IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV-2020-404-616
[2020] NZHC 887

UNDER	the Judicial Review Procedure Act 2016
AND	
IN THE MATTER	of an application for judicial review of decisions made pursuant to an order under s 70(1)(f) of the Health Act 1956
BETWEEN	OLIVER CHARLES CHRISTIANSEN Applicant
AND	THE DIRECTOR-GENERAL OF HEALTH Respondent

Hearing:	1 May 2020
Appearances:	SWB Foote QC and AM Cameron for Applicant A Martin and IS Auld for Respondent (appearing by AVL)
Results:	1 May 2020
Reasons:	4 May 2020

JUDGMENT OF WALKER J
[REASONS]

This judgment was delivered by me on 4 May 2020 at 11.30 am
Pursuant to Rule 11.5 High Court Rules

Registrar/Deputy Registrar

Introduction

[1] Oliver Christiansen challenges the Ministry's refusal to allow him to cut short his mandatory 14-day isolation to see his dying father. The application has been prepared, argued and determined as a matter of urgency. I issued a results judgment at the end of the hearing on Friday 1 May 2020. I granted interim relief and indicated that my reasons would follow. The interim orders I made are set out at the end of this judgment. These reasons are also prepared under urgency and will therefore be shorn of anything other than the critical facts and analysis to explain my reasoning.

[2] The context is New Zealand's response to the COVID-19 crisis. Mr Christiansen arrived in New Zealand on 23 April 2020 on a flight from the United Kingdom. He was placed in 'managed isolation' in a city hotel as directed under the Health Act (Managed Air Arrivals) Order dated 9 April 2020 (the Order).[1] The hotel at which he resided is apparently designated a low-risk isolation facility. He has no symptoms of COVID-19 and is monitored by health professionals at the facility every two days.

[3] His father was diagnosed with brain cancer in January 2020. The initial prognosis was that his father would decline over a relatively lengthy period. However, by mid-April, the prognosis changed. Mr Christiansen learned that his father had only a few weeks to live. He decided to leave his family in London and return to New Zealand to sit out the quarantine, and then spend his father's last days with him. Sadly, his father's condition declined suddenly and dramatically. The medical evidence was that his father will survive for no more than a few days, perhaps to the end of the week-end.[2]

[4] Mr Christiansen applied to the Ministry of Health for an exemption to permit him to travel from the city hotel to the family home where his father is spending his last days. There is no suggestion before me that his father would be going to the hospital. The other family members either at the family home or visiting are

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1 The Health Act (Managed Air Arrivals) Order was made on 9 April 2020 and amended on 21 April 2020. The amendments are not material to this application save that the Order was extended to 11.59 pm on 11 May 2020.

2 The medical evidence is from an oncologist treating his father and his father's GP. It is understandably not challenged.

Mr Christiansen's mother and two sisters. A palliative care nurse attends for a short period daily. I am informed by Mr Foote QC from the bar that the family 'desperately' support the application.

[5] Mr Christiansen's evidence is that he asked for a test for COVID-19 but was refused because he has no symptoms.

[6] He and other individuals at the managed isolation facility are permitted to go outside in groups of 8–10 into an area in front of the facility and are escorted to a public park every second day. They are permitted to walk freely and unsupervised in the park but must practice social distancing.

[7] Mr Christiansen was prepared to comply with any conditions required by the Ministry of Health, such as travelling to his father's residence in a private car, ensuring any necessary cleaning and/or quarantining of the vehicle, staying at his father's home and not leaving it at all for any reason until the expiry of a 24-hour period after his father dies and then returning to managed isolation, and wearing appropriate PPE as directed.

Decisions challenged

[8] Mr Christiansen challenges three Ministry of Health decisions declining him permission to leave quarantine before expiry of the 14 days:[3]

(a) A decision on 27 April 2020 sent at 10.31am by the Deputy-Director COVID-19 at the National Health Coordination Centre of the Ministry of Health (**first decision**);

(b) A decision on 27 April 2020 sent at 11.52am by the Managed Isolation Team (**second decision**);

[3] The 14 day period of managed isolation will expire on 7 May 2020.

(c) A decision on 30 April 2020 notified by the National Coordinator, National Health Coordination Centre of the Ministry of Health (**third decision**).

[9] Each decision was made under delegated authority from the Director-General of Health by a Ministry official or officials. This is the reason why the Director-General is the respondent. The gist of each decision is that Mr Christiansen did not qualify for exemption or reduction of the quarantine period because he did not fit the criteria of the Ministry of Health 'framework'. Specifically:

(a) **First decision** – the criteria for exemption is medical transfers, and those with serious medical conditions that cannot be managed in the accommodation provided;

(b) **Second decision** – the criteria for exemptions is very limited and based on the health of the person who was arriving in the country;

(c) **Third decision** – exemptions are only granted to those requiring medical transfers and those with serious medical conditions that cannot be managed in the accommodation provided.

[10] It is apparent on the face of the decision records that the decision maker(s) applied the narrow exemption criteria in the Ministry of Health framework found on the covid19.govt.nz website even though Mr Christiansen's application was based on other grounds referred to in the Order. I will return to this later in my judgment.

