IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA478/2022
[2024] NZCA 81

BETWEEN	FREE TO BE CHURCH TRUST Appellant
AND	MINISTER FOR COVID-19 RESPONSE Respondent

Hearing: 1 August 2023

Court: Gilbert, Goddard and Katz JJ

Counsel: P T Rishworth KC and L I van Dam for Appellant
B M McKenna and A J Vincent for Respondent

Judgment: 27 March 2024 at 11.00 am

JUDGMENT OF THE COURT

A The appeal is dismissed.

B The appellant must pay costs to the respondent for a standard appeal on a band A basis, with usual disbursements.

REASONS OF THE COURT

(Given by Goddard J)

Table of contents

Introduction and summary

The issue on appeal: was there a delay in removing COVID-19 gathering restrictions that breached the New Zealand Bill of Rights Act 1990?

[1] The appellant (FTBC) represents a group of churches whose right to manifest their religious beliefs — a right protected by s 15 of the New Zealand Bill of Rights Act 1990 (NZBORA) — was limited by vaccination requirements imposed on gatherings under the COVID-19 Public Health Response (Protection Framework) Order 2021 (Order).[1] At the Red setting of what was colloquially known as the "traffic light" framework put in place by that Order, the limit that applied to gatherings that included people without COVID-19 vaccination certificates (CVCs) was 25 persons. This restriction prevented the represented churches from gathering their congregations together for worship. FTBC's unchallenged evidence was that the spiritual impact of the restrictions imposed by the Order was profound.

[2] FTBC now accepts that those limits were justified, and thus that the Order was lawful, at the time it was made by the Minister for COVID-19 Response (Minister) in November 2021. But they say that justification ceased to apply in early 2022 once the Omicron variant of COVID-19 was prevalent in the community, and that NZBORA required the relevant restrictions to be removed by mid-February 2022 at the latest. They say the actual end date for the relevant restrictions, which was 4 April 2022, unjustifiably prolonged the interference with their s 15 NZBORA right.

The High Court found the Order was lawful

[3] FTBC's application for judicial review was filed on 10 March 2022, shortly before Cabinet made the decision to remove the vaccination-related gathering restrictions. It continued despite the changes made to the Order with effect from 4 April 2022. It was heard by Gwyn J in the High Court in June 2022. Before the High Court, FTBC and another applicant group sought judicial review of the Order on the basis that the CVC-related restrictions imposed on faith-based gatherings were unlawful at the time the Order was made because they were inconsistent with

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[1] The Order was made by the Minister for COVID-19 Response under the COVID-19 Public Health Response Act 2020

NZBORA. FTBC also argued that even if the Order was lawful at the time it was made, it ceased to be justified and became unlawful in early 2022.

[4] The High Court held that:[2]

(a) The gathering limits in the Order limited the applicants' right to manifest their religious beliefs protected by s 15 of NZBORA.

(b) Those measures were a justified limit on that right, both at the time of introduction and after the Omicron variant was circulating in New Zealand.

(c) The Minister did not act unreasonably by making distinctions between vaccinated and unvaccinated people in the Order.

[5] FTBC's judicial review application was dismissed, as was the other application before the Court.[3]

Summary of outcome on appeal

[6] How does NZBORA operate in circumstances where:

(a) delegated legislation is made containing a measure that limits rights protected by NZBORA, in response to a public emergency such as a pandemic;

(b) that instrument is lawfully made because the limits on rights are justified at the time the instrument is made; but

(c) circumstances change in a way that affects the continuing justification for the rights-limiting measure?

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2 *Orewa Community Church v Minister for COVID-19 Response* [2022] NZHC 2026, [2022] 3 NZLR 475 [High Court judgment] at [11].

3 At [296]–[298].

[7] Such an instrument does not automatically cease to be lawful and valid at a given date because, with the benefit of hindsight, it can be seen that the justification for that measure was no longer sufficient on that date. Rather, NZBORA speaks to the decision maker, requiring them to act in a manner designed to ensure that rights are not limited more than is demonstrably justified over time.

[8] The decision maker must keep the measure under review (an obligation expressly recognised by s 14(5) of the COVID-19 Public Health Response Act). If that review discloses that circumstances have changed in a way that materially affects the continuing justification for the (temporary) rights-limiting measure, the decision maker must, within a reasonable timeframe, make changes to the delegated legislation to ensure that it does not limit rights more than can be justified in light of the then-prevailing circumstances.

[9] Often the decision maker will not be making a binary choice between retaining or revoking the measure in question: a range of policy options will need to be considered (for example, adopting different and less rights-limiting measures in place of the current measure). Consultation on those policy options will generally be appropriate. A reasonable time needs to be allowed for provision of advice to the decision maker, and for decisions to be made about the preferred option. The amending instrument then needs to be drafted, the draft needs to be considered by the decision maker and their advisers, and (after making any changes to the draft that may be needed) approved. Time may need to be allowed to implement the new or amended delegated legislation. NZBORA does not require decision makers to depart from basic precepts of good (delegated) law-making. The priority and urgency with which action is taken must however be proportionate to the nature and significance of the (no longer justified) interference with rights.

[10] In the present case, the Minister and his advisers kept the Order under review: FTBC did not contend otherwise. They gathered and analysed new information as it became available, assessing the reliability and relevance of that information, including the various studies that were emerging in relation to the effectiveness of vaccination in the context of Omicron. Advice was sought from internal and external experts. Officials identified policy options, and consulted on those options. They provided

advice to Ministers, as a result of which Ministers made decisions which modified the Order in a manner which responded to the then-prevailing circumstances. It is not suggested that the Order as amended from 4 April 2022 was inconsistent with NZBORA. So the Minister made a decision that brought the Order back into line with NZBORA.

[11] Did the Minister take so long to amend the Order to achieve NZBORA-consistency that the delay was itself a breach of NZBORA? The first difficulty we face in answering that question is that this was not the challenge to the Order originally pleaded by FTBC. FTBC did not file any evidence addressing how long such a process ought to have taken, or the date by which the Order should have been amended. Unsurprisingly in these circumstances, neither the Minister's affidavit nor the other affidavits filed by the respondents in the High Court squarely addressed this timing issue: when their evidence was filed they did not know that this was the allegation that they needed to answer. In those circumstances it would not be fair or appropriate for the Court to make the findings sought by FTBC, even if there was some support for them in the material before us. But in any event the material before us does not support the proposition that the Minister, or the Executive collectively, took an unreasonable amount of time to review and amend the Order to ensure consistency with NZBORA.

[12] For these reasons, which we expand on below, the appeal must be dismissed.

Background

[13] The background to these proceedings is set out in detail in the High Court judgment.[4] For present purposes, a brief summary is sufficient.

[14] In the first phase of the COVID-19 pandemic, before any vaccine was available, the New Zealand Government's strategy was to seek to eliminate COVID-19 from the community. On 23 March 2020 the Prime Minister issued an epidemic notice and on 25 March 2020 New Zealand went into its first nationwide lockdown. The elimination strategy had a number of aspects, including border

[4] At [13]–[46].

restrictions, contact tracing, regular testing of frontline workers, and the "Alert Level Framework". Between March 2020 and October 2021 New Zealand moved between alert levels with adjustments to restrictions as required.

[15] Restrictions on gatherings were, for most of that time, a central part of the Alert Level Framework. Services provided at places of worship were classified as "gatherings" from the beginning of the Alert Level Framework.

[16] The first vaccine against COVID-19, the Pfizer-BioNTech vaccine (Pfizer vaccine), was approved for use in New Zealand in February 2021. Roll out of the vaccine throughout New Zealand occurred in the course of 2021.

[17] By early August 2021, COVID-19 had been eliminated in the community in New Zealand.

[18] In August 2021 New Zealand had its first community outbreak of the Delta variant of COVID-19. The country was placed in an Alert Level 4 lockdown on 17 August 2021. Most of New Zealand returned to Alert Level 2 by 7 September 2021, but parts of Auckland, Northland and Waikato remained in the higher alert levels for several months.

[19] In the course of September and October 2021 Ministers received advice about development of a new framework to replace the alert levels which would incorporate use of CVCs as part of a wider suite of interventions to reduce the risk of community transmission of COVID-19. Other elements would include requirements to stay home for people with COVID-19 and for their close contacts, mandatory recordkeeping, reinforcement of hygiene messaging, and mask wearing. The strategy was founded on the effectiveness of vaccination in reducing transmission, reducing the risk of infection, and reducing the severity of illness if infected. Advice dated 10 October 2021 from the Department of the Prime Minister and Cabinet (DPMC) to Ministers recorded that:

> … even with 90%+ vaccination rates, enhanced restrictions would need to remain in the toolkit for combatting COVID-19. For example, if a new variant arose, to which the vaccine did not offer protection, this would reduce the effective immunity of the population, rendering the overall 'traffic lights' risk

strategy invalid (i.e. requiring Alert Level 3 or 4 public health controls to regain control).

