IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA622/2023
CA737/2023
[2025] NZCA 592

BETWEEN	NEW HEALTH NEW ZEALAND INCORPORATED Appellant
AND	MINISTER FOR COVID-19 RESPONSE First Respondent
	ATTORNEY-GENERAL Second Respondent

Hearing:	4 February 2025
Court:	Mallon, Thomas and Woolford JJ
Counsel:	L M Hansen and C F J Reid for Appellant K B Bell, D Jones and E J Cameron for Respondents
Judgment:	12 November 2025 at 10.30 am

JUDGMENT OF THE COURT

A The substantive appeal is dismissed.

B The appeal against the High Court costs decision is allowed. The costs order is set aside and replaced with an order that the appellants pay the respondents $29,472.38 in costs.

C There is no order in this Court as to costs.

REASONS OF THE COURT

(Given by Thomas J)

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Introduction

[1] The response of the New Zealand Government to the global COVID-19 pandemic began with a nationwide lockdown imposed in March 2020 after a state of emergency had been declared. At that time, New Zealand's response involved an elimination strategy to "stamp out" COVID-19. The strategy used an alert level system, which used measures such as lockdowns, restrictions on gatherings and business operations, mandatory record keeping systems and physical distancing requirements to deal with any outbreaks. On 30 August 2020, it introduced the first legal requirement for face coverings to be worn on public transport and aeroplanes.[1]

[2] New Zealand's response moved to a minimisation and protection strategy in October 2021 due to the emergence of the Delta variant, the ongoing social and economic impacts of lockdowns, and the availability of vaccinations. The COVID-19 Protection Framework (CPF) introduced traffic light settings to impose public health requirements similar to those under the alert level system, with the addition of vaccination measures. A number of orders were made by ministers under the COVID-19 Public Health Response Act 2020 (the Act) imposing face covering requirements.[2]

[3] The appellant, New Health New Zealand Inc,[3] brought judicial review proceedings in the High Court challenging the COVID-19 Public Health Response (Protection Framework) Order 2021 made on 30 November 2021 (the 2021 Order) and the COVID-19 Public Health Response (Masks) Order 2022 made on 12 September 2022 (the 2022 Order) (together, the Orders). The appellant argued a number of grounds of review in relation to the Orders' face covering requirements, including that those requirements breached the New Zealand Bill of Rights Act 1990 (NZBORA). The appellant's arguments were principally based on concern about the quality of evidence relied on as to the efficacy of face coverings. Cooke J, in the High

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1 In mid-to-late 2021, a number of additional face covering requirements were brought into the alert level framework.

2 Much of the evidence has used the terms "face covering" and "mask" interchangeably. We generally use the term "face covering".

3 An incorporated society which describes itself as a "consumer-focused health organisation" with aims to "advance and protect the best interests and health freedoms of consumers".

Court, dismissed the judicial review application.[4] The appellant now appeals that decision.

[4] The appellant says that the expert advice given to the Government, including by the Director-General of Health, to the effect that face coverings were not effective and provided no protection, changed in mid-2020 when the first orders requiring face coverings to be worn in various community settings were made. The appellant claims the Ministers were labouring under a material mistake of fact when they made the Orders, namely that face coverings were effective to prevent or limit the spread of COVID-19. That argument morphed into a claim that the highest quality evidence established the fact that there was uncertainty as to whether face coverings were effective. In the appellant's submission, the respondents relied on the lowest quality, lowest certainty evidence to assert face coverings were highly effective. This was more than a contest between experts as so characterised by the High Court.[5] The appellant says that the High Court was wrong to dismiss the ground of review of mistake of fact.[6]

[5] The appellant says that the High Court was also wrong to hold that face coverings were not medical treatment and therefore that the right to refuse to undergo medical treatment protected under s 11 of NZBORA was not engaged.[7] While the High Court found the limitation on the s 14 right to freedom of expression was engaged, it concluded that the limitation was justified as proportionate, a conclusion the appellant also says was in error.[8]