Respondent's position

[11] The respondent, who moved speedily to accommodate this hearing, filed a memorandum just before the start of the hearing.[4] The memorandum dated 1 May 2020 states:

> The [respondent] has reviewed the decision under review, and concedes that, on the face of the documentary record at least, the grounds of review described at paragraph 5 above can be made out. Accordingly the defendant has decided

[4] The application was filed and served on 30 April 2020 and argued the next day.

> the matter should be reconsidered to ensure that relevant factors are considered, under clause 5(i) of the Order. The [respondent] submits that this would be the appropriate remedy should the substantive application for judicial review be successful in any event.

[12] Mr Martin for the respondent sought an adjournment of the hearing for three hours (until midday) and undertook to provide a new decision by that time. He proposed that should the outcome of the new decision making be the same, the issue could be determined in the light of the new decision.

[13] While this was a responsible position to take, it presented something of a dilemma for Mr Christiansen and for the Court. My interpretation of Mr Martin's submission was that any grant of interim orders in these circumstances would be tantamount to a wrongful incursion by the Court into the substantive decision making without the required public health assessment. I acknowledge that any health assessment falls squarely within the respondent's domain of expertise. However, after considering the parties' submissions, I determined that an adjournment was not appropriate for four reasons.

[14] First, the Ministry of Health had already had three opportunities to reconsider its decisions. Second, the evidence is that Mr Christiansen senior was at the very last stage of his life so that any delay could frustrate the application. This is so even with a hearing delayed by only a few hours, particularly if the grounds of challenge shifted (if the new decision was to decline Mr Christiansen's application). Third, the indication in the respondent's memorandum is that they intend reconsideration on only one ground which is non substantive rather than encompassing all grounds of challenge. Fourth, any difficulties around the Court making public health assessments stem from the respondent's own failure to make such an assessment as part of their decision making. It would be circular and inherently unfair for the respondent to be able to rely on this to delay Mr Christiansen's access to justice.

The challenge

[15] Mr Christianson raises three grounds of challenge. The first is that there was an error of law in four respects:

(a) Misinterpreting the grounds on which the application for exemption was based;

(b) Misinterpreting the scope of the power under the Order to grant exemptions to the mandatory 14-day isolation period;

(c) Confining the possible exemptions under the Order to the narrow grounds of medical transfers and those with serious medical conditions that cannot be managed in the accommodation provided, when much broader grounds are available under the Order;

(d) Declining the application for failure to meet those narrow grounds, when the application otherwise complied with the grounds in subclauses 5(g) and 5(i) of the Order.

[16] The second ground of challenge alleges failure to take into account mandatory relevant considerations. Seven mandatory relevant considerations are pleaded:

(a) The actual grounds on which the application was based;

(b) Subclauses 5(g) and 5(i) of the Order;

(c) Mr Christiansen's health;

(d) Mr Christiansen's father's health;

(e) The ability under subclause (1) of the Order to test Mr Christiansen on arrival for COVID-19;

(f) The relatively low risk of transmission arising from travel from the managed isolation facility to his father's residence; and

(g) The negligible, if any, impact on the risk of the outbreak or spread of COVID-19.

[17] The third ground is the alleged unreasonableness of the decision. This is unreasonableness in the legal sense rather than as commonly understood.

[18] The acknowledgement by the respondent is only as to the error of law ground.

[19] In the underlying substantive proceeding, Mr Christiansen asks this Court for a declaration that the decisions are unlawful, invalid and of no legal effect. However, he also sought interim relief given the extreme urgency of the situation. The relief was in the form of an order requiring the Director-General to exempt him from the remainder of his isolation to attend to his dying father.[5] Although characterised as interim, this relief would determine the substantive case for obvious reasons.

Legal background and context

[20] COVID-19 has been classified as an infectious disease for the purposes of s 70(1) of the Health Act 1956.[6]

[21] On 24 March 2020, the Prime Minister issued an epidemic notice under s 5 of the Epidemic Preparedness Act 2006. This notice gave the Medical Officer of Health special powers in accordance with s 70 of the Health Act for the purpose of preventing the spread and outbreak of COVID-19.

[22] The epidemic notice was accompanied one day later by a declaration of a state of national emergency under the Civil Defence Civil Management Act 2002. It has been extended five times.

[23] In accordance with his powers as a Medical Officer of Health under ss 70(1)(e), (ea) and (f) of the Health Act, the Director-General of Health made the Order on the "medical examination and testing and isolation or quarantining requirements" to apply to all persons arriving in New Zealand by air.

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5 The application for interim relief also expresses this in the alternative negative form – an order restraining the Director-General from preventing Mr Christiansen from leaving isolation to attend to his father.

6 An infectious disease is any disease for the time being specified in Parts 1 or 2 of Schedule 1 of the Health Act 1956. COVID-19 is specified in Section B of Part 1 of Schedule 1.

[24] I attach a copy of the Order (as subsequently amended) to this judgment. The Order relevantly provides that all persons arriving in New Zealand by air must be isolated or quarantined for a minimum of 14 days, "except as permitted for essential personal movement for arrivals". The Order has the objective of preventing the spread of COVID-19 into New Zealand from overseas. A significant source of the spread of the disease is attributed to overseas travel and contact with travellers.

