas. This is not the case.

[74] Processing of visas is affected because INZ considered it could not grant visas received but not processed before reg 9A, due to the combined effect of Y4.50 and s 43(1)(b) of the Act. Rather, it paused those applications because it also appreciated that it could not decline them either. Importantly, reg 9A does not concern the processing of offshore visa applications received before 10 August 2020.[17]

[75] Equally importantly, the plaintiffs do not challenge Y4.50. Nor do their pleadings challenge INZ's interpretation of s 43(1)(b). One must avoid conflating the two types of suspension – suspension of application and suspension of processing.[18] The scope of the challenge to reg 9A is directed to the inability of offshore persons to apply for a temporary visa and not the impact of border closure on the processing of applications received before 10 August 2020. However, I also accept that INZ's view of s 43 is part of the narrative relating particularly to the certification of E13.

**Preliminary**

[76] It is common ground that these judicial review challenges are not caught by the ouster provisions in ss 24(3)(b) or 186(3) of the Act. The reviews are not focused on decisions relating to particular individuals or individual applications. Both plaintiffs state that they are taking these challenges with the awareness that they are unable to challenge any individual lapsing decision or decision not to issue an individual visa.

[77] Similarly, it is common ground that s 392(2) of the Act is not engaged. Section 392(2) provides that nothing in the content or application of any immigration instructions made in accordance with s 22 may be the subject of a complaint under the Human Rights Act 1993 (the Human Rights Act). As the challenge relies on the Bill of Rights Act, it is not a complaint under the Human Rights Act.

[78] This explains why these proceedings are framed in a particular way. This in turn informs the issues the Court must determine. The challenges are centred on decisions by the Minister to certify the relevant instructions and the Minister's

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17 I understand that plaintiffs' counsel confirmed in writing prior to the hearing that the challenge was limited to the suspension of the ability to apply. Refer memorandum on behalf of respondents dated 22 December 2021.

18 Mr Mortimer-Wang uses the shorthand phrase "the s 43(1)(b) suspension" to refer to suspension of processing.

recommendations to extend reg 9A which suspends the ability of most people to apply for temporary visas.[19]

**Is Y3.5.1(a)(ii) ultra vires?**

[79] It is logical to deal first with the contention that Y3.5.1(a)(ii) is ultra vires due to inconsistency with the Act.

[80] Immigration instruction Y3.5.1 appears in the Manual under the heading "Applying for entry permission". Under a sub-heading "Considering an application for entry permission", it relevantly provided that immigration officers must consider an 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.

[81] This instruction was revised on 1 December 2021. Sub-paragraph (ii) was replaced with a new (ii) which reads "the relevant Border Entry instructions…". A new sub-paragraph (b) was added which clarifies the relevant Border Entry instructions for different types of visas. It states that if the applicant holds a temporary entry class visa, the relevant Border Entry instructions are those in force at the time the application for entry permission is made.

[82] It was not suggested that anything in this revision (as opposed to the revisions to Y4.50) materially informs or changes the position.

*What role does Y 3.5.1(a)(ii) have in these challenges?*

[83] The plaintiffs contend that the justification advanced by the Minister for reg 9A arises from the inter-relationship between Y3.5.1, Y4.50 and s 43(1) of the Act so that if Y3.5.1 is ultra vires, the justification falls away. But they also argue the corollary - if it is not ultra vires for the reason that the discretion is not removed, then there is

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[19] Refer also *Afghan Nationals* at above n 16, which held that ouster clauses cannot "exclude a challenge that involves an allegation that the statute is not being properly applied" at [49].

still no justification for reg 9A. In short, because it cannot be said that reg 9A was reasonably necessary as the empowering provision requires. This explains why the plaintiffs introduced their late challenge to Y 3.5.1.

[84] When pressed at the hearing to articulate where this argument fits in orthodox judicial review terms and the pleaded case, Mr Dalley posited that it amounts to a combined error of fact and law which responds to the way in which the respondents have advanced their opposition. I have some difficulty with this submission. In my assessment, the argument is in reality an ultra vires challenge to reg 9A. That was not pleaded. Mr Mortimer-Wang made the point at the hearing that the evidence before the Court was premised on the pleaded case and the argument should not be permitted to stray any more widely.

*The contentions*

[85] The plaintiffs argue that Y3.5.1(a)(ii) is inconsistent with the Act. They say that effectively denies entry permission to all non-exempt temporary visa holders, fettering the discretion of immigration officers conferred by ss 22, 45, 46 and 109(7) of the primary legislation. Immigration instructions are subordinate, being merely statements of government policy. Thus, immigration instructions which are inconsistent with the statutorily derived discretion are ultra vires.

[86] They rely on *Afghan Nationals* in which Cooke J found that Y3.5.1(a)(ii) is ultra vires to the extent that it requires the applicable 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.

[87] The respondents argue that Y3.5.1(a)(ii) does not limit the discretion afforded to immigration officers under the Act. Rather, its purpose and effect is merely to inform immigration officers which version of entry permission instructions they are to apply and the decision in *Afghan Nationals* case has no application to temporary entry visas.

*Discussion*

[88] The Act expressly provides that immigration officers have discretion in relation to decision making in a number of respects. Section 109 relevantly provides:

> **109 Decisions on entry permission in relation to temporary entry class visa holders**
>
> (1) The Minister or, subject to any special direction, an immigration officer may, in his or her discretion,—
>
> (a) grant the holder of a temporary entry class visa entry permission on the basis of his or her visa; or
>
> (b) in accordance with section 82, cancel the visa of the holder of a temporary entry class visa, grant a limited visa in its place, and grant the person entry permission on the basis of the limited visa; or
>
> (c) refuse the holder of a temporary entry class visa entry permission.
>
> (2) The Minister or an immigration officer may, in his or her discretion, grant the holder of a temporary entry class visa entry permission on the basis of his or her visa but impose further conditions, or vary or cancel any conditions that would otherwise apply to the visa.
>
> …
>
> (4) A decision under subsection (1) that relates to a temporary entry class visa of a type subject to restricted temporary entry instructions must be made in terms of the temporary entry instructions applicable at the time the person applied for the visa.
>
> …
>
> (7) Nothing in this section prevents—
>
> (a) the Minister or an immigration officer, in his or her discretion, from granting entry permission to the holder of a temporary entry class visa (other than a holder of a temporary entry class visa of a type subject to restricted temporary entry instructions) as an exception to temporary entry instructions:
>
> (b) the Minister, in his or her absolute discretion, from granting entry permission to the holder of a temporary entry class visa of a type subject to restricted temporary entry instructions, as an exception to the restricted temporary entry instructions.

[89] I do not agree that ss 22, 45 and 46 support the plaintiffs' argument. Section 22 is a general section which empowers the certification of immigration instructions.

[90] Section 45 only relates to the grant of visas and does not bear on the question of entry permission. It provides that the grant of visa is generally a matter of discretion unless any provision in the Act expressly provides otherwise. Section 46 affirms that the grant of a visa does not guarantee entry permission other than for a permanent resident visa or a resident visa granted in New Zealand.