[6] The Minister for COVID-19 Response and the Attorney-General, together the respondents, say that the two Ministers who respectively made the Orders were not operating under a mistake of fact in considering that the wearing of face coverings can contribute to preventing or limiting the transmission of COVID-19 and the public health advice on which they relied was appropriate. Further, they say the rights not to be deprived of life and to refuse medical treatment were not engaged by a legal

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4 *New Health New Zealand Ltd v Minister for COVID-19 Response* [2023] NZHC 2647 [judgment under appeal].
5 At [33].
6 At [57].
7 At [84]–[94].
8 At [70]–[82].

requirement requiring face coverings to be worn in specified settings. To the extent that the right to freedom of expression was limited, that was justified under NZBORA.

[7] The respondents emphasise that the Government's response to COVID-19 employed a suite of measures to prevent poor health outcomes and minimise the escalation of COVID-19 and recognised that no single public health intervention would be 100 per cent effective.

Background

[8] The World Health Organisation (WHO) declared the global outbreak of COVID-19 a pandemic on 11 March 2020. COVID-19 is a viral infectious disease that can cause severe acute respiratory syndrome and death. While most people recover fully over time, a significant proportion suffer ongoing and long-lasting health effects. The WHO estimated that for 2020 and 2021, there were 14.83 million excess deaths associated with the COVID-19 pandemic globally.

[9] The 2021 Order introduced a series of requirements under the traffic light system. That included that face coverings were generally required to be worn on public transport and at the premises of retail businesses, public facilities operated by central and local government, and healthcare services. Exemptions applied. The 2022 Order removed all face covering requirements except in certain health service premises wherein visitors were required to wear face coverings but patients/residents and employees were not.[9] In addition to blanket exemptions for certain classes of individual (for example, those under the age of 12 years), a person could apply for an individual exemption pass.[10]

[10] Both Orders were made pursuant to s 11 of the Act which provided as follows:

> **11 Orders that can be made under this Act**
>
> (1) The Minister or Director-General may, in accordance with section 9 or 10 (as the case may be), make an order under this section for 1 or more of the following purposes:

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9 COVID-19 Public Health Response (Masks) Order 2022, cl 5.

10 Clauses 6 and 7.

(a) To require a person to refrain from taking any specified actions or to take any specified actions, or comply with any specified measures, so as to contribute or be likely to contribute to either or both of the following:

(i) preventing, containing, reducing controlling, managing eliminating, or limiting the risk of the outbreak or spread of COVID-19:

(ii) avoiding, mitigating, or remedying the actual or potential adverse public health effects of the outbreak of COVID-19 (whether direct or indirect).

(b) by way of example under paragraph (a), requiring persons to do any of the following:

(i) stay in any specified area, place, or premises or refrain from going to any specified area, place, or premises (including in specified circumstances or unless in compliance with specified measures):

(ia) permit entry to any specified areas, places, or premises only in specified circumstances or in compliance with specified measures:

(ii) refrain from associating with specified persons:

(iii) stay physically distant from any persons in any specified way:

(iv) refrain from travelling to or from any specified area or place, or refrain from travelling to or from any specified area or place in specified circumstances or unless in compliance with specified measures (for example, refrain from leaving an area unless the person has a COVID-19 vaccination certificate):

(v) refrain from carrying out specified activities (for example, business activities involving close personal contact) or carry out specified activities only in any specified way or in compliance with specified measures:

(vi) be isolated or quarantined in any specified place or in any specified way:

(vii) refrain from participating in gatherings of any specified kind, in any specified place, or in specified circumstances:

(viii) report for and undergo a medical examination or testing of any kind, and at any place or time, specified and in any specified way or specified circumstances:

(ix) provide, in specified circumstances or in any specified way, any information necessary for the purpose of contact tracing:

(x) satisfy any specified criteria before entering New Zealand from a place outside New Zealand, which may include being registered to enter an MIQF on arrival in New Zealand:

…

[11] The purpose of the Act was:

> **4 Purpose**
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> 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
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> (b) avoids, mitigates, or remedies the actual or potential adverse effects of the COVID-19 outbreak (whether direct or indirect); and
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> (c) is co-ordinated, orderly, and proportionate; and
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> (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.