[20] On 18 October 2021 Cabinet decided to move from the elimination strategy to a minimisation and protection strategy, with the COVID-19 Protection Framework (CPF) as the central element. The CPF laid out response measures which did not rely on lockdowns for what was, by then, a highly vaccinated population. The CPF featured three settings:

(a) Green — which aimed to allow normal social and economic activity, while continuing to build health system capacity.

(b) Orange — which aimed to avoid exponential growth in cases, with moderate population-level controls.

(c) Red — which aimed to protect the sustainability of the health system and the health of communities through population-level controls.

[21] Cabinet agreed that decisions to move between settings would be guided by thresholds for change developed by the Ministry of Health:

(a) Green — case numbers kept low through testing, contact tracing, and quarantine and hospitalisations at a manageable level.

(b) Orange — a move to Orange would occur with increasing community transmission, increasing pressure on the health system, or increasing risk to at-risk populations.

(c) Red — a shift to Red would occur when Orange is no longer containing the virus in the original outbreak areas, action is needed to protect the healthcare system, and the health of communities or at-risk populations.

[22] The Order, which provided for the CPF, was made on 30 November 2021 and came into force on 2 December 2021.

[23] The Omicron variant was circulating globally from late 2021. Omicron variant cases were detected at the border in January 2022. A DPMC briefing to Ministers dated 18 January 2022 recorded that:

> While current measures under the Framework appear to have been effective at minimising the spread of the Delta outbreak, the risk of an Omicron outbreak remains. Critically, evidence suggests that two doses of Pfizer offer significantly less protection against infection and hospitalisation due to Omicron than due to Delta.

[24] Even at this early stage, before Omicron was present in the community in New Zealand, the effectiveness of vaccination in the context of an Omicron outbreak had been identified as an issue.

[25] The first case of the Omicron variant in the community in New Zealand was detected on 22 January 2022. On 23 January 2022 the Minister ordered that all of New Zealand be moved into the Red setting of the CPF. On the same day, Cabinet decided to introduce a three-phase system to address Omicron, which would run alongside the CPF, with a focus on testing, contact tracing and self-isolation requirements for new cases.

[26] On 25 January 2022 the Minister briefed Cabinet on updates to the Red setting of the CPF, reflecting Ministry of Health advice to him:

> Current evidence suggests Omicron has higher transmissibility, and vaccines show reduced effectiveness against the Omicron variant compared to Delta. This means that more vaccinated people are likely to become infected and that the number of COVID-19 cases occurring each day will be far greater than at any other time during the pandemic. At the initial stages of this outbreak, the overall response to Omicron will focus on 'stamping it out'. Once community case numbers increase, our focus will shift to 'managing the virus' to slow the spread, mitigate impacts on the most vulnerable and maintain essential activities and supply chains.

[27] The Minister also noted that decreasing the number and risk of exposure events was a core public health measure to manage transmission:

> Lower capacity limits in high-risk settings will help to reduce the transmission of the virus. However, there is no precise level of capacity limits for particular kinds of venues that is optimal. Rather, reducing capacity limits is a tool which may be used alongside other public health measures, and specific limits should be set by reference to both those other measures and the practical implications for businesses, [whānau] and others who will be affected.

[28] On 2 February 2022 the Director-General of Health (Director-General) gave advice to the Minister, following a public health assessment carried out by the Ministry of Health, recommending that gathering limits at the Red setting remain unchanged at that point but be kept under regular review as the Omicron outbreak evolved. The advice contemplated reducing gathering limits in the event of rapid and uncontrolled community transmission.

[29] During February Omicron cases in New Zealand continued to increase substantially. The Government response was to shift to Phase 2 of the Omicron response on 15 February 2022 and to Phase 3 on 24 February 2022. At that point, there were over 5,000 recorded cases each day. By 27 February 2022, there were 14,491 cases recorded, with 305 patients in hospital (including five in intensive care) and one death.

[30] From mid-February 2022 the Government was focussed on planning for its future COVID-19 response after the Omicron wave had reached its peak. Central to that was a review of the CPF.

[31] On 4 March 2022 Ministry of Health officials advised the Director-General that physical distancing and capacity limits would remain necessary during the Omicron outbreak, but once the peak was over there would be a strong case to re-evaluate gathering limits.

[32] FTBC put some emphasis on this briefing paper, and in particular on an observation that "there is technically not a sufficient public health rationale currently to justify CVCs being used to prevent entry to certain premises during this phase of the response". However it is important to read that observation in context. The briefing paper recorded that public health measures that limit rights are justified if they contribute materially toward the overarching public health goals: reducing the spread and impact of COVID-19. The briefing paper also noted that limits on NZBORA rights associated with each measure need to be proportionate to the benefits

such measures offer. The need for regular review of such measures was expressly recorded:

> 11. To ensure public health measures remain proportionate, they should be reviewed regularly. Furthermore, rights should be restored as soon as safely and reasonably possible, consistent with response objectives. Finally, consideration is always given to whether measures that limit rights less can be applied to achieve a similar outcome.
>
> *Maintaining overall integrity of the response*
>
> 12. Any advice on how, when and why public health measures are removed needs to consider the impact on the integrity of the response overall and alignment with other measures (for example worker vaccination orders, international and domestic self-isolation etc).
>
> 13. Some measures would be difficult to reintroduce once removed and consideration should be given to the future utility of public health measures. When removing measures, it is important that individuals, businesses, and other organisations have the resources and clear information about any changes to measures.

[33] Under the heading "Physical distancing and capacity limits" the briefing paper identified the need for re-evaluation of gathering limits:

> 23. While we have significant cases in the community, the value of physical distancing and capacity limits remain pertinent. Evidence on physical distancing and gathering limits continues to point to these measures as a basic public health tool to reduce spread of COVID-19. Further, there have been consistent examples of COVID-19 spreading at gatherings where large numbers of people congregate and intermingle.
>
> 24. The CPF provides a system for managing physical distancing and capacity limits. If the CPF is retained (even if modified), it can continue to be used as the tool to implement these measures, i.e., moving up and down the colours – but the settings should be kept under review based on available evidence.
>
> 25. As we move past the peak of Omicron, there will be a strong case for re-evaluating gathering limits. Outdoor gatherings in particular could likely be relaxed soon as a preliminary measure given their lower risk profile compared to indoor gatherings.

[34] The briefing paper then addressed the use of CVCs. We set out this passage in full, as it includes the observation emphasised by FTBC:[5]

> 30. The use of COVID-19 Vaccine Certificates (CVCs) in the CPF was based on vaccination providing significant population protection against infection, separating vaccinated and unvaccinated people as a tool to reduce transmission in the community.
>
> 31. New Zealand now has some of the highest vaccination rates in the world, with approximately 94% of those aged 12 and over having had two doses of an approved vaccine. Achieving this high rate of vaccination can, in part, be attributed to the use of CVCs which are the foundation of the CPF.
>
> 32. Further, we know that current vaccines are less effective at protecting people from contracting Omicron. As most of the population is vaccinated, almost all cases are occurring in people who are 'fully vaccinated' (2 doses of the Pfizer vaccine).
>
> 33. Given there is now significant community transmission, but with very high rates of vaccination, the use of CVCs do not provide the same population protection. *This brings the validity of retaining CVCs as a public health measure, at this point in time, into question. The Director of Public Health's advice is that, given the very high rate of vaccination nationally and the current definition of 'up-to-date vaccination status' (which only includes 2 doses of vaccine, and is now under review), there is technically not a sufficient public health rationale currently to justify CVCs being used to prevent entry to certain premises during this phase of the response.*
>
> 34. However, it is important to note that you will be receiving further advice relating to vaccine tools, including boosters, the definition of "up-to-date vaccination status", and mandates for affected groups of workers which should still remain at this point. *This further work, particularly if a requirement to have been boosted is included in the definition of 'up to date vaccination status[ ], could mean that only 73% of New Zealanders would be considered fully vaccinated. If so, the original public health rationale for CVCs would be restored immediately since a significant number of New Zealanders would not be considered fully vaccinated.*

[35] The recommendations in the briefing paper, all of which were accepted by the Director-General, included:

> (a) Noting that public health measures that limit freedoms must be reviewed regularly to ensure they are co-ordinated, orderly and proportionate.

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5 Emphasis added.

(b) Noting the Director of Public Health's advice that, given the very high rate of vaccination nationally, there is not a sufficient public health rationale currently to justify CVCs being used to prevent entry to certain premises during this phase of the response.

(c) Noting that further advice was being prepared regarding broader issues relating to vaccinations, including boosters and the definition of "up-to-date vaccination status", and mandates for affected groups of workers.

(d) Noting that the further advice on the definition of "up-to-date vaccination status" could include the requirement to have received two doses of vaccine and a booster to be considered fully vaccinated.