[91] In my assessment, all that Y3.5.1(a)(ii) does is point to which border entry instructions must be *considered* when considering any application for entry permission. This reflects the potential that, in any individual case, immigration instructions may have changed between the application for visa and application for entry permission. It does not fetter the exercise of discretion on the part of an immigration officer. This is underscored by the requirement in Y3.5.1(a)(i) to consider entry permission in *accordance with the requirements of the Act*. This calls up, albeit more obliquely than might be desirable, an immigration officer's ability to grant entry permission as an exception to instructions.[20]

[92] Cooke J in *Afghan Nationals* held that Y3.5.1(a)(ii) was 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.[21] This was expressly contrary to s 108(6) of the Act. That section provides that decisions about entry permission for residence class visa holders must be made, and any discretion exercised, in terms of the residence instructions applicable *at the time* the person applied for the visa rather than the entry permission. But, there is no equivalent of s 108(6) for temporary entry class visas. [22]

[93] Accordingly, I reject the argument that Y3.5.1(a)(ii) is ultra vires. As to the consequences of that finding, I accept the point that the ultimate submission strayed outside the scope of the pleadings too widely. However, in any event, I consider that an immigration officer's discretion to grant entry permission as an exception to instructions does not lead to a conclusion that reg 9A was not "reasonably necessary".

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20 Since 1 December 2021, Y 4.50(b) reinforced that position by expressly referring to the possibility that a person may still be granted entry permission by an immigration officer, or by the Minister of Immigration, as an exception to instructions under s 108(9) or s 109(7) of the Immigration Act.

21 At [141].

22 Section 109(4) requires that applications for entry permission under restricted temporary entry instructions must be assessed in terms of instructions applicable at the time the person applied. The restricted temporary entry instructions do not relate to general visitor visas.

Nor do I accept that the discretion means there is no reason to believe that the applicant for a visa will be refused entry permission at the border. To the contrary, the submission overlooks the practical imperative of an orderly control of the border during the pandemic.

**Alleged failure to properly consider international and domestic human rights obligations in making the lapsing and suspension decisions?**

*Contentions*

[94] The empowering provision for reg 9A requires that the Minister be satisfied that the regulation is reasonably necessary for one of the stipulated reasons.[23] Alongside that mandatory requirement or condition, the plaintiffs contend that the Minister was required to consider New Zealand's international and domestic human rights obligations when making the suspension decisions. They refer to the statement in the Minister's affidavit that:

> I am aware of New Zealand's international obligations as they relate to the making of immigration decisions, and that there are international obligations relating to family life and ensuring the best interests of children.

[95] The plaintiffs argue that this statement goes no further than the statement in *Zhang v Minister of Immigration.*[24] In that case, Gwyn J determined that mere awareness is an insufficient basis on which it could be confidently inferred that the Minister did in fact consider, in a genuine and discrete way, the significance of the International Covenant on Civil and Political Rights (ICCPR)[25] or United Nations Convention on the Rights of the Child (UNCROC)[26] in decision making.

[96] Mr Dalley's oral submissions on this aspect shifted ground somewhat. He reframed the challenge as one falling within the twin orthodoxy in judicial review – the taking into account of irrelevant matters and its companion, failure to take relevant matters into account. He submitted that it should be inferred from the evidence that the Minister did not accept that international obligations required him to exclude from

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23 Section 401A(4).

24 *Zhang v Minister of Immigration* [2020] NZHC 568.

25 International Covenant on Civil and Political Rights 999 UNTS 171 (opened for signature 16 December 1966, entered into force 23 March 1976).

26 Convention on the Rights of the Child 1577 UNTS 3 (opened for signature 20 November 1989, entered into force 2 September 1990).

suspension *all* visas relating to partners and dependent children rather than only those who satisfied the living together requirement. Further, that there was no consideration of international obligations owed to families of migrants.[27] On the contrary, the Court can infer that the Minister considered he owed no obligations to this cohort. He points to the respondents' submission that international obligations do not impose any substantive obligation on a state to permit all couples to live in the country of their choice.

[97] The plaintiffs rely in particular on article 10(1) of the International Covenant on Economic Social and Cultural Rights (ICESCR)[28], article 17 of the ICCPR and article 3(1) of UNCROC. Article 10 (1) provides:

> The widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society, particularly for its establishment and while it is responsible for the care and education of dependent children. Marriage must be entered into with the free consent of the intending spouses.

[98] Article 17 of the ICCPR provides:

> 1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.
>
> 2. Everyone has the right to the protection of the law against such interference or attacks.

[99] Article 3(1) of the UNCROC provides:

> In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

[100] They also refer to other articles which are not specifically pleaded as relevant considerations but provide wider context.

[101] The continued separation of partners and families of both New Zealand citizens and residents and those on temporary visas whose partners and children have made

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27 This point relates to the fact that partners of temporary visa holders in New Zealand were caught by reg 9A.

28 International Covenant on Economic, Social and Cultural Rights (open for signature 16 December 1966, entered into force 3 January 1976).

visa applications to join them in New Zealand is said to engage these articles. The plaintiffs contend that had the Minister properly considered those matters, he may have come to a different decision.

[102] The Minister accepts that when Parliament confers a law-making power such as by the empowering provision in this case, it will ordinarily expect the decision maker to take into account obligations arising from international conventions at a general level and to the extent that they are relevant. Mr Mortimer-Wang submits this does not extend to any obligation to exercise that power consistently with international obligations because they are not enforceable at domestic law unless specifically incorporated into a statute.

[103] Mr Mortimer-Wang emphasised in his contextual framing that reg 9A is a general level rule rather than one directed at an individual factual situation. He submitted that specific international obligations are more easily and effectively considered in the context of individual cases than at the abstract higher level. It is in that case-specific consideration of rights that those rights "bite". Nonetheless, he accepted, as he must, that the position of family members, informed by international obligations, is a relevant consideration given the sufficiently foreseeable separation of family members.

[104] In the same vein, he sought to distinguish *Zhang* as representative of one of the two different contexts (individual versus general level decision making). He submitted that a decision maker is not required to contemplate every individual factual circumstance affected by a general rule where there are appropriate safety valves in the system to consider the individual case downstream.

*Discussion*

[105] It is necessary first to drill further into the impugned decisions, dealing first with reg 9A.

[106] There are three in built protections in s 401A. First, regulations may only be made for a limited period although may be 'refreshed' (initially for a three-month

period and, since 11 May 2022, for a six-month period)[29]. Secondly, s 401A itself is time-limited. Following the most recent amendment, s 401A is automatically repealed at the close of 15 May 2023. Thirdly, the Minister must not recommend the making of regulations unless satisfied that doing so is reasonably necessary to manage the effects, or deal with the consequences of:[30]

(a) the outbreak of COVID-19;

(b) measures taken under the Act or any other enactment to contain or mitigate the outbreak of COVID-19 or its effects; or

(c) any other measures (whether in New Zealand or elsewhere) to contain or mitigate the outbreak of COVID-19 or its effects.