[12] Face coverings were not explicitly provided for, although a later amendment to s 11 of the Act provided for more particular orders, including an order about the wearing of face coverings.[11]

Is the appeal moot?

[13] The 2021 Order and the 2022 Order have been revoked and the primary legislation under which the Orders were made has been repealed. It follows that the

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[11] COVID-19 Public Health Response (Extension of Act and Reduction of Powers) Amendment Act 2022, s 8(3). This amendment entered force on 26 November 2022.

appeal is moot. However, when we raised the issue of mootness at the hearing, Ms Cameron for the Crown explained that the respondents did not want to rely on mootness, given the significant powers exercised by the Crown during the COVID-19 pandemic.

[14] When an appeal is moot, the Court has a discretion whether to hear the appeal.[12] Though a decision to hear a moot appeal should be made only in exceptional circumstances, broader public interest can justify the hearing of a moot appeal.[13] In particular, questions of mootness may be less compelling in public law cases.[14]

[15] Notwithstanding that the appeal is moot, we consider the issues it raises are of sufficient legal and public importance that it is right for the matter to be heard and determined by this Court. The Act reserved extensive powers to the Government and were exercised in a manner that affected all New Zealanders, with implications for rights protected under NZBORA. Though the face covering requirements were less restrictive than some of the other measures taken by the Government in response to COVID-19, the requirements were a key aspect of the restrictions imposed under the Act, were in force for almost two years, and applied (albeit subject to exceptions) to everyone in New Zealand.

The appeal

[16] The grounds of appeal are extensive:

> 1. The judge was wrong to find that the Minister was not labouring under a material mistake of fact, namely that masks and community mask mandates were an effective measure to contribute, prevent or limit the spread of COVID-19 in the community.
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> 1.1. The judge acknowledged that the evidence about the effectiveness of masks was uncertain.
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> 1.2. The judge failed to take into account that none of the types of face coverings mandated by the first respondent were designed to prevent the transmission and spread of respiratory viruses, and especially of aerosols, and by their

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12 *Baker v Hodder* [2018] NZSC 78, [2019] 1 NZLR 94 at [32], citing *R v Gordon-Smith* [2008] NZSC 56, [2009] 1 NZLR 721 at [16].

13 *Baker v Hodder*, above n 12, at [33]. See also *Regina v Secretary of State for the Home Department, Ex parte Salem* [1999] 1 AC 450 (HL) at 455–457.

14 *Baker v Hodder*, above n 12, at [33].

design and function could not prevent transmission and spread of aerosols.

1.3. The judge failed to take into account that face coverings such as cloth masks and medical/surgical masks are designed for single use (after which the cloth mask can be washed but the surgical mask must be disposed of) and not designed to be put on and touched and removed multiple times and stored (such as in pockets, bags and glove boxes, and on potentially contaminated surfaces). Further the judge failed to take into account that N95 respirators must be used only after a medical evaluation and be properly fitted and then disposed of in accordance with the regulatory standard.

1.4. The judge failed to correctly consider and apply the hierarchy of scientific evidence by wrongly subordinating the highest level of scientific evidence (such as systematic reviews and meta-analysis of randomised control trials) and accepting low quality levels of scientific evidence (such as observational studies which have inherent biases) which are not suitable to justify coercive public health measures.

1.5. The highest quality scientific evidence in relation to mask effectiveness is the Cochrane Reviews 2020 and 2023 which found that masks could not be shown to make a significant difference in preventing transmission, even in healthcare settings where staff are trained in mask use and undertake fit testing.

1.6 The judge failed to acknowledge that the evidence of effectiveness relied on by the first respondent was low certainty and low quality.

1.7 The judge was wrong to reduce the appellant's case to a difference of expert opinion. Expert opinion is one of the lowest levels of scientific evidence.

1.8. The judge was wrong to hold that the views of the WHO beginning from June 2020 were a complete answer to the mistake of fact ground of review.

1.9. The judge was wrong to hold that there are practical or ethical difficulties with undertaking randomised control trials in relation to face coverings during COVID-19.