(e) Agreeing that, in light of the ongoing work to define an "up-to-date vaccination status", it was too early to conclude that there was an insufficient public health rationale for CVCs to be used to prevent entry to certain premises.

(f) Agreeing to receive further advice on the definition of "up-to-date vaccination status", including any implications this may have for the appropriate usage of CVCs, "shortly".

[36] On 21 March 2022 the Minister reported back to Cabinet on the CPF review and sought decisions from Cabinet on the post-Omicron-peak COVID-19 response. The Cabinet paper noted that the elimination strategy and minimisation and protection approach had prevented the worst impacts of COVID-19. Modelling indicated that hospitalisations were likely to peak some time in mid-to-late March and would then decline.

[37] Cabinet was advised that CVCs would have served their purpose once the Omicron peak subsided, and that the significant limit on rights that they reflected would no longer be proportionate to the public health risks in the next phase. However the paper advised Cabinet that CVCs remained an important part of the "toolkit" for

those businesses and organisations who wished to continue using them and as part of a future response if, for example, a more severe, immunity-evading variant emerged for which there was a new, effective vaccine. The paper also advised that, to be effective, CVCs would need to be updated to reflect the roles of boosters and acquired immunity. The paper dealt with a number of related issues, such as modifying a support payment scheme affected by gathering limits, and noted that officials were engaging with business and union stakeholders to update guidance to reflect the removal of certain vaccination mandates and the shift of more responsibility to employers and others to determine whether they would want to retain any restrictions on entry to premises for health and safety, or other grounds.

[38] On 23 March 2022 Cabinet agreed to make, and publicly announced, a number of changes to the CPF. The changes that are relevant for present purposes became operative in two stages. With effect from 25 March 2022 capacity limits for CVC-compliant gatherings were removed at the Green and Orange settings, and increased to 200 for indoor gatherings at Red. And with effect from 4 April 2022 CVCs were removed from the CPF, so there were no longer separate (lower) limits on gatherings that were not CVC compliant.

[39] The decision to remove CVCs from the CPF on 4 April 2022 was informed by:

(a) Ministry of Health advice that, while two doses of the vaccine provided some reduction in Omicron transmission, it was less than for Delta.

(b) New Zealand now had one of the highest vaccination rates in the world, with approximately 95 per cent of those aged 12 and over having had two doses of an approved vaccine (88 per cent for Māori). Unvaccinated people therefore represented a smaller transmission risk than when CVCs were introduced.

(c) The increasing level of acquired immunity from the Omicron outbreak.

(d) The fact that it would take five to six weeks to incorporate a booster into the CVC system and for the public to download their new CVC for

use, by which time New Zealand would likely be well past its Omicron peak.

[40] Thus, with effect from 4 April 2022, the vaccination-based gathering restrictions to which FTBC objected were no longer in place.

Relevant legislation

COVID-19 Public Health Response Act 2020

[41] The COVID-19 Public Health Response Act came into force on 13 May 2020. Its purpose is set out in s 4:[6]

> **4 Purpose**
>
> The purpose of this Act is to support a public health response to COVID-19
>
> that—
>
> (a) prevents, and limits the risk of, the outbreak or spread of COVID-19 (taking into account the infectious nature and potential for asymptomatic transmission of COVID-19); and
>
> (b) avoids, mitigates, or remedies the actual or potential adverse effects of the COVID-19 outbreak (whether direct or indirect); and
>
> (c) is co-ordinated, orderly, and proportionate; and
>
> (ca) allows social, economic, and other factors to be taken into account where it is relevant to do so; and
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> (cb) is economically sustainable and allows for the recovery of MIQF costs; and
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> (d) has enforceable measures, in addition to the relevant voluntary measures and public health and other guidance that also support that response.

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6 All references to the provisions of the COVID-19 Public Health Response Act are references to the Act as it stood at the time the Order was made in November 2021.

[42] Part 2 of the COVID-19 Public Health Response Act provided for COVID-19 orders to be made by the Minister.[7] The requirements for making a COVID-19 order at the relevant time were set out in s 9(1):[8]

> **9 Requirements for making COVID-19 orders under section 11**
>
> (1) The Minister may make a COVID-19 order under section 11 in accordance with the following provisions:
>
> (a) the Minister must have had regard to advice from the Director-General about—
>
> (i) the risks of the outbreak or spread of COVID-19; and
>
> (ii) the nature and extent of measures (whether voluntary or enforceable) that are appropriate to address those risks; and
>
> (b) the Minister may have had regard to any decision by the Government on the level of public health measures appropriate to respond to those risks and avoid, mitigate, or remedy the effects of the outbreak or spread of COVID-19 (which decision may have taken into account any social, economic, or other factors); and
>
> (ba) *the Minister must be satisfied that the order does not limit or is a justified limit on the rights and freedoms in the New Zealand Bill of Rights Act 1990*; and
>
> (c) the Minister—
>
> (i) must have consulted the Prime Minister, the Minister of Justice, and the Minister of Health; and
>
> (ii) may have consulted any other Minister that the Minister (as defined in this Act) thinks fit; and
>
> (d) before making the order, the Minister must be satisfied that the order is appropriate to achieve the purpose of this Act.

[43] Section 11 set out the wide range of matters that may be provided for in a COVID-19 order, including requirements in relation to: entry to premises; physical distancing; isolation and quarantine; refraining from participating in gatherings of a specified kind, in a specified place, or in specified circumstances; requiring that a CVC be produced to enter certain premises; and providing for CVC eligibility, issue, and period of validity.

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7 The pre-requisites for making such an order are set out in s 8 of the Act.

8 Emphasis added.

[44] Section 13(1)(a) provided for COVID-19 orders to be valid despite inconsistency with the Health Act 1956 or other enactments. However s 13(2) expressly provided that s 13(1)(a) did not limit or affect the application of NZBORA. And s 13(3) provided, to avoid doubt, that nothing in the Act prevented the filing, hearing or determination of any legal proceedings in respect of the making or terms of any COVID-19 order.

[45] Section 14 provided for the form, publication and duration of COVID-19 orders. Section 14(5) provided that the Minister and the Director-General must keep their COVID-19 orders under review.

COVID-19 Public Health Response (Protection Framework) Order 2021

[46] As already mentioned, the Order was made on 30 November 2021.

[47] Clause 3 of the Order provided that its purpose was to prevent, and limit the risk of, the outbreak or spread of COVID-19 and to otherwise support the purposes of the COVID-19 Public Health Response Act.

[48] The Order set out various public health measures which would apply if and only if they are specified as applicable in a COVID-19 response schedule (Green, Orange or Red) that applied to a particular region at any given time.

[49] On 2 December 2021, when the Order took effect, there were two active schedules:

(a) The Red schedule (sch 7) was active for Northland, Auckland, Rotorua district, Kawerau district, Whakatāne district, Ōpōtiki district, Gisborne district, Wairoa district, Taupō district, Ruapehu district, Whanganui district and Rangitīkei district; and

(b) The Orange schedule (sch 6) was active for the rest of New Zealand.

[50] From 23 January 2022 the Red schedule was active for all of New Zealand, with the whole country moving to the Orange setting on 13 April 2022.

[51] The Order defined the term "gathering" as follows:

> **13 Meaning of gathering**
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> In this order, **gathering**—
>
> (a) means people who are intermingling in a group but excludes people who remain at least 2 metres away from each other, so far as is reasonably practicable; and
>
> (b) includes—
>
> (i) a gathering to undertake voluntary or not-for-profit sporting, recreational, social, or cultural activities:
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> (ii) a gathering to undertake community club activities (except activities that occur at the same time and place as services provided under a club licence under section 21 of the Sale and Supply of Alcohol Act 2012):
>
> (iii) a faith-based gathering:
>
> (iv) a funeral or tangihanga:
>
> (v) a gathering held in a defined space or premises of a workplace (other than a vehicle in use as part of a public transport service) that have been hired for the exclusive use of the gathering by a person (other than the person who manages or controls the defined space or premises); but
>
> (c) excludes a gathering for the purpose of a business or service at—
>
> (i) office workplaces; and
>
> (ii) ordinary operations at retail; and
>
> (iii) gyms; and
>
> (iv) hearings at courts and tribunals; and
>
> (v) education entities at normal operations.

[52] The definition specifically included faith-based gatherings.