[107] While the plaintiffs criticise the Minister for rolling over reg 9A without recognising changes of context arising from vaccine development, increased MIQ capacity and the passage of time, they have not pleaded that the suspension decisions are ultra vires the empowering provision.[31]

[108] Regulation 9A suspends the ability for all persons outside New Zealand to apply for a temporary entry class visa unless that person falls within one of the excepted categories. The material exception for present purposes is those persons applying for a visa *on the basis* that the person is a spouse, partner, or dependent child of a New Zealand citizen or a person who holds a residence class visa who must or may be granted entry permission under immigration instructions.

[109] The meaning of "on the basis" is not apparent from the face of the regulation. Commonly it means the reason for doing something. Although not argued before this Court, one available interpretation of the exception as drafted is that applications for *any* type of visa, applied for by reason that the applicant is a spouse, partner, or dependent child, falls within the exception. INZ construes it more narrowly to mean an application for a visa under 'Partnership Instructions', consistent with the

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29 Refer s 15(1) Immigration (COVID-19 Response) Amendment Act 2021 (2021 No 14).
30 Section 401A(4).
31 This is the argument which relies on the ultra vires of Y3.5.1.

immigration scheme in place. As explained above, this is a particular application with its own characteristics which requires meeting the partnership requirements.[32]

[110] The associated briefing papers relating to suspension of offshore temporary visa applications recorded that the proposed reg 9A complied with, among other things, the Human Rights Act, Bill of Rights Act and relevant international standards and obligations. They did not identify any particular standards and obligations more specifically. Nor did those papers distinguish between impacts on different interested cohorts. However, I accept Mr Mortimer-Wang's submission that considering the interests of families and children in setting a general level rule does not require a granular assessment of all potential permutations in which those interests may manifest.[33]

[111] In *H v Minister of Immigration*[34] the Court of Appeal did not require direct evidence that a specific obligation of the Convention relating to the Status of Refugees had been considered by the Minister. Instead, it inferred from the evidence that the Minister considered the interests of refugees when certifying an immigration instruction. I accept that it is not realistic to expect that every such obligation will be cited. What matters is whether the substance of the obligation is considered rather than a tick-box exercise.

[112] It cannot be seriously contended that the decisions at issue had the potential to cut across the best interests of families, and particularly children. The Minister deposed that he did take into account the interests of families and children when deciding to enact reg 9A. He states:

> [23] I am aware of New Zealand's international obligations as they relate to the making of immigration decisions, and that there are international obligations relating to family life and ensuring the best interests of children.
>
> [24] A significant pressure in every COVID-related border measure the government has taken has been the effect that the border closure (or other border related measures) has on family connections, including spouses, partners and children. There have been difficult calls to make in a range of

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32 Immigration instruction V3.15, E4.5 or immigration Instruction WF.

33 The Minister also deposed that as Bill of Rights compliance is a question of law, other than confirming that he acted consistently with any obligations under the Bill of Rights Act, he did not give evidence on that aspect.

34 *H v Minister of Immigration* [2020] NZCA 562 at para 54 – para 64.

areas about who will be permitted to come to New Zealand, and a range of factors including public health advice and resourcing has informed those.

[25] When people's lives are affected by these decisions in such concrete ways, I have felt keenly the responsibility of setting border measures (together with my Cabinet colleagues). They are always taken with the knowledge that there are real world consequences for people affected, and that our decisions have to be taken in a way that tries our best to meet as many competing obligations as we can (including ensuring to the extent we can ensure families and children can be together), while keeping New Zealanders safe, and the immigration system functioning well while under extreme pressure from the effects of COVID-19 and the measures we have taken. Those factors – and others – sometimes pull in different directions. It is an unfortunate reality that during the COVID-19 pandemic, not every person who would ordinarily be able to come to New Zealand will be able to do so.

[26] The decisions I made in respect of reg 9A and instruction E13 fall into these categories. The need to try to reduce the impact on families to the extent possible was something I was mindful of while making these decisions. For example:

26.1 First, although the criteria in reg 9A and instruction E13 largely map to the border closure criteria established in instruction Y4.50, all of them contain certain exceptions for visas based on partnership or dependent children of New Zealand citizens and permanent residents. This was reflective of my (and my Cabinet colleagues) consideration of family interests at the time.

26.2 Second, the issue of how the partnership-based exceptions were drawn across the suite of border settings was the subject of lobbying to me in my role as Minister of Immigration. After they were initially put in place, I received a letter from the Immigration Industry Steering Group raising the issue of whether settings might be changed to permit general visitor visas to be granted to persons unable to meet partnership requirements.

[113] The letter to which the Minister refers in his affidavit requested that INZ be authorised to grant GVVs on the basis of a relationship with a New Zealander that does not meet partnership requirements and for those visa holders to be exempt from current border restrictions. This is on the basis that the purpose behind granting border exemptions on partnership and dependent child visas is to ensure family unity. Extending the exemption to this group fits the stated purpose.

[114] The Minister does not state when he became aware of this letter. It is dated 8 March 2021, before the June 2021 decision. I am prepared to infer that he was cognisant of the effect of the removal of the ability to apply for GVVs on persons in relationships before the June 2021 decision although he only responded to the letter on 14 July 2021, after his decision to extend the period of reg 9A. There is nothing on

the record to suggest that the Minister was cognisant of this removal before March 2021.

[115] The Minister's response to that letter is instructive. He stated:

> The Government must balance the demand of those offshore who intend to enter New Zealand with our limited capacity to isolate and quarantine new arrivals.
>
> …
>
> INZ is currently taking a pragmatic approach to the requirement to be living together in a genuine and stable relationship – a partnership will be considered to have met the definition if the partners have previously lived together.
>
> Prior to the border closure, INZ was able to grant Visitor Visa General visas in some cases where an applicant was unable to demonstrate one or more of the partnership requirements, including living together. However, INZ is not currently processing these visas as they are not considered 'a visa based on the relationship with that partner' as required under the current border exception criteria for partners of New Zealand citizens and residents.

[116] I accept that each decision to extend the effect of reg 9A required the Minister to readdress the issues rather than exercise pro-forma decision making. Each time the Minister made his decision his officials prepared briefing papers and a paper was prepared for Cabinet. That material was largely the same for each decision period. It can be inferred that the Minister did not consider that the context had changed in that period. On each occasion, the briefing papers referred to the need to continue to manage the flow of incoming visas so that INZ could focus on efficient processing of visas; this would complement the border restrictions and communicate to people offshore that they were unable to travel to New Zealand.

[117] The respondents acknowledge that each extension of reg 9A had the objective of addressing the same circumstances and the motivation remained consistent since reg 9A was promulgated. The plaintiffs argue that the relative 'reasonableness' of the suspension decisions has diminished over time given the increasing availability of widespread pre-departure testing, vaccinations, shorter MIQ stays and the length of separation of families.