[25] Clause 5 of the Order defines "permissions for essential personal movement for arrivals" to include:

> *Emergencies, medical services, court orders etc*
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> b. a person leaving their place of isolation or quarantine if necessary, as a matter of emergency, to preserve their own or any person's life or safety:
>
> c. a person leaving their place of isolation or quarantine if necessary to access hospital health services or any court or tribunal:
>
> ….
>
> *Authorised travel*
>
> g. a person leaving their place of isolation or quarantine to undertake travel that is permitted under a framework approved by the Director-General (and published on the covid19.govt.nz internet site maintained by the New Zealand government for travel) that is appropriate both –
>
> i. so as to enable persons entering New Zealand to travel to their intended residence after they cease to be isolated or quarantined under clause 1 of this order **or on other compassionate grounds**; and
>
> ii. on the basis that it has a relatively low risk of transmission or otherwise reduces the overall risk of outbreak or spread of COVID-19 for New Zealand's health system.
>
> *Exceptional circumstances*
>
> i. a person leaving or changing their place of isolation or quarantine for **any other exceptional reason** approved by the Director-General after taking into account any impact on the risk of outbreak of spread of COVID-19.
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> (emphasis added)

[26] The framework published on the covid19.govt.nz website provides that "a very small number of people will be eligible for exemption from managed isolation". To be

eligible for an exemption, an applicant needs to fit into one of the prescribed "exemption categories". Those categories are listed as:

> - a minor who is travelling alone — this exemption allows a parent or caregiver to join the minor in managed isolation, not for the minor to leave self-isolation.
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> - individuals arriving as medical transfers — if being transferred to hospital, a letter from the DHB verifying they will enable self-isolation in hospital or discharged within 14 days, they will be required to complete the time in a managed isolation facility.
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> - individuals with physical or other needs that cannot be appropriately accommodated at the managed facilities — applications in this category need to be supported with clinical evidence from a registered medical practitioner. Needs considered are the needs of the individual arriving in New Zealand, not of others already in New Zealand.
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> - workers critical to the COVID-19 response required to undertake tasks during the 14 days isolation — applications in this category need to be supported by a letter from the relevant government department, essential service employers or lifeline utility.

[27] Nothing in the online framework references "exceptional circumstances", as provided for in clause 5(i) of the Order or "other compassionate grounds" provided for in clause 5(g)(ii).

Requests for permission

[28] Mr Christiansen first emailed the Ministry of Health on 24 April 2020 at 14.36 pm. He appended supporting documentation comprising a letter from his father's oncologist. He expressly stated that he sought "compassionate dispensation". When he first applied, the family's expectation at that stage was that there was still time in hand so he was only seeking to reduce the length of managed isolation.

[29] Operations personnel from the National Crisis Management Centre (NCMC) emailed a response on Sunday 26 April 2020 at 14.42 pm. Although that email was incomplete, the nub of it was that the application was being referred to the Health Team, another unit within the NCMC.

[30] On Sunday 26 April 2020 at 15.15 pm, the Managed Isolation Team emailed Mr Christiansen to say that the medical information provided was insufficient. They

asked him to complete an attached form. The nature of that form suggested that the Managed Isolation Team had not comprehended the nature and basis of the application. That was because the form they sent was a Medical Exemption from Managed Isolation form. Mr Christiansen responded in short order, emphasising that he was not applying on the basis of his own medical condition but in order to care for his gravely ill father. His email stressed the urgency.

[31] On Monday 27 April 2020 at 10.31 am, the Deputy-Director COVID-19 National Health Coordination Centre emailed Mr Christiansen declining his application to reduce his 14-day isolation period. The email stated:

> Minimising the spread of COVID-19 is critical to protecting New Zealand, and exemptions are being granted in very limited circumstances. Unfortunately, your application did not meet the criteria for an exemption. The criteria for an exemption is: medical transfers, and those with serious medical conditions that cannot be managed in the accommodation provided. You are therefore required to complete your 14-day isolation period at managed facilities.
>
> If you believe there is information that has not been considered in this assessment, or that there are compassionate or other exceptional reasons why an exemption should be granted, please contact us again with additional information.

[32] Mr Christiansen emailed a response within approximately 20 minutes, reiterating that "I am NOT applying for a medical exemption, I am applying for **permission to travel on compassionate grounds**…I ask that you consider my application and supporting evidence as it is intended, as an application for domestic travel on compassionate grounds" (emphasis as per original email). He re-attached the application and asked for it to be considered on a proper basis.

[33] On Monday 27 April 2020 at 11.01 am Mr Christiansen emailed the NCMC Travel Team again re-emphasising that the application he was making was made on compassionate grounds. He re-attached the original application and supporting letter from medical professionals. In the early afternoon of the same day, he emailed the same Team advising that he had just learned his father had had a seizure and may be about to pass away imminently. He asked for an urgent response and offered to have the oncologist speak with someone at the Ministry to facilitate his application.

[34] Approximately an hour-and-a-half later, at 3.32 pm, personnel at NCMC responded by email saying that the Team was unable to approve reduced periods of managed isolation as that was within the Health Team's compass and needed their approval. The email stated, "Sorry but we (ncmc) do not have the flexibility in this case."

[35] Earlier on Monday 27 April 2020 at 11.52 am, the Managed Isolation Team emailed stating "There does seem to be a misunderstanding that needs to be clarified." The email went on to say:

> All travellers arriving in New Zealand are required to complete 14 days of isolation in a managed facility. The criteria for exemptions to this are very limited and are based on the health of the person who is arriving in the country. As you are in good health you unfortunately do not therefore qualify for an exemption or a reduction to the isolation period... I hope this explains the grounds on which your case was considered. I apologise for any confusion.