[53] In the Red setting[9] there were to be no gatherings unless permitted.[10] A permitted gathering was one where:

(a) if it was a gathering of "CVC compliant" people, it was subject to a fixed number of 100 and a one-metre physical distancing rule;[11] and

(b) if it was not a gathering of exclusively "CVC compliant" people, it was subject to a fixed number of 25 and a one-metre physical distancing rule.[12]

[54] In the Orange setting,[13] there were to be no gatherings unless permitted,[14] and a permitted gathering was one where:

(a) if it was a gathering of "CVC compliant" people, there was no fixed number limit;[15] and

(b) if it was not a gathering of all "CVC compliant" people, it was subject to a fixed number of 50 and a one-metre physical distancing rule.[16]

[55] In the Green setting,[17] there were to be no gatherings unless permitted,[18] and a permitted gathering was one where:

(a) if it was a gathering of "CVC compliant" people, there was no fixed number limit;[19] and

(b) if it was not a gathering of all "CVC compliant" people, it was subject to a fixed number of 100 and a one-metre physical distancing rule.[20]

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9 COVID-19 Public Health Response (Protection Framework) Order 2021, sch 7.
10 Clause 42. See sch 7, pt 2.
11 Clause 46.
12 Clause 47.
13 Schedule 6.
14 Clause 42.
15 Clause 46.
16 Clause 47.
17 Schedule 5.
18 Clause 42.
19 Clause 46.
20 Clause 47.

[56] CVC was defined to mean a COVID-19 vaccination certificate issued under cls 8 or 9 of the COVID-19 Public Health Response (COVID-19 Vaccination Certificate) Order 2021.[21] "CVC compliant" was defined as follows:

> **6 When person is CVC compliant**
>
> (1) In this order, a person is **CVC compliant** if the person—
>
> (a) holds a valid CVC issued to that person; or
>
> (b) is under the age of 12 years and 3 months.
>
> (2) A person who is required under an applicable COVID-19 provision to ensure or verify that a person (**person A**) is CVC compliant satisfies that requirement, in relation to subclause (1)(b), if the person reasonably considers that person A is under the age of 12 years and 3 months.

[57] The Government issued Guidelines for Places of Worship on 29 November 2021 which explained the application of the Order in the context of places of worship.[22] Under the CPF restrictions, a religious group could choose to:

(a) require CVCs for all services and offer larger services;

(b) require CVCs for no services and offer smaller services;

(c) offer both services operating with CVCs and services operating without CVCs (as long as spaces were cleaned between groups, there was no intermingling of the two groups, spaces used were ventilated, and those involved were clear on the distinction); or

(d) if an organisation had multiple defined spaces in a venue, operate multiple activities at once, with an activity requiring a CVC in one space and an activity not requiring a CVC in another space (provided there was no intermingling between groups).

[58] As under the Alert Level Framework, online services remained an available option for religious groups to reach the members of their congregations.

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21 Clause 5.

22 These guidelines were subsequently amended on 4 April 2022.

[59] As already mentioned, requirements in relation to CVCs were removed from the CPF with effect from 4 April 2022.

NZBORA

[60] NZBORA affirms a number of rights and freedoms.[23] It applies to acts done by the legislative, executive and judicial branches of the Government of New Zealand.[24] It thus applies to acts done by the Minister in connection with making, and reviewing, COVID-19 orders.

[61] Section 5 of NZBORA provides that the rights and freedoms contained in NZBORA may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

[62] Section 13 of NZBORA provides that everyone has the right to freedom of thought, conscience, religion, and belief, including the right to adopt and to hold opinions without interference. It was not suggested that the Order limited freedom of religious belief. The right that FTBC emphasises, which relates to manifestation of religion and belief, is affirmed in s 15:

> **15 Manifestation of religion and belief**
>
> Every person has the right to manifest that person's religion or belief in worship, observance, practice, or teaching, either individually or in community with others, and either in public or in private.

The FTBC proceedings

[63] FTBC is a charitable trust incorporated under the Charitable Trusts Act 1957. It represents ministers and church leaders of various Christian churches of Protestant denominations which have been affected by the New Zealand Government's COVID-19 response.

[64] FTBC filed its application for judicial review on 10 March 2022, at a time when the Order had been in force for some three months. The Minister was named as

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23 New Zealand Bill of Rights Act 1990, s 2.
24 Section 3(a).

the respondent. The focus of the application was the gathering restrictions that applied under the CPF. In particular, FTBC pleaded that the effect of the Order at the Red setting was to restrict all of its faith-based gatherings to 25 people and, accordingly, to preclude the ability of a physical gathering of the whole congregation. It thus limited the right of those represented by FTBC to manifest religion in worship, observance and practice in community with others and in public.

[65] FTBC pleaded that in making the Order, and keeping it under review, the Minister failed to take into account, or failed to properly and meaningfully take into account, whether the Order limited their s 15 right, and if so, whether the Order was a justified limitation on that right. FTBC pleaded that when the Order was made, and at the time of filing their application, the Order was an unjustified limit on the s 15 right because:

(a) The limiting measures did not serve a sufficiently important purpose to justify curtailment of the s 15 right "given that vaccination does not prevent persons contracting and spreading COVID-19, particularly once the … Omicron variant became the prevailing threat in New Zealand".

(b) The limiting measures were not rationally connected with the purpose, given that vaccination does not prevent persons contracting and spreading COVID-19 "particularly once the … Omicron variant became the prevailing threat in New Zealand".

(c) The limiting measures impaired the s 15 right more than was reasonably necessary for sufficient achievement of the purpose. The purpose could be achieved through less rights-impairing public health mechanisms such as the wearing of face coverings, testing, and/or by reference to the space needed to adhere to physical distancing rules.

(d) The limiting measures were not in due proportion to the importance of the objective.

[66] FTBC sought a declaration that the limiting measures in the Order were in breach of s 15 of NZBORA and invalid, an order quashing one or all of the limiting measures, and declarations that the Minister had failed to take into account the matters referred to above.[25]

[67] FTBC's statement of claim did not contain any pleading that expressly referred to the scenario of the limiting measures in the Order being consistent with NZBORA at the time the Order was made, but ceasing to be justified at some point in early 2022. There was no pleading that the Minister had acted inconsistently with NZBORA by failing to keep the limiting measures under review, or by failing to modify or revoke those limiting measures by a specified date.

[68] FTBC filed evidence from ministers and members of affected churches about their beliefs, and the impact of the Order on those beliefs. FTBC did not file any expert evidence about the effectiveness of COVID-19 vaccinations.

[69] The other applicant group, referred to in the High Court judgment as the "Orewa applicants",[26] relied on expert theological evidence from Dr Matthew Flannagan, a New Zealand theologian, and expert medical evidence from Professor Timothy Flanigan, a Professor of Medicine at Brown University in the United States who specialises in serious infectious diseases and public health. FTBC also relied to some extent on the evidence of Professor Flanigan.

[70] The respondents filed evidence from Dr Ashley Bloomfield, the Director-General at the relevant time, and Dr Ian Town, the Chief Science Advisor at the Ministry of Health. They also filed evidence from the Minister, Mr Christopher Hipkins, about the making of the Order and the rationale for it. The Minister's evidence also addressed the ongoing review of the restrictions provided for by the CPF, and the decisions to modify the CPF that were made on 23 March 2022. The respondents also filed an affidavit sworn by a theologian, Professor Paul Trebilco.

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25 The statement of claim also alleged that the Minister had acted unreasonably in making the Order, and sought a declaration to that effect. However that claim was not successful in the High Court, and has not been pursued on appeal.

26 See High Court judgment, above n 2, at [5].

[71] FTBC did not file any evidence that addressed the question of timing of revocation of the limits on gatherings, on the hypothesis that they were originally justified and NZBORA consistent. Rather, that argument was advanced at the High Court hearing, and before this Court, in reliance on the evidence provided by the respondents and the documents included in that evidence.

[72] The issue that was the focus of argument before us — did the Minister move too slowly in removing the gathering restrictions, and in particular the 25 person restriction for non-CVC-compliant gatherings at the Red setting — was not addressed by any of the deponents for the respondents. That is unsurprising, in circumstances where a challenge on that basis was not articulated in the statement of claim or in any evidence filed by FTBC. The absence of such evidence has implications for our ability to address the claim as now advanced by FTBC, as we explain in more detail below.

High Court judgment

The issues before the High Court

[73] Before the High Court, as before us, the Minister accepted that the gathering restrictions limited the applicants' right to manifest their religion.[27] So the key question for the Judge to determine was whether that limitation was demonstrably justified in a free and democratic society.[28]

[74] It was common ground before the High Court that the appropriate approach to that question was as outlined by the Supreme Court in *Hansen v R*. The respondents were required to show that any limiting measure:[29]

(a) is prescribed by law;

(b) serves a sufficiently important objective or purpose to warrant limiting the protected right or freedom; and

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27 At [120].
28 At [116].
29 At [118], citing *R v Hansen* [2007] NZSC 7, [2007] 3 NZLR 1; and *R v Oakes* [1986] 1 SCR 103.

(c) the means chosen to achieve the objective are proportionate to the importance of the objective. This has several elements:

(i) rational connection — whether the limiting measure is rationally connected with its purpose.