[118] The fact that reg 9A itself specifically retains an ability for persons to apply for temporary entry class visas based on relationships while temporarily suspending that ability for nearly everyone else confirms that the Minister had regard to family

considerations when making reg 9A. Addressing the position of families, partners and children underscores the importance of family, partner and children considerations. Thus, there is direct evidence that the interests of families and children were taken into account in the decision-making process.

[119] The facts of *Zhang* are not on all fours. It involved review of a decision under s 190(5) of the Act that there were no special circumstances justifying an exception to immigration instructions. The case-specific context of *Zhang* supported a more intense and different review.

[120] The international convention rights relating to family life are crucially important considerations but they have not been incorporated as a matter of substantive domestic law.[35] This means that the plaintiffs are not able to directly enforce the international conventions and no substantive limits on decisions arise from these international conventions. It is though well established that there is a presumption of statutory interpretation that "so far as its wording allows legislation should be read in a way which is consistent with New Zealand's international obligations"[36]. I am inclined to consider the presumption of consistency where human rights are implicated is particularly strong.[37]

[121] I conclude however that the challenge based on failure to take into account these relevant considerations is in reality a criticism of the weight that the Minister gave to this consideration in his decision making. In other words, the attack is one of substance based on a facially arbitrary distinction.[38] How conflicting considerations are weighed is for the decision maker and not the Court unless unreasonableness considerations can be successfully invoked.[39] This means that where the line was

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35 Contrast s 129 of the Act which provides that a person must be recognised as a refugee in accordance with this Act if he or she is a refugee within the meaning of the Refugee Convention and s 131 which directly incorporates the rights to be free from arbitrary deprivation of life, or cruel treatment in the ICCPR.

36 *New Zealand Air Line Pilots' Association Inc v Attorney-General* [1997] 3 NZLR 269 (CA) at 289; *Zurich Australian Insurance Ltd t/a Zurich New Zealand v Cognition Education Ltd* [2014] NZSC 188 [2015] 1 NZLR 383 at [40]. There is no inconsistency in the adoption of these two models – Hanna Wilberg *Administrative Law* [2010] NZ L Rev 178 at 190.

37 Refer Claudia Geiringer "*Tavita* and all that: Confronting the confusion surrounding unincorporated treaties and administrative law" (2004) 21 NZULR 57 at 102-103.

38 No challenge based on reasonableness was advanced.

39 *Huang v Minister of Immigration* [2009] 2 NZLR 700 (CA) at [67]; *AI (Somalia) v Immigration and Protection Tribunal* [2016] NZHC 2227, [2016] NZAR 1471 at [49].

drawn between cohorts affected by the suspension and those excluded from the suspension is a type of merits review not available to this Court in these proceedings.

[122] Accordingly, I reject the challenge to reg 9A on the ground of failure to take into account relevant considerations. It is unnecessary to address the submissions relating to justification for derogation from international obligations advanced by the plaintiffs.

*Lapsing decision*

[123] I turn to the challenge to the lapsing decision on the same grounds.

[124] The Minister's certification of E13 was intended to deal with the thousands of visa applications which had been received before New Zealand's border closed and between the closure and the making of reg 9A.

[125] INZ took the view that it could not grant a temporary entry class visa in reliance on s 43(1)(b) of the Act. I set this provision out again for convenience:

> **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).

[126] Consequently, from INZ's point of view, those applications were effectively stalled. Mr Gilray's evidence is that keeping these applications "on the books", awaiting the opening of the border was not feasible. First, there was uncertainty about when the border would open. Secondly, the supporting evidence for the application

would likely become stale. Thirdly, INZ was facing fee refund requests from significant numbers of these applicants. These issues were exacerbated by the passage of time.

[127] As there was no existing mechanism to scale up the refund process and individual processing was unrealistic, INZ developed a system to permit lapsing for all temporary entry class visas and allow refunds. According to Mr Gilray, lapsing would mean:

> [91]…that INZ removes the application from its cohort of active files to be processed and determined. When an application is lapsed, INZ no longer has to do any further processing or make any decision with regard to the application. Lapsing can be undertaken with considerably more efficiency than processing each application individually.
>
> [92] Lapsing discontinues the application of the relevant person. INZ records the application as lapsed within its Application Management System (AMS), and takes no further action in relation to the application. The applicants are refunded the application visa fee and levies (where applicable).
>
> [93] Lapsing has no prejudicial effect on any applications those applicants may make in the future.

[128] The Minister, presented with a proposal to lapse, or return and refund those applications which INZ considered could not be granted agreed to certify E13 on 24 June 2021. The power to do so derived from ss 24 and 22 of the Act. Section 24(1) provides that the Minister may certify Instructions that provide "rules or criteria for the lapsing of applications in respect of which no decision to grant a visa has been made, or is likely to be made". Section 24(2) provides that rules and criteria set under s 24 may, among other things, differ for different classes or categories of applications. There is no mandatory requirement to be satisfied, unlike s 401A of the Act.

[129] Instruction E13 does not of itself lapse any application. It instead provides that certain temporary visa applications may be lapsed. It carries through the exemption for types of temporary visa applications including "an application based on a relationship (partner or dependent child) to a New Zealand citizen or residence class visa holder. Unlike reg 9A, the exemption in E13 includes an application based on a relationship with a temporary visa holder.

[130] The grounds of challenge mirror the consideration grounds in respect of reg 9A. For that reason, I approach the analysis in the same way whilst recognising

that the Minister's decision to certify was supported by different briefing papers, none of which expressly referred to New Zealand's international obligations.

[131] The first briefing paper dated 22 February 2021 stated that temporary visa applications not made under an exception category and not exempt from the border closure submitted after 10 August 2020 are "legally unable to be made, and so must be returned along with the application fees…". It sought the agreement of the Minister that those applications be lapsed and application fees be refunded but that INZ continue to process offshore temporary visa applications "based on a relationship to a New Zealander or temporary visa holder". [40]

[132] The briefing paper referred to an alternative approach of holding these applications in abeyance pending greater certainty around the re-opening of the border. It recommended against this course as "for most of these applications, the original purpose of visit will no longer be valid and in almost all cases additional evidence …would need to be requested."

[133] Mr Dalley submitted that the effect of E13 has the curious result in that applicants who made partnership-based visa applications but which an immigration officer has processed and determined that a grant of a GVV would be appropriate, will not have their applications lapsed. However, those who made a GVV application based on their partnership with or dependence on a New Zealand citizen, residence class visa holder, or temporary class visa holder will have their applications lapsed. In short, the distinction is made not on substantive grounds but by reference to the type, class or form of application made.

[134] The respondents' argument that consideration was given to international obligations is slightly weaker than that for the suspension decisions. Yet, it is still evident from the face of E13 that the Minister considered the question of families and children consistently with the international obligations cited by the plaintiffs. After all, it carries through the exception for visa applications based on relationships and even extends the exception to partners of temporary visa holders.

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[40] Although New Zealand residents were not mentioned in the recommendations, it is clear that it was intended to reference them also in the exception category.