[36] On Monday 27 April 2020 at 15.18 pm, the Managed Isolation Team emailed again. They expressed sympathy. They re-emphasised "there is just nothing we can change at this time. 14 days isolation in managed facilities is a mandated requirement in force in New Zealand." Mr Christiansen followed up in response, expressing how devastated he was. He urged compassionate grounds. He proposed the use of PPE and conditions to minimise, if not eliminate any risk.

[37] On Tuesday 28 April 2020 at 21.03 pm, Mr Christiansen again emailed the Managed Isolation Team to repeat his request for reconsideration under the exemption procedure. He expressly referred to the "exceptional circumstances" exemption. He stated that his father is asking "Where is my boy? Where is my boy?"

[38] On Wednesday 29 April 2020, Mr Christiansen emailed the Minister of Health and Director-General of Health and the Minister for Health directly. The Director-General quickly responded within an hour and a half saying he will refer the letter to the Team to "carefully consider the information."

[39] Mr Christiansen updated the Director-General on his father's condition. In an email on Thursday 30 April 2020 at 9.59 am, he suggested to the Director-General that

referral to "the Team" is not likely to help if the Team is operating under a view that they can only look at the limited medical grounds exemption. He stated:

> If that means you have not delegated to the Team your authority to grant exemptions for other exceptional reasons, (such as [I am] invoking for compassionate purposes), then you either need to enlarge the criteria they are working under at [your] direction or [you] should [yourself] consider [my] request, as the official who has the authority to grant exemptions under paragraph 5(i) of the Notice.

[40] That same day at 12.16 pm, Mr Christiansen received an email attaching a letter from the National Coordinator of the National Health Coordination Centre. The letter stated that the writer has reviewed all of the information provided and declines the appeal to leave the managed isolation facilities. Consistent with the theme emerging from all the correspondence from the various individual or units within the Ministry of Health, it stated:

> We have consistently taken a precautionary approach to COVID-19 and our border measures are there to protect all New Zealanders from the virus. Exemptions are only granted to those requiring medical transfers, and those with serious medical conditions that cannot be managed in the accommodation provided.

Arguments

[41] In view of the respondent's position at the hearing, it is unnecessary to traverse the substantive argument in great detail. In summary, Mr Christiansen's case is that the Order impliedly requires consideration of the specific circumstances of each individual application – a weighing of the compassionate circumstances with the risk of transmission in that particular case. This did not happen because the decision makers confined themselves to whether the circumstances fitted any of the criteria in the so-called "framework" on the government website. This was in essence to adopt fixed rules which is the antithesis of a discretion.[7]

[42] The respondent limited his opposition to the jurisdiction point; that the Court could not or ought not make an interim order in circumstances where the decision was under reconsideration.

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7 *Housing New Zealand v Auckland District Court* [2008] NZAR 389 at [31] and [35].

Legal Principles

[43] It is important to understand that this is not an appeal. The Court is not entitled to ask itself whether the substance of the decisions were right or wrong. There are limits to scrutiny of the merits. Traditionally, the primary role of the Courts in judicial review is to supervise the decision maker's reasoning process - how, rather than what, decisions are made. The extent of those limits, particularly in the extraordinary circumstances such as the ones prevailing in New Zealand at present, is open to debate.

First cause of action – error of law

[44] The central question is whether the respondent has misinterpreted its powers under the Order. A person with a legal power must exercise that power within the perimeters set by that law.[8] An error of law arises where a decision-maker does not act within those perimeters; for example, where a decision-maker applies gloss to a statutory test, or asks themselves the wrong question.[9] To be reviewable, an error of law must be material: "one which may well have altered the ultimate decision".[10]

[45] In my judgment, the decision-makers in this case construed the exemption test too narrowly by omitting consideration of two available grounds. This omission related to the decision-makers' interpretation of both clauses 5(g)(i) and 5(i). Properly construed, there are two elements to clause 5(g)(i). They are disjunctive and explicitly include a provision for "other compassionate grounds". The exceptional circumstances provision in clause 5(i) also received no mention by the decision makers.

[46] The decision-makers' rejection of Mr Christiansen's application was based on the repeated assertion that exemptions would only be granted to those requiring medical transfers, and those with serious medical conditions that could not be managed in the accommodation provided. This appears to be based on the 'framework' posted on the covid19.govt.nz website, which lists four narrow grounds for exemptions relating to medical conditions. The 'approved' grounds for exemptions

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8 *Berryman v Solicitor-General* [2008] 2 NZLR 772 (HC) at [84].
9 Matthew Smith *New Zealand Judicial Review Handbook* (Brookers, Wellington, 2011) at 709.
10 *Astrazeneca Ltd v Pharmaceutical Management Agency* HC Wellington CIV-2011-485-2314, 22 December 2011 at [73].

were then reflected in the form provided to Mr Christiansen, which is tellingly titled "Medical Exemption from Managed Self Isolation Form".