(ii) minimal impairment — whether the limiting measure impairs the right or freedom no more than is reasonably necessary to achieve that purpose; and

(iii) proportional effect — whether the benefits achieved by the measure are outweighed by the significance of the limitation of the right.

Applying the Hansen test to the Order

[75] The restrictions challenged by the applicants were contained in the Order, so were clearly prescribed by law.[30]

[76] The Orewa applicants accepted that the second limb of the test was also satisfied: the gathering restrictions served a sufficiently important objective to warrant limiting the s 15 right. FTBC originally pleaded that the limiting measures did not serve a sufficiently important purpose, but by the time of the hearing no longer pursued that argument.[31] The Judge considered the issue for herself, and concluded that the purpose of the CPF was to minimise the spread of COVID-19 in the context of a Delta outbreak, to protect the vulnerable and to avoid the health system being overwhelmed. The principal rationale for the introduction of CVCs and the gathering limits was the advice from the Director-General that, because of the effectiveness of the COVID-19 vaccine in limiting the risk of infection, transmission and hospitalisation, the use of CVCs would mitigate the risk of COVID-19 outbreaks and protect vulnerable populations by reducing the risk of COVID-19 spread. An incidental benefit was the possibility that the use of CVCs could help to boost vaccination rates. Gathering limits

30 At [120].
31 At [124].

self-evidently limit the ability of the virus to spread in the community.[32] These purposes were sufficiently important to justify some curtailment of the right to manifest religion.[33]

[77] The Judge noted that the two applicant groups adopted somewhat different approaches at the High Court hearing. The Orewa applicants challenged all the gathering restrictions in the Order as introduced. FTBC also challenged the gathering restrictions in the Order as introduced, but primarily focussed on the CVC-based gathering restrictions once Omicron entered the New Zealand community.[34]

Were the CVC-related gathering restrictions proportionate when introduced?

[78] The Judge began by considering the CVC-related gathering restrictions as introduced.[35] She reviewed the evidence about transmission of COVID-19 and the effectiveness of the Pfizer vaccine, in some detail.[36] She also considered the evidence about risk of transmission of the virus at faith-based gatherings.[37]

[79] The Judge was satisfied that the gathering restrictions in the Order, as they applied to faith-based gatherings, were not arbitrary and were rationally connected to their purpose. So the first limb of the proportionality test in *Hansen* was satisfied.[38]

[80] After considering the evidence of Professor Flanigan on alternative mechanisms for reducing the spread of COVID-19 at faith-based gatherings — social distancing, masks and hand hygiene — and the applicants' argument that regular testing of congregants by way of PCR tests or Rapid Antigen Tests and proof of prior infection could have been used as a practical alternative to the CVC-related restrictions, the Judge concluded that the approach adopted by the Minister was within the range of reasonable alternatives open to him. The applicants' claims of

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32 At [125].
33 At [126].
34 At [127]–[129].
35 At [130].
36 At [148]–[168].
37 At [169]–[186].
38 At [206].

arbitrariness and over-breadth by way of comparison with other activities were not borne out.[39]

[81] The Judge then considered the proportionality of the benefits achieved by the gathering restrictions to the significance of the limitation on the applicants' right to manifest their religion. The Judge concluded that the benefits of the CVC-related restrictions as introduced outweighed the limitation on the applicants' right. The limitation was proportional and demonstrably justified.[40]

[82] Although the Judge's finding on this point was not in issue before us, one aspect of the Judge's reasoning was challenged by FTBC. FTBC say that the Judge wrongly gave less weight to their rights because they were a minority group. It is helpful to set out in full the passage that prompted this argument:[41]

> [236] As the respondents acknowledge, it would be inappropriate for them or the Court to challenge the correctness of the applicants' beliefs. Having said that, the consultation with faith communities showed that many churches decided to operate with CVCs, to protect vulnerable congregants, and Professor Trebilco's evidence was that there is a range of views within the Christian community. That is relevant to the proportionality analysis. The gathering restrictions affected religious and non-religious alike. *They may be a proportionate limit on the s 15 rights of a group whose views are not widely shared*.
>
> [237] The primary objective of the Order is to prevent, and limit the risk of, the outbreak or spread of Covid-19 in the community, in order to minimise death and serious illness and consequent impacts on the public health system. I have concluded that there was a rational connection between the restrictions and their object of decreasing the spread of Covid-19. That connection is convincingly set out in the evidence for the respondents. The applicants have not identified any alternative method that would be equally effective in achieving the objective. I conclude that the benefits of the CVC-related restrictions as introduced outweigh the limitation on the applicants' right and the limitation is proportional and demonstrably justified.

Were the CVC-related gathering restrictions proportionate after Omicron emerged?

[83] The Judge then turned to the FTBC argument that once the Omicron variant had emerged in New Zealand, the public health rationale for having a materially lower cap on numbers at a gathering, if one or more attendees were unvaccinated, was

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39 At [211]–[226] and [234].
40 At [237].
41 Emphasis added.

undermined. At that point, FTBC argued, the limitations in the Order became arbitrary and not rationally connected to the objective. Non-CVC gatherings should have been subject to the same capacity limits as those applying to CVC gatherings (100 rather than 25, at the Red setting), but using protective measures other than CVCs, in particular masks.[42]

[84] FTBC argued that the Government knew, at least in January 2022, that the effectiveness of the primary course of the Pfizer vaccine against the Omicron variant was substantially reduced. A public health review in February 2022 had concluded that there was no longer "a sufficient public health rationale to justify" a differentiated approach based on vaccination. However the gathering limit was not removed until April 2022.[43]

[85] The Judge reviewed the evidence from Dr Town and Dr Bloomfield, which acknowledged that early evidence suggested that two doses of the vaccine offered significantly less protection against infection from Omicron than Delta, and that Omicron was significantly more transmissible than Delta. Dr Town gave evidence that rapid waning of vaccine effectiveness occurs with Omicron, but a booster dose restores protection. The Judge summarised his evidence as follows:

> [248] Dr Town says that rapid waning of [vaccine effectiveness] occurs with Omicron, but a booster dose restores protection. The data demonstrates that:
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> (a) The vaccine effectiveness is around 55 per cent or more soon after two doses of Pfizer. This represents an epidemiologically important reduction in transmission. Vaccine efficacy wanes to levels unlikely to reduce infection risk and transmission within five to six months of the second dose.
>
> (b) The vaccine efficacy is around 55 per cent to 69 per cent after the booster dose of Pfizer. The data also suggests that while there is some waning of efficiency after the booster dose, this occurs more slowly than after the primary course, with efficiency remaining above 50 per cent in those who had received a booster more than 10 weeks before.
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> [249] [Vaccine effectiveness] against hospitalisation appears to be 60-70 per cent after a primary vaccine course, but declines to around 45 per cent from 25 weeks after the second dose. Vaccine effectiveness against hospitalisation

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42 High Court judgment, above n 2, at [238]–[239].
43 At [238]–[239].

> increases to around 90 per cent after a booster dose (including in those over 65 years of age).
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> [250] Dr Town concludes that two doses of the Pfizer vaccine continued to provide some protection and to assist in limiting the spread of Omicron within the community and reducing the incidents of hospitalisation. Two doses are less effective against Omicron than against Delta. A booster dose provides enhanced protection.

[86] The Judge was not persuaded that the evidence of reduced vaccine effectiveness for Omicron, compared with Delta, when taken together with the evidence about the ongoing benefits of vaccination in the Omicron context, supported the submission that there was no longer a sufficient public health benefit to justify continued use of CVCs.[44]

[87] The Judge then considered FTBC's argument that the briefing paper of 4 March 2022, and in particular the observation that "there is technically not a sufficient public health rationale currently to justify CVCs being used to prevent entry to certain premises during this phase of the response".[45] FTBC argued that this briefing paper should have led the Minister to immediately remove CVCs from the CPF.[46]

[88] The Judge considered that FTBC's reliance on the 4 March 2022 briefing paper was selective and misleading. She emphasised the paragraph immediately following, which identified the possibility of a change to the definition of "up-to-date vaccination status", and advised that this would restore the original public health rationale for CVCs. The Judge concluded that the 4 March 2022 briefing paper did not support FTBC's submission. It did however demonstrate that the Order was being kept under review, as required by s 14(5) of the COVID-19 Public Health Response Act.[47]

[89] The Judge then considered the third issue raised by FTBC: the apparent delay between Cabinet's agreement on 23 March 2022 to remove CVCs from the CPF, and the actual removal on 4 April 2022. The Judge considered that the 21 March 2022

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44 At [252].
45 See [33] of the briefing paper, set out at [34] above.
46 High Court judgment, above n 2, at [253]–[254].
47 At [259].

paper from the Minister to Cabinet made plain why the gap between the decision and that decision taking effect was required:[48]

> 15 I propose that MVPs are removed from the Framework at 11:50pm Monday 4 April 2022. By this date, we are very likely to have confidence that we have moved past the Omicron peak and allows time for sectors and agencies to put in place the guidance and workplace requirements they need to manage residual COVID-19 risk.