[135] I consider that the real target of the plaintiffs' attack should not be E13 but the immigration instructions relating to definition of a genuine partnership, combined with INZ's interpretation of applications "based on a relationship". This is not how the challenge was framed and I say no more about it.

*Irrelevant considerations?*

[136] As previously stated, the ground of irrelevant considerations is another orthodox ground of challenge in judicial review. In this case, it has not been specifically pleaded this way although it was addressed in oral submissions. I therefore deal with it briefly only.

[137] Mr Dalley's submission, as clarified during the hearing, was that the Minister chose a blunt tool in reg 9A and instruction E13 by prioritising what Mr Dalley termed "administrative ease" over the mandatory considerations sourced from New Zealand's international obligations. By "administrative ease", he was referring to the evidence as to why it was not workable to solve the administrative problem wrought by the border closure in any more nuanced way.

[138] That evidence was that it was not, and would not be, feasible to separate out the cohort of persons the plaintiffs raise concern about from the approximately 40,000 temporary entry class visa applications.[41] While it is possible to identify from that number the applications for visitor visas as the INZ system records the type of visa applied for, that left just over 24,000 applications in November 2021 which were potentially subject to lapsing. INZ's system does not record the level of information to identify which of those applications were made because the applicant is in a genuine relationship with a New Zealand citizen or resident. He says that would require a "page-turn" of each of the 24,000 applications. That, in turn, that would require the application of an extremely high level of resources which INZ does not have under the current pressures. To do that would undermine the entire rationale for the lapsing solution in the first place.

[139] To the extent that Mr Dalley suggests by his submission that allocation of resource is not a relevant consideration in immigration decision making, I disagree.

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[41] There was no application to cross examine the respondents' deponents.

As s 3 of the Act states, the purpose of the Act is to manage immigration is a way that balances the national interest, as determined by the Crown, and the rights of individuals. What Mr Dalley describes as administrative ease is part and parcel of allocation of finite resources, a matter which sits squarely within the national interest at a policy level.

[140] To the extent that Mr Dalley's submission is that the Minister prioritised administrative ease over international obligations in error, the submission faces the same obstacle identified above in that it transcends into a substantive or merits review.

[141] It follows that the considerations challenge to the suspension decisions and the lapsing decision fails. I find no reviewable error in the Minister's certification of E13.

**Failure to consider discriminatory impact – s 19 Bill of Rights Act**

*The contentions*

[142] This challenge is pleaded as follows:

(a) The decision(s) of the Minister are discriminatory on the basis of ethnic origins, religious belief, sex and sexual orientation;

(b) Discrimination on those grounds is prohibited by s 19 of the Bill of Rights Act;

(c) The Minister would have come to a different decision if he had properly considered the Bill of Rights Act as required.

[143] This is not explicitly framed in terms of an alleged breach of the Bill of Rights Act but is tantamount to such.

[144] The alleged discrimination lies in the inability of many overseas partners to satisfy INZ's requirement that they demonstrate that they are living together with the New Zealand partner in a genuine and stable relationship.[42] Inability to meet that requirement means that, as interpreted by INZ, the carve-outs in reg 9A and instruction

[42] Immigration New Zealand *Operational Manual* (26 May 2022) at [E4.5.20], [4.5.30] and [4.5.35].

E13 are not available to that cohort, though they are in genuine and stable relationships.[43]

[145] The Minister denies that his decision(s) are discriminatory as pleaded or that he failed to consider his obligations under the Bill of Rights Act. He denies that s 19 is engaged at all.

[146] I distil the issues as whether:

(a) section 19 is engaged;

(b) regulation 9A and instruction E13 have a differential effect on the basis of a prohibited ground;

(c) regulation 9A and instruction E13 have a discriminatory impact; and

(d) if so, any discrimination is demonstrably justified under s 5.

[147] Each raises a host of sub-issues.

*Is section 19 Bill of Rights Act engaged?*

[148] The Minister is a member of the executive branch.[44] There is no doubt that the Bill of Rights Act applies to the Minister's recommendation to make reg 9A (and each extension of reg 9A) and to his certification of E13. But, a question arises as to whose affirmed rights the Minister is required to consider?

[149] The plaintiffs' focus is on those overseas partners of New Zealand citizens and resident visa holders who do not meet partnership policy requirements of living together.[45] The respondents argue that this focus on the overseas partner of the New Zealand citizen –the person prevented from applying for a temporary entry visa – is a jurisdictional obstacle.[46]

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43 Relevantly, the challenge is not to how INZ is implementing either reg 9A or instruction E13.
44 New Zealand Bill of Rights Act 1990, s 3(a).
45 This includes dependent children included in those applications.
46 Although the would-be visa applicant is not a plaintiff in these proceedings.

[150] Mr Mortimer-Wang submitted that persons who are not New Zealanders and who are outside New Zealand's jurisdiction cannot normally claim the benefits of the rights affirmed by the Bill of Rights Act. He referred to its long title which provides that it is an Act:

> (a) to affirm, protect, and promote human rights and fundamental freedoms *in New Zealand*; and
>
> (b) to affirm New Zealand's commitment to the International Covenant on Civil and Political Rights (1996).
>
> (Emphasis added)

[151] Secondly, he relied on the statutory presumption against extraterritorial legislation[47] and the scheme of the Act. He suggested that control of New Zealand's border is inherently a territorial matter; the Act does not purport to claim prescriptive jurisdiction over offshore individuals who seek entry but only sets laws and rules about who may enter its territory. The third limb of his submission was that it is impractical and risks sovereign interference to expect domestic decision makers to take into account and comply with the Bill of Rights Act in respect of impacts on foreign nationals.

[152] Ms Sundar, who dealt with this part of the case on behalf of the plaintiffs, submitted in reliance on *Afghan Nationals* that INZ assumed jurisdiction when it accepted a GVV application for processing. This is particularly so for those applications made in reliance on INZ's recommendation to make a GVV application if the living together requirement could not be met. She contended that this does not involve considering the impact on a foreign national beyond that person's interaction with INZ. It is limited to applying New Zealand law when processing that application. This submission does not address would-be applicants who are prevented by reg 9A from making an application and might be thought to conflate the two different types of suspension.[48]

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47 Refer *Ludgater Holdings Ltd v Gerling Australia Insurance Co Pty Ltd* [2010] NZSC 49, [2010] 3 NZLR 713 at [22] citing *Poynter v Commerce Commission* [2010] NZSC 48, [2010] 3 NZLR 300 at [36]–[45].

48 Refer paragraph [75].

*Discussion*

[153] Issues of extraterritorial reach of the Bill of Rights Act have not yet been resolved by the courts. A number of cases suggest that New Zealand officials cannot avoid the application of the Bill of Rights Act simply by conducting inconsistent acts overseas and there may be extra-territorial operation of the Bill of Rights.[49] Those cases involved extra-territorial acts in the conventional sense. That is, acts undertaken outside New Zealand. They do not consider potential discriminatory impacts on foreign nationals arising from actions and decisions taken by officials in New Zealand. While their context is not on all fours, they illustrate an expansive approach to the avowed purpose of protecting and promoting fundamental rights. To that extent, they inform the question of whose affirmed rights are to be taken into consideration.