[47] A decision-making public body entrusted with a decision must not adopt rigid rules that disable it from exercising discretion in individual cases. Decision-makers cannot rely on fixed frameworks which "close [their] mind to the possibility that special circumstances may exist outside those categories", particularly when the law in question gives the decision-maker some flexibility.[11]

[48] The framework the defendant based their decisions off did not reflect the wording in the empowering Order. It is unlawful to blindly follow a policy if that policy is not reflective of the actual position in law: "the policy cannot deny the power which the law has conferred".[12] The framework adopted by officials is not the same as the empowering legal test that should have been applied to Mr Christiansen's application. They applied narrow list of medical-related reasons for an exemption. The Order, however, allowed for other exemptions – both in terms of "other compassionate grounds" in cl 5(g)(i) and "exceptional circumstances" in cl 5(i). Based on the face of the record, the decisions failed to consider these grounds for exemption at all. As such, this failure amounts to an error of law.

Second cause of action – failure to take into account mandatory relevant considerations

[49] It is also strongly arguable that the decision-makers' failure to specifically address Mr Christiansen's submission that his case fell under the exceptional circumstances ground in cl 5(i) amounts to a failure to address a mandatory relevant consideration. Understandably in the present context, Mr Martin did not address that ground. I stress that my finding is not to be construed as a determination of the substantive claim.

[50] Where a person has made a submission to a decision-maker on a discretionary relevant factor, it becomes mandatory for the decision-maker to consider that factor

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11 *Housing New Zealand v Auckland District Court* [2008] NZAR 389 (HC) at [31];
12 *Westhaven Shellfish Ltd v Chief Executive, Ministry of Fisheries* [2002] 2 NZLR 158 (CA) at

and the submissions on it.[13] That happened here – Mr Christiansen's email to the Managed Isolation Team on 28 April, asked the Ministry to consider his application as an "exceptional circumstance" under s 5(i). Previous to that, he had emphasised he was "NOT" applying for a medical exemption, but under "compassionate grounds". However, in their responses to him, neither the National Co-ordinator nor the Exemptions Team mentioned cl 5(i), or in any way suggested they had considered whether his case was exceptional. As a result, a failure to consider his submissions properly – namely, whether his circumstance falls under cl 5(i) – is a failure to consider a mandatory relevant consideration.

[51] On this basis, I am satisfied that there is a strong case that the decision was in error. The respondent has made both an error of law and has arguably failed to take mandatory relevant considerations into account.[14]

Third cause of action - unreasonableness

[52] The plaintiff's final cause of action is that the decisions are so untenable and insupportable that a proper application of the law requires a different answer. As Palmer J noted in *Hu v Minister of Immigration*, "the law of judicial review is bedevilled by whether and how "unreasonable" public decisions are allowed to be".[15] The seminal test for "unreasonableness" sets a very high threshold.[16] A plaintiff must show that there was something overwhelmingly wrong with the decision.

[53] There is an often-cited concern that review for reasonableness strays too far into the substantive merits of a decision; a concern that courts will use the concept to simply overturn decisions they disagree with.[17] In my view, the threshold for overturning a decision on the basis of reasonableness will vary depending on the context of a decision. These are extraordinary times. I am inclined to the view that the context of this application, the nature of the fundamental rights in issue, the wide-

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13 *New Zealand Fishing Industry Association v Minister of Agriculture and Fisheries* [1988] 1 NZLR 544 (CA); *Soliman v University of Technology, Sydney* [2012] FCAFC 146 at [55]– "A failure to take into account a central submission may constitute jurisdictional error".

14 The respondent acknowledges only the error of law "on the face of the record".

15 *Hu v Immigration and Protection Tribunal* [2017] NZHC 41 at [2].

16 *Associated Provicial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223.

17 See, for example, Hanna Wilberg and Mark Elliott (eds) *The Scope and Intensity of Substantive Review: Traversing Taggart's Rainbow* (Hart Publishing, Oxford, 2015).

ranging powers under the Health Act and the current crisis all support, if not demand, more expansive supervision by the Courts.

[54] However, those issues are best left to considered reflection and judgment. In view of my findings in respect on the grounds of error of law and failure to take into account relevant considerations, I find it unnecessary to discuss further the reasonableness ground advanced.

Remedy and Orders – Interim relief

[55] The availability of interim relief was the nub of the argument before me. The applicant sought an interim order requiring, among other things, the respondent to release Mr Christiansen from managed isolation so he could visit his gravely ill father on certain conditions designed to minimise, or even eliminate, the risk of any spread of COVID-19. It is worth re-emphasising that the applicant is completely asymptomatic and his health status has been checked every few days but he has not undergone a COVID-19 test, despite his many requests to do so.

[56] The respondent submitted that the answer was remitting the decision back to the officials, then under train, and that an interim injunction in these circumstances would be inappropriate, particularly given this is a matter concerning risk to public health which the Court is not well placed to assess.

[57] A Court may make interim orders under s 15 of the Judicial Review Procedure Act 2016 if it is satisfied that such orders are necessary to preserve the applicant's position before the final determination of the case. Once that threshold is reached, the Court has a wide residual discretion to make an interim order, taking into account any relevant circumstances. Section 15 reads:

> **15 Interim orders**
>
> (1) At any time before the final determination of an application, the court may, on the application of a party, make an interim order of the kind specified in subsection (2) if, in its opinion, it is necessary to do so to preserve the position of the applicant.
>
> (2) The interim orders referred to in subsection (1) are interim orders—

(a) prohibiting a respondent from taking any further action that is, or would be, consequential on the exercise of the statutory power:

(b) prohibiting or staying any proceedings, civil or criminal, in connection with any matter to which the application relates:

(c) declaring that any licence that has been revoked or suspended in the exercise of the statutory power, or that will expire by the passing of time before the final determination of the application, continues and, where necessary, that it be deemed to have continued in force.

