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What does the High Court decision on MIQ actually mean?



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Yesterday, the High Court handed down a door-stopper of a decision (140 pages!) ruling that the way in which places in the MIQ system were allocated was unlawful. Andrew Geddis explains.

MIQ ... MIQ ... sounds somewhat familiar. Remind me?

The Managed Isolation and Quarantine system was set up at the border as a part of our elimination strategy toward Covid-19. In essence, it required (virtually) everyone

coming into the country to spend at least two weeks (later cut down to seven days) in a hotel room before being able to re-enter normal community life.

Two weeks in a hotel? Time to complete Netflix (again)? What's so bad about that?

The requirement to stay in MIQ effectively turned getting an MIQ spot into permission to enter the country. And because there were fewer places in MIQ than people wanting to come into New Zealand, it stopped lots and lots of people from doing so. That then burdened citizens' right to return to New Zealand as guaranteed in the New Zealand Bill of Rights Act 1990.

But didn't we have to do it because, you know, Covid?

Yep – especially while we ran an elimination strategy. The High Court accepted that MIQ as a general policy approach was both lawful and appropriate. Unsurprisingly, you might think, given that not having thousands of people die from a preventable illness generally is accepted to be A Good Thing.

Then why wasn't "because Covid" the end of the story here?

There's a distinction between having some system of MIQ and having the system of MIQ that was actually adopted. And so, a bunch of New Zealanders who had been impacted by the MIQ system ("Grounded Kiwis") brought a number of challenges to how our actually adopted system operated between September and December of last year. In short, they alleged that it went further than was necessary, didn't allocate places in a lawful way, and stayed around for longer than it needed to.

What happened to those challenges?



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seven) days – was justified on public health grounds. Furthermore, the system needed to remain in place throughout the period covered by Grounded Kiwis' challenge.

What? MIQ didn't go on for too long? But didn't I read recently that Ashley Bloomfield recommend it end back in November last year?

Yeah, turns out that story was a bit of a beat up. Upon getting further information regarding an initial suggestion that MIQ safely could be scaled back, Ashley Bloomfield decided the risk of additional “clusters” being introduced into the country remained too great. And the court accepted that view. From the decision:

“This is an area where the court should appropriately defer to the evidence of the experts. I accept therefore that MIQ continued to be justified on public health grounds at least for arrivals who would not be self-isolating in Auckland. The risks of transitioning to a self-isolation model too quickly were too high in a country that was still trying to control the delta outbreak in Auckland and keep it out of other areas of the country and to increase its vaccination coverage, including in vulnerable communities. The emergence of the omicron variant bears that out.”

So, Grounded Kiwis actually lost their case?

No. They won on one quite important point. Because there was more demand for MIQ spots than places available, some kind of allocation system was required. Originally, this was done on a simple “first come, first served” basis as and when places became available, which was deeply problematic. So, in September of 2021 there was a switch to a “virtual lobby” system for places, which functioned as a lottery. When MIQ rooms were being released you put your name into the lobby, you got given a random place in a queue, and people then got to claim MIQ spaces in order of their queue spot. If all the spaces were gone by the time your place in the queue was reached, you missed out.

Current accommodation availability

Vouchers for MIQ are gradually released in batches over several weeks and months.

There are still more rooms to be released for September, October and November. Keep checking the system for available dates.

Vouchers for December will be released once airlines have confirmed their schedules.



A typical attempt to secure an MIQ slot in September, October or November 2021 looked like this (Screengrab: MIQ lottery)

OK – that sounds a bit fairer. What was the problem?

Several. The virtual lobby system made no effort to distinguish between New Zealand citizens (who have a legislatively guaranteed right to return to New Zealand) and non-citizens (who don't). It made no effort to distinguish between the individual reasons for seeking MIQ slots. It made no effort to account for how long a person had been trying to get an MIQ slot, as it reset every time it was run. In short, it was a blunt allocation method that gave everyone the same chance of success in a situation where some people ought to have had a better chance than others.

Wasn't there any way to skip this queue? I seem to remember people getting MIQ spots for emergencies.

There were a few MIQ places set aside for "emergency allocation". However, the criteria for accessing these were very narrow. And, the court found, those criteria were then misapplied in individual cases. As such, the existence of this method of skipping the MIQ queue didn't adequately offset the overall bluntness of the virtual lobby lottery.

So, what's the upshot of all this?

The court found that the use of a virtual lobby lottery, combined with an inadequate emergency allocation system, was an unjustifiable limit on the legally guaranteed right of citizens to return to the country. While some allocation procedure had to be in place, the government couldn't show that the one it had adopted (with its various

flaws) was the least infringing on individual rights. In short, the court ruled that the government should have tried harder to put in place an allocation system that took account of the individual circumstances of the various applicants for MIQ spots. Exactly what that would have looked like, the court doesn't say. But it wasn't convinced that the one adopted was the least-worst option.

What comes next? After all, MIQ has been disestablished.

Grounded Kiwis only asked for “declaratory relief” – a formal statement by the court that the actually adopted MIQ system was unlawful, and how it was unlawful. The court has said it will issue such a declaration, but sent the lawyers from both sides away for 14 days to work out what it should say. The terms of that declaration will then set legal guiderails for how any future system of MIQ must operate, which remains a real possibility given new Covid-19 variants. Any additional legal remedies will require individuals to go back to court and seek damages. They'd be silly to do so, because they wouldn't get them.

As for the government's response, the minister for Covid recovery Chris Hipkins has [put out a statement](#) to say that the government is “carefully considering the court's decision”. It very well could appeal it, given that the finding of unlawfulness in essence rests on one judge's assessment that the government could have done more without concretely saying what that more ought to have looked like. Alternatively, it may just take the L and box on.

Anything else interesting in the decision?

The court's discussion of Ashley Bloomfield's decision to recommend MIQ remain in place in November last year notes that he reached it “against the backdrop of media articles about MIQ that included, for example, a 29 October 2021 [article in The Spinoff](#) ..” What other publication will give you both director general of health-influencing opinion and a [power ranking of New Zealand news stories about potatoes](#)?

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