[154] Cooke J confronted a similar issue in *Afghan Nationals*.[50] The applicants for judicial review were 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.[51] The COVID-19 outbreak and effective closure of the border intervened. They were not granted permission to enter New Zealand notwithstanding the humanitarian crisis that then engulfed Afghanistan.

[155] Of the extra-territoriality submission, the Judge said:[52]

> I accept the Bill of Rights can have some application here. It applies because New Zealand has chosen to apply the [Immigration] 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 ss4, 5 and 6 of the Bill of Rights. The proper interpretation of the Act cannot vary based on the physical location of the person to whom [it] 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.
>
> 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

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49 *Young v Attorney-General* [2018] NZCA 307, [2018] 3 NZLR 827 at [40]; and *Smith v R* [2020] NZCA 499, [2021] 3 NZLR 324 at [92].

50 Above n 7.

51 The jurisdictional question was perhaps more acute since the plaintiffs were outside the jurisdiction. Contrast here where the plaintiffs are in New Zealand.

52 At [39]–[40].

> 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 had the death penalty. But the immigration decisions here still do not seem to me to engage the right to be deprived of life except on such grounds as are established by law and are consistent with the principle of fundamental justice.

[156] This case suggests there are at least two instances where the Bill of Rights Act has direct application in the immigration context notwithstanding some extra-territorial dimension. First, when interpreting the legislation in a "rights-consistent" manner. Secondly, when processing and determining visa applications under the Act, although not all affirmed rights in the Bill of Rights would be engaged then. Each affirmed right in the Bill of Rights Act requires separate consideration under this approach.[53]

[157] I agree with the first point as to the interpretive mandates in the Bill of Rights Act. I am not persuaded that the issues before this Court involve extra-territorial reach. It is the Minister's decision making in respect of New Zealand's border which is challenged. The proper question is not whether the Bill of Rights Act applies extraterritorially but whether public officials in New Zealand must consider consistency with the Bill of Rights Act when acting in a way affecting the lives and rights of individuals overseas.

[158] I accept that reg 9A tells people overseas that New Zealand does not intend to deal with them for a limited time. This might be said to point away from assumption of personal jurisdiction even if receipt of an application for a visa were enough to assume personal jurisdiction over that person. But, the gist of this challenge is less about the suspension of applications for GVVs and more about where the line is drawn as to exceptions for partnership based visa applications.

[159] I consider that there are more cogent reasons for than against the proposition that the discrimination provisions of the Bill of Rights Act are a mandatory

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53 This is consistent with *R v Matthews* (1994) 11 CRNZ 564 (HC) where the issue of extraterritorial application of s 23(1) of the Bill of Rights Act (right to a lawyer upon arrest or detention under an enactment) was determined by reference to the limiting effect of the term "enactment" which could only be referring to New Zealand and not foreign enactments.

consideration in decisions of the type in this case and that this includes considering the rights of the overseas partner. I set out my reasons.

[160] First, the deleterious impact on the overseas partner is a mirror image of the impact on the New Zealand-based partner rather than an additional, separate or different one. There is already a significant connecting factor to New Zealand. It is not artificial to recognise this symmetry merely because the New Zealand-based partner is not the direct subject of reg 9A and is not the visa applicant. That is an overly technical distinction which does not reflect the real and human impact of decision making on a New Zealand citizen or resident in New Zealand.

[161] Second, the rights in the Bill of Rights Act generally apply to "everyone" or "every person" but bite only when a person has or intends some interaction with the Government.[54] This counters the argument that the scope of an obligation to take into account the impact on foreign nationals would potentially be endless.

[162] Thirdly, there is no risk of interference with the domestic affairs of another sovereign nation since no other nation has or can have any role in the regulation of New Zealand's border. Neither does it risk regulating the conduct of any person overseas. Thus there is no mischief in international law terms.

[163] Fourthly, if there is no reason in principle why the Bill of Rights Act should not be interpreted to apply to acts that would otherwise fall within the ambit of s 3 by reason only that they occur offshore, there is no reason in principle why the Bill of Rights Act should not apply in respect of acts affecting overseas parties seeking permission to enter New Zealand. I reject the argument that allowing New Zealand-based partners to found claims based on their own rights when the decisions at issue target overseas persons is to allow extraterritorial application of the Bill of Rights by the back door.

[164] Fifthly, there are also those applications accepted and processed by INZ before reg 9A was made. Mr Witbrock's partner's application is but one of such applications. In those instances, there is a stronger case for the assumption of personal jurisdiction.

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[54] See Paul Rishworth and others *The New Zealand Bill of Rights* (Oxford University Press, Melbourne, 2003) at 114.

Even if the assumption of personal jurisdiction limits Bill of Rights Act considerations to the process focused natural justice obligation, observance of natural justice does not condone discrimination.

[165] It is also telling that the suspension decisions record:

> [42] While the Immigration Act 2009 recognises that immigration matters inherently involve different treatment on the basis of personal characteristics, immigration policy development seeks to ensure that any changes are necessary and proportionate. The Ministry of Business, Innovation and Employment considers that the proposals in this paper are consistent with the New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993.

[166] And:

> [45] The Amendment Regulations comply with each of the following:
>
> …
>
> 45.2 The rights and freedoms contained in the New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993.
>
> …

[167] The record relating to certifying E13 does not expressly refer to the Bill of Rights Act or Human Rights Act however the Minister deposed that in making both the suspension and lapsing decisions, he "acted consistently with any obligations under the Bill of Rights Act".

[168] For these reasons, the respondents' threshold objection as to the jurisdiction of the Bill of Rights Act fails.

*Are the impugned decisions discriminatory?*

[169] The plaintiffs first need to establish that the decisions were discriminatory in terms of s 19 of the Bill of Rights Act which reads:

> **19 Freedom from discrimination**
>
> (1) Everyone has the right to freedom from discrimination on the grounds of discrimination in the Human Rights Act 1993.
>
> …

[170] The Human Rights Act sets out the prohibited grounds of discrimination at s 21.[55] The plaintiffs rely on s 21(1), paras (a), (c), (g), (l) and (m) which read:

> **21 Prohibited grounds of discrimination**
>
> (1) For the purposes of this Act, the ***prohibited grounds of discrimination*** are—
>
> (a) sex, which includes pregnancy and childbirth:
>
> …
>
> (c) religious belief:
>
> …
>
> (g) ethnic or national origins, which includes nationality or citizenship:
>
> …
>
> (l) family status, which means—
>
> (i) having the responsibility for part-time care or full-time care of children or other dependants; or
>
> (ii) having no responsibility for the care of children or other dependants; or
>
> (iii) being married to, or being in a civil union or de facto relationship with, a particular person; or
>
> (iv) being a relative of a particular person:
>
> (m) sexual orientation, which means a heterosexual, homosexual, lesbian, or bisexual orientation.