[90] That aspect of FTBC's challenge also failed.[49]

[91] The Judge was satisfied on the evidence that, after the Omicron variant was circulating in the community, there remained a rational connection between the CVC-related restrictions and the purpose of those restrictions.[50]

High Court conclusions

[92] While there were a range of other, less restrictive measures relevant to the purpose sought to be achieved by the CVC-related restrictions, the Judge considered that they would not have had a similar level of effectiveness.[51] The restrictions after Omicron was in the community were in due proportion to the importance of their objective. The potential of faith-based gatherings to affect others — the rights of the broader public to life and health and their interests in an effectively functioning health system — rendered the possibility of qualification of the applicants' rights necessary.[52] The restrictions had been subject to ongoing review. They were temporary (four months) in the context of what was almost certainly the worst public health crisis in at least 100 years. Overall, the Judge was satisfied on the evidence that the CVC-related restrictions as introduced, and as continued after Omicron arrived in the community, continued to be a proportionate response to the public health risk.[53]

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48 At [261].
49 At [262].
50 At [275].
51 At [276].
52 At [282].
53 At [283].

[93] The Judge concluded that the Order was not an unjustifiable limitation on the applicants' rights under s 15 of NZBORA at the time it was made, or after Omicron had arrived in the community.[54]

[94] The respondents did not seek costs before the High Court, given the fundamental rights at issue and the public interest in the matters raised.[55] No costs order was made.

Issues on appeal

[95] FTBC appeals to this Court against the Judge's conclusion that the limit on the right to manifest religion arising out of the Order was demonstrably justified when the Omicron variant was circulating in the community. The argument before us proceeded on the basis that the Order was justified at the time it was made.

[96] The issues agreed by the parties focussed on the application of the *Hansen* test as at mid-February 2022. The core issues that the parties invited this Court to consider were whether:

(a) applying the correct legal test, the limiting measure was rationally connected to its objective from mid-February 2022;

(b) the Court was correct to conclude that from mid-February 2022, a mask requirement would not have had a similar level of effectiveness to the CVC-related restrictions; and

(c) the harm to the appellant's right to manifest religion was outweighed by the benefit of the 25-person limit on non-CVC gatherings at this time.

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54 At [296]–[297].
55 At [299].

[97] The issues identified by the parties also included questions about the operation of the *Hansen* test, and in particular whether:

(a) Rational connection is only a "threshold issue" such that it is necessary only to show that there is a causal connection between the infringement and the benefits sought on the basis of reason or logic, or, alternatively, whether the Court should have required the respondents to establish the limiting measure was "fair and not arbitrary, carefully designed to achieve the objective in question and rationally connected to the objective".[56]

(b) It is relevant to the proportionality assessment that a religious view is not widely shared.

[98] As we explain below, it seems to us that the invitation to this Court to re-apply the *Hansen* test as at mid-February 2022 is misconceived. Rather, the focus should be on what NZBORA requires of a decision maker in changing circumstances which call into question the continuing justification for a rights-limiting measure. We return to this below.

FTBC submissions on appeal

[99] The argument before us on behalf of FTBC focussed on the relativity of the gathering limits set by the Minister under the Red setting of the CPR. Gatherings were limited to 100, if all participants were vaccinated, and 25, if one or more participants were unvaccinated.[57] FTBC accepted that the Government was entitled to set an overall gathering limit of 100 to reflect its risk tolerance: that limit was not challenged. FTBC also accepted that the 100:25 ratio was based on the public health advice received by the Minister in September/October 2021, which FTBC characterised as being that with the Delta variant, an unvaccinated person in a 25-person gathering posed a similar level of transmission risk as a vaccinated person in a 100-person

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56 *Hansen v R*, above n 29, at [204].

57 Strictly speaking, if the person responsible for the gathering did not ensure that all participants were CVC-compliant. So if CVC status was not checked, the limit was 25. And a person could be CVC-compliant although not vaccinated, if they had an exemption or were aged under 12 years and three months.

gathering. Thus, FTBC submitted, the 100:25 ratio reflected the two groups' relative risk of spreading COVID-19.

[100] However the emergence of the Omicron variant changed that relative risk. Although that relative risk had changed materially, the 100:25 ratio was retained. So, FTBC argued, from mid-February 2022, when Omicron had out-competed Delta, the different treatment of vaccinated and unvaccinated people was no longer rational or proportionate to its purpose, and hence not demonstrably justified. It was not demonstrably justified to wait until 4 April 2022 to recognise the material change in relative risk.

[101] It followed, FTBC submitted, that the High Court had erred by failing to consider whether a gathering limit of 25 people (where one or more is unvaccinated) remained in due proportion to a gathering limit of 100 vaccinated people, or was demonstrably justified relative to the gathering limit of 100 vaccinated people. In addition, FTBC submitted that the Court applied the wrong test for rational connection and failed to engage with the expert evidence that the effectiveness of the vaccine against Omicron infection was "clinically insignificant".

[102] FTBC also submitted that the High Court erred in concluding that masks were not a less rights-impairing alternative in the Omicron context, and in its weighing of the significant harm caused to the FTBC church communities against the limited social advantage of the gathering restrictions.

[103] FTBC clarified that it does not criticise the Government for retaining the capacity limit of 100 for gatherings of vaccinated people, despite the significantly increased risk of infection/transmission with Omicron. The Government was entitled to increase its risk tolerance and was entitled to have regard to the economic impact of its response to COVID-19. Rather, the criticism was that the public health risk assessment overlooked that, in retaining the status quo in the face of a materially altered relative risk, the 100:25 ratio was no longer proportionate. Despite acknowledging on 18 January 2022 that the Order needed to be "adjusted to account for the … reduced vaccine effectiveness of Omicron", the Government made no adjustment to gatherings until 4 April 2022.

[104] FTBC responded to the Judge's analysis of the 4 March 2022 advice to the Director-General by saying that the pending advice on boosters did not detract from the conclusion that the justification for the measure had ceased. It indicated only that the public health justification which had lapsed might be capable of being revived. But that should not have been used as a reason to delay removing a public health measure that was no longer proportionate. Equally, FTBC said, there was no sensible basis to retain until 4 April 2022 a measure that had become ineffective, so as to allow the Omicron peak to subside.

[105] FTBC submitted — and this submission goes to the heart of their argument — that the Ministry's view as to timing was not determinative of the issue of whether the 100:25 ratio continued to be demonstrably justified in response to Omicron. That, FTBC submitted, is a question of law for this Court to decide.

[106] Mr Rishworth KC, who appeared for FTBC, confirmed that the challenge before this Court was to the Executive's decision not to revoke the Order, or remove the relevant gathering restrictions, at an earlier date. He said it was not a challenge to the reasonableness of the Minister's decision making. Rather, he said, the question was whether the Order complied with the requirements of NZBORA from mid-February 2022 onwards.

[107] In the course of oral argument we explored with Mr Rishworth the relief sought on appeal. He confirmed that FTBC was not arguing that the Order ceased to be effective at some date. Nor was FTBC seeking an order setting aside the Order. Rather, FTBC was seeking an appropriate declaration. The form of declaration suggested by Mr Rishworth in the course of the hearing was that the Minister failed to amend or revoke the limiting measure of the 25-person limit on gatherings so as to maintain its rationality and proportionality from mid-February 2022.

[108] We asked Mr Rishworth who was under a duty to act, and unlawfully failed to act, at a particular time. He acknowledged that identifying the person who failed to act in this case is difficult. He fell back on the notion of collective responsibility of the Crown. He explained that FTBC's case was that things were not done in a timely way by various officials that would have made it possible for the Minister to act

differently. There had been a failure to ask the right questions at the time they should have been asked.

[109] Ms van Dam, who appeared as junior counsel for FTBC, took us in considerable detail through the internal Crown documents in late 2021 and early 2022. She confirmed that FTBC was not arguing that the Minister had failed to comply with the obligation in s 14(5) to keep the Order under review. But, she said, there were many points revealed by the documentary record where it became unlawful to fail to make the decision to dispense with CVC-based gathering limits. It should have been made when Omicron was circulating widely in the community in February 2022. By 15 February 2022 Delta was no longer circulating. And by 4 March 2022 it had been recognised that there was "technically" no longer a justification for requiring CVCs. This, she said, was the latest point at which a decision should have been made but was not made.

The Minister's submissions

[110] The Minister emphasised that as the argument had developed on appeal, its focus was a seven-week period from mid-February 2022 to 4 April 2022 when the challenged gathering restriction was removed. During this period, the Minister said, the Government faced an unprecedented challenge. For the first time in the pandemic, COVID-19 was circulating widely in the community. Officials were dealing with imperfect information, and preliminary and limited understandings as to how the Omicron variant would impact a COVID-naïve population.