(3) However, if the Crown is a respondent,—

(a) the court may not make an order against the Crown under subsection (2)(a) or (b); but

(b) the court may, instead, make an interim order—

(i) declaring that the Crown ought not to take any further action that is, or would be, consequential on the exercise of the statutory power:

(ii) declaring that the Crown ought not to institute or continue any proceedings, civil or criminal, in connection with any matter to which the application relates.

(4) An order under subsection (2) or (3) may—

(a) be made subject to such terms and conditions as the court thinks fit; and

(b) be expressed to continue in force until the application is finally determined or until such other date, or the happening of such other event, as the court may specify.

[58] The purpose of s 15 is generally to preserve the position of the applicant, not improve it.[18] However, preservation is not interpreted so narrowly that it means only preserving the status quo. In *Greer v Chief Executive of Department of Corrections*, Francis Cooke J held that interim relief can encompass orders which place the applicant in the position they would have been in but for the alleged illegality.[19] It can

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18 See, for example, *Forser v New Zealand Chiropractic Education Trust* [2010] NZAT 361 (HC).

19 *Greer v Chief Executive of Department of Corrections* [2018] NZHC 1240, [2018] 3 NZLR 571 at [22] relying on *Whiskey Jacks Rotorua Ltd v Minister of Internal Affairs* HC Wellington CIV-2003-485-1901, 10 September 2003; *Kiwi Foundation Ltd v Attorney-General* HC Wellington CP346/97, 18 December 1997; and *Taylor v Chief Executive of the Department of Corrections* [2010] NZCA 371, [2011] 1 NZLR 112.

also encompass orders which preserve an applicant's remedy in the event he or she prevails in the substantive proceeding. As the Court said in *Greer:*[20]

> Like all legislation, s 15 should be interpreted in light of its purpose. There are two evident purposes of the interim relief power – to relieve the applicant from the adverse effects of a challenged decision until the challenge is heard and determined, and to preserve the ability of the Court to grant effective relief if the challenge is successful. The threshold question should be interpreted and applied in light of these purposes.

[59] I find further support in Part 30 of the High Court Rules 2016. Rule 30.14 recognises the inherent power of this Court and is another route to the same end without the same express threshold requirement. In short, whichever approach is adopted, I find that I have the jurisdiction to make an interim order in the terms sought.

[60] This is an exceptional situation. It is strongly arguable that the interim order places Mr Christiansen in the position he would have been in had the respondent addressed his application as it should have been addressed. As Mr Foote and Mr Cameron put it their crisp written synopsis:

> There is a strong case that had the respondent applied the Health Act Order correctly, Mr Christiansen's circumstances would be recognised as coming within one or both of the exemption categories: either compassionate grounds with a low risk of transmission, or exceptional circumstances. It is difficult to comprehend what other situations would suffice to meet these categories if the present applicant's circumstances do not.

[61] In other words, it restores him to the position he would have been in but for the fault in the original decisions. The harsh reality is there is no time for a sensible alternative remedy. It is difficult to envisage more compassionate grounds than those presented here. There could not be any more pressing circumstances than the prognosis of likely death within 1–2 days. Even a short delay may mean any remedy is futile.

[62] Just because interim relief will effectively or practically determine the proceeding through dint of circumstance does not present an insurmountable hurdle.

[63] It is also now apparent that there is no jurisdictional bar to interim mandatory orders where necessary and appropriate.[21] While the interim orders I made in this

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20 At [24].

21 *Taylor v Chief Executive of the Department of Corrections* [2010] NZCA 371, [2011] 1 NZLR 112.

instance take the form of mandatory terms, because of the manner of their expression, they do not require the respondent to take positive steps other than to stipulate any further reasonable conditions to minimise the public health risk. The orders are therefore distinguishable from those at issue in *Taylor v Department of Corrections*, where the interim orders would have required Corrections to take positive steps to provide Mr Taylor with a computer. In substance and effect, the permission is really more akin to a prohibitive interim order in the sense that it restricts enforcement of the isolation requirements against Mr Christiansen.

Summary

[64] In conclusion, I am satisfied that the merits strongly favour Mr Christiansen. The decisions to decline permission are on their face legally flawed on more than basis. Had the correct approach been followed, Mr Christiansen's application may have successfully come within the compassionate grounds (with low risk of transmission) or exceptional circumstances categories.

[65] A rigid policy that does not include exceptional circumstances, especially where the empowering law provides for those exceptions, is the antithesis of what was intended under the Order, objectively read. As stated by Winkelmann J in *Housing New Zealand Corporation v Auckland District Court* officials "cannot close [their] mind to the possibility that special circumstances may exist outside those categories described and dealt with in even the most carefully formulated policy".[22]

[66] I have balanced other material factors in the exercise of my discretion. These are principally the public health and safety concerns and the potential ramifications of the grant of relief. I am satisfied that the restrictive conditions I imposed, which include directing the respondent to stipulate additional reasonable conditions, addresses the question of risk.