[171] The sections in the two different Acts work together to define and protect from, discrimination.[56] Section 65 of the Human Rights Act extends the proscription on certain discriminatory actions to indirect discrimination.

[172] Direct discrimination is where the law uses the prohibited ground as a basis for differentiating between two groups. Indirect discrimination is where a facially neutral law has differential effects based on a prohibited ground.[57] In this case, it is common

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55 The long title to the Human Rights Act 1993 states that one of the purposes of the Act is the provision of better protection of human rights in New Zealand "in general accordance with the United Nations Covenants or Conventions on Human Rights".

56 *Ngaronoa v Attorney-General* [2017] NZCA 351, [2017] 3 NZLR 643 at [111].

57 *New Zealand Health Professionals Alliance Inc v Attorney-General* [2021] NZHC 2510, (2021) 12 HRNZ 693 at [160].

ground that the alleged discrimination is not direct but indirect. It is the combination of reg 9A and instructions E4.5.20 and E4.5.30 that means not everyone who may be in a genuine partnership can rely on the carve-out in reg 9A.

[173] The parties agree that the approach to analysing discrimination for Bill of Rights Act purposes is set out by the Court of Appeal in *Ministry of Health v Atkinson.*[58] The Court there stated:

> [55] It is agreed that the first step in the analysis under s 19 is to ask whether there is differential treatment or effects as between persons or groups in analogous or comparable situations on the basis of a prohibited ground of discrimination. The second step is directed to whether that treatment has a discriminatory impact.

[174] And later:

> [109] … [We] consider that differential treatment on a prohibited ground of a person or group in comparable circumstances will be discriminatory if, when viewed in context, it imposes a *material disadvantage* on a person or group differentiated against.
>
> (emphasis added)

[175] Identifying the appropriate comparator groups to examine whether there is differential treatment between those groups is not necessarily straightforward. It is also critical to the inquiry which follows. The focus must be on analogous or comparable situations. The plaintiffs identify the relevant comparator groups as those partners and dependent children whose visa applications could be suspended and lapsed and those whose could not.

[176] In respect of the suspension decisions, their first cohort "includes" those overseas partners (and dependent children) of New Zealand citizens or residence class visa holders whom INZ determined did not meet the partnership policy requirements of living together along with the overseas partners and dependent children of all temporary visa holders. The second cohort "includes" the overseas partners (and dependent children) of New Zealand citizens or residence class visa holders who applied for a partnership based visa and met the partnership policy requirements as determined by INZ, including the living together requirement.[59]

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58 *Ministry of Health v Atkinson* [2012] NZCA 184, [2012] 3 NZLR 456.

59 The second group also included the overseas partners and dependent children granted a critical purpose visa.

[177] In respect of the lapsing decision, the plaintiffs' first cohort "includes" those overseas partners (and dependent children) who made a GVV application based on their partnership with or dependence on a New Zealand citizen, residence class visa holder, or temporary class visa holder or applicant. The second cohort "includes" the overseas partners (and dependent children) of a New Zealand citizen or resident who made a partnership-based visa application.

[178] The respondents broadly agree that these are the appropriate comparator groups provided they are framed in a way recognising that it is the New Zealand-based partner whose s 19 rights are engaged.[60] Thus, they propose the following comparator groups:[61]

(a) New Zealand citizens or residents who are in a genuine relationship with an offshore applicant for a visa and who are living together — being persons whose partner would ordinarily expect to meet partnership instructions; and

(b) New Zealand citizens or residents who are in a genuine relationship with an offshore applicant for a visa but who are not living together — being persons whose partner would ordinarily not expect to meet partnership instructions.

[179] This slight re-framing has the attraction of simplicity while getting to the crux of the complaint.

[180] The respondents accept that both the suspension and lapsing decisions have a differential effect on these two groups which is indirectly discriminatory. But they argue that the indirect discrimination is not based on one of the prohibited grounds. Rather the differentiator is whether or not the partners have lived together and therefore meet the requirements of a partnership-based visa. I agree that both reg 9A and E13 are "facially neutral".[62] The discrimination is between those who meet the

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60 This is consistent with the respondents' argument that the Bill of Rights Act has no extra-territorial application.

61 The respondents do not separately address the partners of temporary visa holders. This is unsurprising as no submissions were directed to this group.

62 A description referred to in *New Zealand Health Professionals Alliance Inc v Attorney-General*, above n 57.

partnership requirements and those who do not. This is not a prohibited ground of discrimination.

[181] The respondents also emphasise that these challenges before the Court are of a general rather than specific nature. No individually specific set of facts are pleaded nor any decision made in respect of an individual case as relates to reg 9A. Similarly, the challenge to E13 is a general rather than specific challenge. As these are systemic rights challenges, the respondents say that the Court's inquiry is limited to whether the immigration scheme as a whole was capable of being operated consistently with the Bill of Rights Act.[63]

[182] The plaintiffs disagree and point to the specificity of the description of the exceptions to reg 9A. I do not accept that this is the relevant distinction but rather accept the respondents' characterisation of the challenge. It is the immigration framework which must be considered holistically rather than single aspects in isolation. If this were not the case, then the challenge under the Bill of Rights Act would face the insurmountable obstacle that there is nothing in reg 9A or instruction E13 which differentiates between the identified comparator groups in isolation from the partnership requirements in E4.5.20 and E4.5.30.

[183] To succeed, the plaintiffs need to show that the impugned decisions disproportionately affect the identified subgroups of persons in a manner amounting to indirect discrimination. Only then can there be a material disadvantage which arises from a prohibited ground of discrimination.[64] They contend that the sub-groups who are disproportionately affected are those who for reasons of ethnic origins, religious belief, or societal prejudice in other countries cannot meet the living together requirement.

[184] All persons had exactly the same ability to apply for a visa based on partnership or relationships after the enactment of reg 9A as they did immediately before it. Prior to reg 9A, there was a meaningful pathway through a GVV application for entry for

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63 *Criminal Bar Association of New Zealand Inc v Attorney-General* [2012] NZHC 1572 at [83], upheld on appeal *Criminal Bar Association of New Zealand Inc v Attorney-General* [2013] NZCA 176, [2013] NZAR 1409 at [166]-[169]; *New Zealand Health Professionals Alliance Inc v Attorney-General,* above n 57,at [153]; and *R (Bibi) v Secretary of State for the Home Department (Liberty intervening)* [2015] UKSC 68, [2015] 1 WLR 5055.

64 As set out in *Ngaronoa v Attorney-General*, above n 56, at [148].

persons who could not meet the partnership requirements. That meant that the system as a whole was capable of being operated in a non-discriminatory way. The question is whether reg 9A changed the framework for this cohort so that it led to a discriminatory impact on a prohibited ground. In other words, the plaintiffs must satisfy the Court that reg 9A disproportionately affects the sub-groups within a protected class.