[111] In these circumstances, the Minister said, immediate removal of CVCs in mid-February 2022 would have been contrary to the precautionary principle in circumstances where the vaccine continued to have an impact against Omicron, albeit a lesser one than against Delta. In particular, vaccination continued to have a significant impact on hospitalisation, so was relevant to the Government's central concern about the health system being overwhelmed as the first Omicron wave reached its peak. The Government also needed to responsibly assess its options for a fundamentally changed COVID-19 landscape. A knee-jerk reaction to Omicron would have risked jeopardising the public and the health system.

[112] Thus, the Minister submitted, the Government acted appropriately and expeditiously in line with the precautionary principle to remove restrictions once it became apparent they were no longer justified.

Discussion

[113] This is, so far as we are aware, the first time that an appellate court in New Zealand has been called on to consider how NZBORA applies to delegated legislation in circumstances where that legislation limits rights affirmed by NZBORA, those limits are demonstrably justified for the purposes of s 5 of NZBORA at the time the relevant legislation is made, but circumstances change in a manner that calls into question the continuing justification for the rights-limiting measure.[58]

NZBORA limits the power to make delegated legislation

[114] It is well-established that delegated legislation that is inconsistent with NZBORA cannot be lawfully made in the absence of an express provision in the empowering legislation that authorises that inconsistency. If Parliament intends to authorise the making of regulations or other orders that are in conflict with fundamental rights, then it needs to do so expressly and unambiguously. Otherwise, this is treated as an inherent limit on the power conferred by the primary legislation to make subordinate legislation.[59]

[115] The COVID-19 Public Health Response Act did not authorise the Minister to make orders inconsistent with NZBORA. To the contrary, s 9(1)(ba) expressly required the Minister to be satisfied that an order does not limit or is a justified limit on the rights and freedoms in NZBORA. As Cooke J explained in *NZDSOS Inc v Minister for COVID-19 Response*, the requirement that the Minister be satisfied that an order is NZBORA-consistent provides an additional level of protection. But it does

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58 The issue was touched on by Cooke J in *NZDSOS Inc v Minister for COVID-19 Response* [2022] NZHC 716, (2022) 18 NZELR 833 at [63]. An appeal from that decision was heard by this Court, and judgment has been delivered. This issue was not however squarely addressed in the judgment: see *NZTSOS Inc v Minister for COVID-19 Response* [2024] NZCA 74.

59 *New Health New Zealand Inc v South Taranaki District Council* [2018] NZSC 59, [2018] 1 NZLR 948 at [294]–[297], citing *Drew v Attorney-General* [2002] 1 NZLR 58 (CA) at [68]; *Cropp v Judicial Committee* [2008] NZSC 46, [2008] 3 NZLR 774 at [25]; *Zaoui v Attorney-General (No 2)* [2005] NZSC 38, [2006] 1 NZLR 289 at [90]–[91]; and *Dotcom v Attorney-General* [2014] NZSC 199, [2015] 1 NZLR 745 at [100].

not replace the requirement that any order must be consistent with NZBORA. That is a further, objective, requirement which must be assessed by the Court.[60]

[116] It follows that if a court finds that delegated legislation made under the COVID-19 Public Health Response Act was not consistent with NZBORA at the time it was made, that delegated legislation was not lawfully made within the scope of the powers conferred by Parliament on the relevant decision maker. The appropriate relief will generally be to set aside the delegated legislation (or the problematic measures contained in that legislation, if severable).

[117] However that is not the position here. The Minister lawfully made the Order challenged by FTBC. The Order is lawfully made delegated legislation.

Implications of NZBORA for lawfully made rights-limiting delegated legislation

[118] How does NZBORA operate in relation to rights-limiting delegated legislation after the date on which that legislation is made? In the absence of relevant authority squarely on point, we address this question from first principles.

[119] Mr Rishworth was right to concede in the course of argument that even if it could be shown that the Order ceased to be demonstrably justified by a given date, applying the *Hansen* test, that would not mean it had automatically become invalid on that date. It was lawfully made, and continued in force unless and until amended or revoked by the Minister, or set aside by a court. NZBORA does not impose a test for the continuing validity of delegated legislation. The delegated legislation does not vanish in a puff of smoke as soon as the *Hansen* test ceases to be satisfied.

[120] Nor does the delegated legislation become unlawful, so liable to be set aside, as soon as that test ceases to be satisfied. If delegated legislation was lawfully made, it remains lawful and valid unless and until revoked. A court cannot set aside delegated legislation that was lawful and valid at the time it was originally made on the basis that such legislation could not have been lawfully made at some later date. That is not the right test as a matter of principle.

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60 *NZDSOS Inc v Minister for COVID-19 Response*, above n 58, at [59]–[60].

[121] Rather, NZBORA operates by speaking to relevant decision makers, and requiring them to act consistently with the rights that are affirmed both at the time they make delegated legislation and on a continuing basis. As s 3 states, NZBORA applies to *acts done* (and, we would add, omissions to act) by each of the three branches of government — here, to acts of the Minister as a member of the executive branch. In making delegated legislation a decision maker must act consistently with NZBORA. Failure to do so means the act of making the delegated legislation was not lawfully authorised, so the product of that act is liable to be set aside by the court in judicial review proceedings. But what NZBORA requires of a decision maker changes once the legislation has been made. It speaks to the acts and omissions of decision makers that are relevant at that point in time. Those acts and omissions fall into two linked categories: keeping the delegated legislation under review, and exercising powers to amend or revoke it. We address each in turn.

[122] Where delegated legislation contains measures that limit rights affirmed in NZBORA in order to support a response to a public emergency such as a pandemic, it is inherent in the rationale for those measures that they will not be justified indefinitely. The public emergency will at some point come to an end, or require a different form of response. The measures will be lawful if the limits on rights that they impose are demonstrably justified in a free and democratic society at the time the delegated legislation is made.[61] But the expectation is that the emergency will pass, and the initial justifications for the rights-limiting measures will cease to apply. In those circumstances NZBORA requires the maker of the delegated legislation to keep it under review to ascertain whether there continues to be a sufficient justification for the rights-limiting measures that it contains.[62] The greater the limits on rights effected by those measures, and the faster circumstances are changing, the greater the need for vigilance to ensure that rights are not limited for longer than can be justified.

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61 The inherently temporary nature of the justification for such limits on rights affirmed by NZBORA will generally require the rights-limiting measures to be time bounded. Thus for example the COVID-19 Public Health Response Act was itself time-bounded, and provided for limits on the duration of COVID-19 orders: see ss 3 and 14–16.

62 For an analogous obligation to keep under review emergency measures that derogate from obligations under the International Covenant on Civil and Political Rights, see the American Association for the International Commission of Jurists *Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Policial Rights* (April 1985) at [51] and [55]. The Siracusa Principles can be a useful interpretive aid when applying NZBORA: see *Quilter v Attorney-General* [1998] 1 NZLR 523 (CA) at 540–541; and *Nottingham v Attorney-General* [2022] NZHC 405 at [11]–[12].

[123] Such a review may identify that a rights-limiting measure is no longer justified, in the sense required by s 5 of NZBORA. Or the absence of justification may come to the decision maker's attention in other ways, for example where public concerns are raised about the measure. If the maker of the delegated legislation appreciates that the measure is no longer NZBORA compliant, that decision maker is required by NZBORA to take action to amend or revoke the delegated legislation to bring it back into compliance with NZBORA. That duty also arises, in our view, where a decision maker who took reasonable steps to review the measure would appreciate the NZBORA non-compliance, even if the particular decision maker has failed to do so.

[124] The decision maker's duty under NZBORA to act consistently with the rights affirmed by NZBORA manifests itself in this context as a duty to take steps to amend or revoke the delegated legislation. That duty must operate in a realistic manner that takes into account the importance of considered, properly informed, democratically legitimate, delegated law making. The issue for the decision maker will rarely be as simple as whether an isolated provision in delegated legislation should be retained or revoked. More commonly, there will be a range of interrelated policy choices to be made. If for example the rights-limiting measure is no longer justified because its objective can be achieved by different less rights-limiting measures, those alternative measures need to be identified, and amending legislation prepared to give effect to those alternative measures in place of the original measure. Or the original measure may be justified provided additional safeguards are introduced: but then those safeguards need to be identified and appropriate provisions framed to give effect to them. There may be a choice to be made between one or more paths to NZBORA compliance, and that choice may turn on a range of social and economic considerations that the decision maker needs to weigh.

[125] In short, the decision maker will have an obligation to act. But precisely how the decision maker acts will depend on the relevant circumstances at that time, the objectives of the empowering legislation, and an analysis of the available options for pursuing those objectives in the current circumstances.