[67] I have also considered the question of the appropriate deference to the expertise of the decision makers in a time of unprecedented public crisis. No matter how necessary or demonstrably justified the COVID-19 response, decisions must have a

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22 *Housing New Zealand Corporation v Auckland District Court* [2008] NZAR 389 (HC) at [31].

clear and certain basis. They must be proportionate to the justified objective of protecting New Zealand bearing in mind the fundamental civil rights at issue – freedom of movement and of assembly in accordance with the New Zealand Bill of Rights Act 1990.

[68] In this particular case, there is a very strong argument that the permission for Mr Christiansen to visit his dying father was not considered on the correct legal grounds and did not take account of relevant mandatory considerations. It had the hallmarks of automatic rejection based on circumscribed criteria rather than a proper exercise of discretion required by the Health Act (Managed Air Arrivals) Order. Indeed, the respondent responsibly acknowledges that on the face of the documentary record, one of the grounds of review can be made out.

[69] In my judgment, this exceptional case demands an effective and swift response by the Court to achieve overall justice. I have in mind here particularly the imminence of Mr Christiansen's father's passing and the very material factor that visitation is only at a private home and not in a public space.

Orders

[70] I therefore make the following orders:

(a) Requiring the respondent to permit Mr Christiansen to leave Managed Isolation prior to the end of his 14-day isolation period at the Central City facility for the purposes of visiting his terminally ill father.

(b) The release is on condition that Mr Christiansen complies with the following conditions:

(i) To travel by private car, unaccompanied, to his father's home address and remain there until his father passes;

(ii) To maintain physical separation from other family members at the home address;

(iii) To return on his own within 24-hours of his father's passing by the same private car to the Managed Isolation Facility for the remainder of the duration of his 14-day isolation period (should that be required);

(iv) To ensure that any necessary cleaning and/or quarantining of that private car is carried out;

(v) To wear personal protective equipment as directed by the Ministry of Health, including gloves and a face-mask;

(vi) To comply with any monitoring requirements by Police and/or officials; and

(vii) To comply with any other reasonable conditions directed by the respondent to reduce any risk of transmission, such conditions to be notified by the respondent to Mr Christiansen by 12.15 pm today.

[71] These orders are to lie in Court until **12.00 pm, Friday 1 May 2020**.

[72] The parties have leave to apply, and I will make myself available at short notice if any practical problems arise.

[73] The parties did not address me as to costs. I reserve costs.

[74] I record my gratitude to all counsel for their focused and helpful submissions under extreme urgency.

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Walker J

COVID-19 SECTION 70 ORDER - 9 APRIL 2020

MINISTRY OF HEALTH
MANATŪ HAUORA

SECTION 70(1)(e), (ea), and (f) HEALTH ACT ORDER

On 24 March 2020, the Prime Minister, with agreement of the Minister of Health, issued an epidemic notice under s 5 of the Epidemic Preparedness Act 2006.

The epidemic notice allows the use of special powers by the Medical Officer of Health in accordance with s 70 of the Health Act 1956 for the purpose of preventing the outbreak and spread of COVID-19.

A state of national emergency was declared under the Civil Defence Emergency Management Act 2002, with effect from 12:21pm 25 March 2020. It has been extended twice (on 1 April 2020 and 8 April 2020).

From 31 March 2020, an order under section 70(1)(f) of the Health Act 1956 applied to arrivals into New Zealand providing certain isolation or quarantining requirements.

For the purpose of preventing the outbreak and spread of COVID-19, an infectious disease, I, Dr Ashley Bloomfield, Director-General of Health, exercising the functions of a Medical Officer of Health for all districts of New Zealand (that is, nationally), in circumstances where a state of emergency has been declared under the Civil Defence Emergency Management Act 2002, there is an epidemic notice in force, and as the spread of COVID-19 is a significant risk to the public, make the following order pursuant to s 70(1)(e), (ea), and (f) of the Health Act 1956:

Medical examination and testing and isolation or quarantining requirements

1. I require all persons arriving in New Zealand by air (other than excluded arrivals) to-
    a. report, and submit themselves, for the medical examination and testing permitted by clause 2, as soon as practicable after their arrival, at the security designated aerodrome at which they arrive; and
    b. be isolated or quarantined, for the period required by clause 3, as follows:
        i. to remain at the place of isolation or quarantine determined under clause 4, except as permitted for essential personal movement for arrivals; and
        ii. to maintain physical distancing, except from fellow residents; and
    c. after paragraph (b) ceases to apply, be isolated or quarantined in accordance with the general isolation and quarantine order at the place of residence they choose for the purposes of that order.

2. The medical examination and testing under clause 1(a) may only involve testing for temperatures, seeking information on symptoms, chest auscultation, and mouth or nose swabs required to test for COVID-19.

3. The period of isolation or quarantine under this order must be-
    a. 14 days; or

b. if a medical officer of health or a health protection officer is not satisfied they meet the low risk indicators at the end of the 14-day period, any longer period needed to satisfy the officer of that fact (but no more than 28 days in total).

4. A medical officer of health or health protection officer must determine that the place of isolation or quarantine is-
   a. a place in a high risk facility, if the person is assessed as have been diagnosed with COVID-19, has COVID-19 symptoms, is being or has been tested for COVID-19, or has been in close contact with someone with suspected, probable or confirmed COVID-19 in the last 14 days; and
   b. a place in a low risk facility, in any other case (unless paragraph (c) applies); and
   c. another place of quarantine or isolation, if necessary due to the individual physical or other needs of the person.