[185] There will be people in genuine relationships who are affected by reg 9A for reasons other than religion, ethnic origin, sex or sexual orientation. There will be people without the financial means to travel to be with their spouse overseas or people who met and conducted relationships over the internet. There will also be many who are in same-sex relationships who can live together in another country and so are not disadvantaged by reg 9A (and one's location is not a prohibited ground of discrimination).

[186] The difficulty is that there is no cogent evidence on which to draw any safe conclusions about whether the impact is or is not disproportionate. The plaintiffs sought data from INZ under the Official Information Act 1982. On 22 November 2021, they made an Official Information Act request. That request asked for the number of GVV applications on hand with INZ that are based on an overseas relationship with a New Zealand citizen, resident or temporary class visa holder. The response was that INZ does not hold this information in a form that is able to be easily accessed or compiled. (It goes without saying that an even more granular assessment identifying the reason why the living together requirement is unable to be met is not available.)

[187] This is consistent with Mr Gilray's statement that:

> … identifying a cohort of applications for general visitor visas is possible. As I set out above, in November 2021 the number of visitor visas potentially subject to lapsing under instruction E13 is a little over 24,000 applications. As a reminder, these are applications for visitor visas that are not under "partnership" instructions (that is, general visitors visas are not relationship-based visas as discussed above at paragraph 36). However, it is not possible to easily identify within those 24,000 applications which applicants were wanting to come to New Zealand for, say, a two-week tour of the country, and which were wanting to come to New Zealand on the basis that they were in a genuine relationship with a New Zealand citizen or resident and wish to spend time living together. INZ's system that logs receipt of applications does not

> record this level of information: they are all registered as general visitor visa applications.
>
> Second, identifying the cohort within the applications would require a page-turn of each of the 24,000 applications. That would require an extremely high level of resource to carry out, which INZ does not have under current pressures. It would undermine the entire rationale of why the lapsing solution was developed in the first place.

[188] Consequently, there is no evidential basis on which to find a material disadvantage on the basis of a prohibited ground of discrimination. The plaintiffs' challenge under this head falters at the first limb of the *Atkinson* test.

[189] Out of caution, I go on to discuss the second step in the *Atkinson* analysis — the alleged discriminatory impact. This requires an assessment of whether, when viewed in context, the differential treatment imposes a material disadvantage on the person or group differentiated against.[65]

[190] Here the whole immigration framework is in play. The respondents point to other avenues for the affected class to come to New Zealand, including:

(a) Applying for a visa under partnership instructions seeking an exception to the living together requirement. There is evidence that 130 visas based on partnership as an exception to instructions have been granted over the course of the border closure (but no evidence as to the proportion of exceptions granted to applications seeking an exception).

(b) Applying for a critical purpose visitor visa, the main means of entry during border closure;

(c) Requesting a visa by special direction under s 61A of the Act.

[191] The plaintiffs criticise these avenues as not meaningful. Ms Armstrong-Myers, an immigration specialist and licensed immigration advisor states:

> Mr Gilray … also states that immigration officers have the discretion to grant visas as exceptions to the instructions so that the full circumstances of the case are considered. Since the March 2020 lockdown, I have never had an exceptions to instructions granted, and definitely never on a visa application

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65 *Ministry of Health v Atkinson*, above n 58, at [109].

> for an offshore partner. To give the Court some context, I have been involved in various partnership cases in the last 18 months.
>
> I also note that INZ in its Internal Administration Circular No: 19/01 at paragraph 12, annexed at C to my previous affidavit, clearly states that immigration officers are to refrain from granting partnership-based visas as an exception to instructions as this, in their opinion, undermines the integrity of partnership instructions.
>
> …
>
> Finally, Mr Gilray provides the option of applicants requesting a visa from the Minister of Immigration as a special direction. In fact, the Associate Minister of Immigration, who has been delegated the Minister's power of issuing visas under s 61A of the Immigration Act 2009, has effectively put in place a blanket policy of not intervening in cases where the applicant is offshore during the pandemic and the border closure. Therefore, again, while Mr Gilray is correct in theory, he overlooks the practical aspects of the policies.

[192] While there is also the humanitarian border exception route, INZ interprets this as requiring exceptional circumstances. Ms Armstrong-Myers refers in her affidavit evidence to her experience of a very high decline rate.[66]

[193] Thus, whether the alternative pathways are meaningful is contested. That is not something that this Court is capable of determining on the untested evidence before it. The challenges in this proceeding are only to reg 9A (more accurately to the extensions to reg 9A) and E13, and not to INZ's administration of the immigration system. Ms Hyndman's evidence is that the purpose of IAC 19/10 is to encourage the use of alternative pathways rather than the exception route, which is necessarily informed by what other pathways exist. Any application under these alternative pathways must be assessed against the relevant criteria or discretion and the relevant rights under the Bill of Rights Act assessed, informed by context.

[194] On its face, it may appear arbitrary to distinguish the genuineness of a relationship based on the living together stipulation when other pathways have been narrowed, but that is a matter better examined in a challenge to the partnership instructions. Even if it leads to an unfair outcome in some individual cases, this does not translate to an immigration system which is incapable of being operated in a way that respects affirmed rights in the Bill of Rights Act.

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66 See the discussion in *Afghan Nationals,* above n 7, at [83]–[108]

[195] I also accept the respondents' argument that it is not possible to show discriminatory effect when reg 9A is not the principal barrier to any temporary entry class visa applicant coming to New Zealand but a collateral measure. Instruction Y4.50 is the instrument which closed the border, and the principal barrier. It is not challenged in this proceeding.

[196] In my assessment, the plaintiffs' challenge to reg 9A also falters at the second of the *Atkinson* steps. I am not persuaded on the evidence before the Court that the immigration system is incapable of being operated in a way that respects the important rights underlying this challenge.

[197] In so far as a rights compliance enquiry into instruction E13 is concerned, I have reached the same conclusions for the same reasons. But there are also additional reasons why I find against the assertion of discriminatory effect. Instruction E13 does not of itself create a material disadvantage as it does not mandate an outcome. It does not require any immigration officer to lapse any visa application. The decision to lapse is one taken by an immigration officer. It is a separate decision. It is difficult to argue that E13 is incapable of being operated in a proportionate way. It does not decline a person's application, nor affect their ability to apply again. Mr Gilray deposes that lapsing does not mean that an applicant loses their place in the queue.

[198] Consequently, I find that neither the suspension decisions nor the lapsing decisions are discriminatory on any of the prohibited grounds. It follows that the question of whether any discrimination is demonstrably justified under s 5 does not arise.

**Result**

[199] For the reasons set out I find no reviewable error in the suspension or lapsing decisions. Accordingly, I dismiss the plaintiffs' claims.

**Costs**

[200] The parties did not address me on costs. If the parties are unable to agree costs, I direct as follows:

(a) Any memorandum seeking costs is to be filed and served within 10 working days of this judgment;

(b) Any memorandum in response is to be filed and served within a further 10 working days;

(c) Memoranda are not to exceed three pages.

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**Walker J**