[126] NZBORA does not require decision makers to act precipitously on the basis of insufficient information, or without appropriate advice from officials and relevant

experts. It does not require them to act without properly consulting those affected by any proposed changes to the legislation. Nor does it require draft legislation to be developed in artificially constrained timeframes that risk errors and oversights. It does not require the decision maker to adopt that legislation without giving it careful consideration. None of these are features of the free and democratic society that NZBORA is designed to uphold.

[127] Nor will it invariably be appropriate for any decision that is made to have immediate effect, even where it is designed to restore NZBORA compliance. Often, a reasonable time needs to be allowed for implementation of new arrangements introduced by changes to a legislative instrument. NZBORA does not require decision makers to ignore the practical implications of law changes.

[128] These duties — the duty to keep delegated legislation that limits rights under review, and the duty to take steps to amend or revoke the delegated legislation to achieve compliance with NZBORA — can be supervised by the courts in the same way as any other statutory obligations. But as the discussion above makes plain, the inquiry is not just whether the delegated legislation is NZBORA compliant at a particular point in time. Rather, the inquiry will focus on whether the ongoing duties outlined above have been breached. And if a breach is made out, the remedial response will generally be a declaration. It is difficult to conceive of circumstances in which a court would determine for itself what the outcome of the review should have been, and set aside delegated legislation (or part of it) without the decision maker having an opportunity to consider the full range of options for amending or replacing that legislation. That would involve the court making a decision entrusted to the relevant decision maker, which is rare in any circumstances, let alone where the exercise of a delegated legislative power is in issue.

[129] Importantly, it does not follow from a finding (made with the benefit of hindsight) that a particular measure in delegated legislation ceased to satisfy the *Hansen* test at a given date, that the legislation should have been amended *by that date* to remove the (no longer justified) measure. Rather, the question is whether the relevant decision maker failed to act consistently with the duties outlined above by not

initiating action by that date directed towards promptly amending or revoking the delegated legislation.

[130] As this brief discussion illustrates, an inquiry into failure to comply with NZBORA in relation to a complaint that a rights-limiting measure should have been, but was not, revoked or amended is very different from an inquiry into whether such a measure could lawfully have been made in the first place. If the measure is still in force, the question will be whether it has been kept properly under review. If not, the likely response is to direct that such a review take place. The more significant the limit on rights, and the clearer the absence of continuing justification, the more urgent that review will be.

[131] Where a measure has been kept under review, and the complaint is that the review should have taken place faster and reached a conclusion earlier, the nature of the inquiry will depend on whether it is common ground that the measure ceased to be justified at a later time. If, as here, it is common ground that the measure ceased to be justified and, by the time the challenge is heard, that measure has been modified in a manner that addresses the concerns raised, the question for the courts will be whether failure to move faster was itself a failure to act consistently with NZBORA. That will require a highly contextual examination of the process followed during the review, and identification of a time by which NZBORA required action to be taken that was not taken. That is a very different inquiry from the inquiry into initial lawfulness. It is an inquiry that the court will be in a position to undertake only if such a challenge has been adequately pleaded, and the decision maker has had a fair opportunity consistent with the requirements of natural justice to respond to that challenge.

[132] At the risk of stating the obvious, the duties of a maker of delegated legislation to keep rights-limiting measures under review, and to take steps to amend or revoke the delegated legislation to achieve compliance with NZBORA, do not depend on whether the limits on rights affect all or most people or a small minority. Where the limits on rights affect different groups in different ways or to a different extent, the justification for all of those impacts must be kept under review and appropriate action taken where the justification ceases to exist in respect of any group, however small.

Applying this framework to the present case

[133] We turn to apply this framework to the present case. Here, the argument before us proceeded on the basis that the Order was lawfully made on 30 November 2021. It was common ground that the measure was kept under review. It was also common ground that by 23 March 2022, it was apparent to the Minister (and other Ministers) that the circumstances had changed to an extent that meant that the CVC-related gathering restrictions were no longer justified, and should be promptly removed.

[134] We do not consider that any useful purpose would be served by making a declaration that merely confirmed that the CVC-related gathering restrictions ceased to be justified at some point in time in early 2022, in circumstances where that is not in dispute. Nor do we consider that it is legally relevant or practically useful to attempt to determine a specific date by which that was, or should have been, apparent to the Minister. That is only part of the equation when it comes to determining whether the duty to act in a timely manner to achieve NZBORA-compliance was engaged and was breached.

[135] In any event, Mr Rishworth confirmed that he was not arguing that the Minister had acted unlawfully by failing to modify the Order to remove the CVC-related gathering restrictions at an earlier date. The Minister had not received unequivocal advice that the restrictions were no longer justified before the advice stream that led to the 23 March 2022 decisions. Nor was it suggested in argument that the Minister should have taken specific steps at some earlier date to accelerate the process of receiving advice and making decisions about the amendment of the Order.

[136] That brings us back to the observation we made earlier about the way in which the argument before us had evolved from the original challenge before the High Court. We were not well placed to consider whether the review ought to have been conducted more rapidly, or what specific steps ought to have been taken by the Minister or his advisers by particular dates, in the absence of evidence squarely addressing that issue. FTBC did not plead its case on the (alternative) basis that the Order was valid when made, but should have been amended or revoked earlier. It did not file any evidence addressing that question. In the absence of any pleading squarely raising this issue,

and any evidence from FTBC on the point, it was (unsurprisingly) not addressed in the affidavit of the Minister or the other affidavits filed in the High Court. In those circumstances a court could not fairly or responsibly make a finding that the Minister (or the Executive collectively) had failed to act in accordance with NZBORA because he had failed to amend or revoke the Order by an earlier date.

[137] However we observe that on the basis of the documentary record before us, the process that was undertaken to identify and analyse the change in circumstances, consider options for responding to those changed circumstances, and provide advice to the Minister, in the context of a fast-developing and complex public health crisis, appears to have been prompt and efficient.

[138] We do not accept the submission that there was a clear path forward as at 4 March 2022 that required the CVC-related gathering restrictions to be removed forthwith. The advice paper to the Director-General of 4 March 2022 expressly identified two possible paths forward. One would recognise the absence of a sufficient public health rationale for use of CVCs based on the current definition of "up-to-date vaccination status" (which only included two doses of the vaccine). The other option, which was the subject of continuing work, was to modify the definition of "up-to-date vaccination status" to include a requirement to have had a booster. The advice to the Director-General was that this would restore the original public health rationale for use of CVCs. In circumstances where the second option was still squarely on the table, it would have made no sense — and would have been inconsistent with good legislative practice — to remove, then shortly afterwards reintroduce, CVC-related gathering restrictions. That is an unrealistic and impractical suggestion. We do not accept that failure to take that path was inconsistent with NZBORA.

[139] Nor do we consider that it was inconsistent with NZBORA for the Minister to decide on 23 March 2022 to remove the CVC-related gathering restrictions with effect from 4 April 2022, rather than immediately. As the Judge noted, the 21 March 2022 Cabinet paper identified the rationale for the gap between the decision and its operative date.[63] It was expected that by 4 April 2022 New Zealand would have moved past the

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63 High Court judgment, above n 2, at [261].

Omicron peak, reducing pressure on the health system. And, critically, that would allow time for sectors and agencies to put in place the guidance and workplace requirements they needed to manage residual COVID-19 risk. In circumstances where the Government requirement for CVCs was being removed, it was necessary for employers and those responsible for gatherings to consider whether, in the particular context of the workplaces and gatherings for which they were responsible, such requirements should be retained or different requirements (such as wearing a specified type of mask) should be put in place. There was no evidence before us about the time reasonably required to enable that adjustment to occur throughout New Zealand. We are not prepared to find that an 11-day lead time was inconsistent with the requirements of NZBORA in the absence of any pleading or evidence addressing that issue.

[140] That is sufficient to dispose of the appeal. It has not been necessary for us to address the issues identified in the parties' agreed issues list concerning application of the *Hansen* test to the Order as at mid-February 2022. The issues of principle identified at [97] above are better decided in a case where they squarely arise. Here, for the reasons explained above, they do not.

Costs

[141] The Minister seeks costs before this Court. He submits that the public interest in a review of the lawfulness of the Order was satisfied by the High Court proceedings, and is further diminished by the fact that the CPF has now been revoked.

[142] We agree: we do not consider that there was sufficient public interest in an appeal raising the question of whether a change to the Order that already had been made should have been made some weeks earlier, especially in circumstances where the material before the High Court did not squarely address that timing issue with the result that this Court was, in turn, not well placed to consider it. The ordinary principle that costs follow the event is not displaced in the context of this appeal.

Result

[143] The appeal is dismissed.

[144] The appellant must pay costs to the respondent for a standard appeal on a band A basis, with usual disbursements.

Solicitors:
Parry Field Lawyers, Christchurch for Appellant
Crown Law Office | Te Tari Ture o te Karauna, Wellington for Respondent