Permissions for essential personal movement for arrivals

5. For the purposes of clause 1 of this order, the following are permitted as **essential personal movement for arrivals**:

Limited recreation purposes

   a. if the person is placed in a low risk facility, leaving that place for the purpose of exercise or other recreation if-
      i. it is done in an outdoor place within a 2 kilometre radius; and
      ii. they wear personal protective equipment; and
      iii. it is done in compliance with clause 1(b)(ii) of this order (the physical distancing requirements) and the order forbidding congregation in outdoor places made under s 70(1)(m) of the Health Act 1956 on 25 March 2020; and
      iv. it does not involve swimming, water-based activities (for example, surfing or boating), hunting, tramping, or other activities of a kind that expose participants to danger or may require search and rescue services:

Emergencies, medical services, court orders, etc

   b. a person leaving their place of isolation or quarantine if necessary, as a matter of emergency, to preserve their own or any other person's life or safety:
   c. a person leaving their place of isolation or quarantine if necessary to access hospital health services or any court or tribunal:
   d. a person leaving or changing their place of isolation or quarantine,-
      i. if required by a medical officer of health or a health protection officer to move to another place of isolation or quarantine; or
      ii. if required under Part 4 of the Health Act 1956; or
      iii. if necessary to use another temporary or emergency place of isolation or quarantine (for example, if necessary for care while sick) approved by a medical officer of health or a health protection officer; or
   e. a person changing their place of isolation or quarantine if required as a result of a court order or any other power under any enactment to order a person to be detained, to change their place of detention, or otherwise determine their place of residence (for example, a direction of the New Zealand Parole Board or a probation officer):

f. a person leaving their place of isolation or quarantine to assist or accompany a child or other person to travel to or from a place under paragraph (b) to (e) with the consent of a medical officer of health or health protection officer:

Authorised travel

g. a person leaving their place of isolation or quarantine to undertake travel that is permitted under a framework approved by the Director-General (and published on the covid19.govt.nz internet site maintained by the New Zealand government) for travel that is appropriate both-
    i. so as to enable persons entering New Zealand to travel to their intended residence after they cease to be isolated or quarantined under clause 1 of this order or on other compassionate grounds; and
    ii. on the basis that it has a relatively low risk of transmission or otherwise reduces the overall risk of outbreak or spread of COVID-19 for New Zealand's health system:

Exceptional circumstances

i. a person leaving or changing their place of isolation or quarantine for any other exceptional reason approved by the Director-General after taking into account any impact on the risk of outbreak or spread of COVID-19.

Definitions

6. In this order, the following definitions apply:

Director-General means the Director-General of Health exercising the functions of a Medical Officer of Health for all districts of New Zealand

excluded arrival means-

a. aircraft pilots, flight crew members, and medical attendants assisting with medical air transfers; and
b. any person designated by the Director-General as critical to provide services to assist with the response to COVID-19; and
c. any person who is for the time being entitled to any immunity from jurisdiction by or under the Diplomatic Privileges and Immunities Act 1968 (other than a person referred to in section 10D(2)(d) of that Act) or the Consular Privileges and Immunities Act 1971 (or any order under either of those Acts); and
d. any person who arrives on a flight that left its point of departure on or before the time at which this order takes effect

fellow resident, for any person A, means another person who is isolated or quarantined with person A at the same place of isolation or quarantine

general isolation and quarantine order means the order made under s 70(1)(f) of the Health Act 1956 on 3 April 2020

high risk facility means a facility designated by a medical officer of health for the purposes of detention in a way appropriate for people with high risk of transmitting COVID-19

low risk facility means a facility designated by a medical officer of health for the purposes of detention in a way appropriate for people with low risk of transmitting COVID-19

low risk indicators means medical tests and information that indicate that a person is at a low risk of having or transmitting COVID-19

physical distancing means remaining 2 metres away from other people or, if you are closer than 2 metres, being there for less than 15 minutes
place of isolation or quarantine means, for any person, a place determined under clause 4 of this order (for example, a room at a facility)
previous arrivals order means the order made under s 70(1)(f) of the Health Act 1956 on 31 March 2020 in relation to persons arriving in New Zealand
security designated aerodrome has the same meaning as in the Civil Aviation Act 1990.

Effect of order

7. This order (rather than the previous arrivals order) applies to persons arriving in New Zealand on a flight that left its point of departure after the time at which this order comes into effect.

Assistance from Constables

8. Under s 71A, I request that constables do anything reasonably necessary to assist in ensuring compliance with this order. This includes, but is not limited to:
   - helping a Medical Officer of Health, or any person authorised by a Medical Officer of Health, in the performance of functions under s 70;
   - preventing persons from obstructing or hindering a Medical Officer of Health, or any person authorised by a Medical Officer of Health;
   - compelling, enforcing, or ensure compliance with a requirement of a Medical Officer of Health, or any person authorised by a Medical Officer of Health;
   - preventing or reducing the extent of the doing of a thing that a Medical Officer of Health, or any person authorised by a Medical Officer of Health, has forbidden or prohibited in this order or otherwise in the exercise of performance of powers or functions under s 70.

Period of this Order
This order has effect from 11:59pm on 9 April 2020, and expires on 11:59pm on 22 April 2020 (unless earlier revoked or extended).

Dated 9 April 2020

Dr Ashley Bloomfield
Director-General of Health