1.10. The judge was wrong to find that the first respondent took into account the evidence that had developed over time about the effectiveness of masks and mask requirements before making the Orders.

1.11. The judge was wrong to find that the fact that there was uncertainty about the effectiveness of face masks given the available scientific evidence was part of the advice to the first respondent prior to making to the Orders.

1.12. The judge was wrong to find that the disadvantages of masks and mask requirements for proper use were considered by the first respondent prior to making the Orders. They had not been considered after September 2020 at a time when the mandates were limited to public transport only.

1.13. The judge was wrong to speculate that Minister Verrall would have been unaware that the effectiveness of face masks had uncertainties or that there were disadvantages in requiring them. Minister Verrall made her decision on the basis there was no uncertainty in the evidence about effectiveness and no disadvantages in terms of potential harms to the wearer.

2. The judge was wrong to find that the first respondent was not acting ultra vires in making the mask mandate Orders.

3. The judge erred in his understanding and application of the precautionary principle and reduced it to the proposition "better safe than sorry".

3.1. In any case the precautionary principle was not applied by the first respondent at the time of making the mask mandate Orders because although the judge accepted that the evidence on mask effectiveness was uncertain, the first respondent did not consider there was any scientific uncertainty about the effectiveness of masks.

3.2. The precautionary principle if it applied required the first respondent to consider a cost benefit assessment of mask mandates including considering harms, and the first respondent did not do this.

4. The judge was wrong to hold that the mask mandate was a demonstrably justified limitation under s 14 of the New Zealand Bill of Rights Act 1990 (NZBORA).

5. The judge was wrong to hold that a mask mandate did not constitute medical treatment without consent for the purposes of s 11 of the NZBORA.

6. The judge was wrong to hold that the first respondent considered the substance of the right in s 11 and wrong to hold that a mask mandate would nonetheless be justified under the NZBORA.

7. The judge was wrong to hold that s 8 of the NZBORA was not engaged by the mask mandate.

8. The judge was wrong to find that the Orders were not irrational given the scope and scale of the exemptions permitted.

9. Although the judge permitted counsel to refer to certain charts and graphs contained in Ian Miller's book "Unmasked: Global Failure of COVID Mask Mandates", the judge was wrong when he failed to take them into account in his judgment.

[17] The appellant seeks a decision allowing the appeal and setting aside the judgment under appeal, a declaration that the Orders were invalid and a declaration that the respondent's decision to implement a face covering mandate constitutes medical treatment without consent for the purposes of s 11 of NZBORA. It also seeks costs.

The evidence

[18] We begin with an overview of the extensive evidence filed in the High Court as it provides the necessary context for a discussion of the judgment under appeal.

[19] The appellant's evidence consisted of evidence from:

(a) Associate Professor Byram Bridle — an Associate Professor of Viral Immunology at the University of Guelph in Ontario, Canada;

(b) Mr Tyson Gabriel — an industrial hygienist from the United States;

(c) Mr Ian Miller — a professional writer from the United States;[15]

(d) Dr Thomas Jefferson (in reply) — a public health physician from Italy;

(e) Mr Terry Anderson (in reply) — a retired engineer from Christchurch; and

(f) the appellant's chairman.

[20] In response the respondents had filed affidavits from:

(a) the two Ministers who made the 2021 Order and the 2022 Order respectively — the Rt Hon Christopher Hipkins and the Hon Ayesha Verrall (together, the Ministers);

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[15] The Judge ruled the evidence of Mr Miller inadmissible as it did not meet the requirements for expert evidence: see judgment under appeal, above n 4, at [7]–[10].

(b) the two relevant Directors-General of Health — Dr Ashley Bloomfield and Dr Diana Sarfati;

(c) the Ministry of Health's Chief Science Advisor — Dr Ian Town;

(d) the Principal Modeler in the Department of the Prime Minister and Cabinet — Mr Piers Greenbrook-Held;

(e) a Senior Advisor in relation to COVID-19 related web content — Ms Lisa Rapley; and

(f) Professor Michael Baker and Associate Professor Amanda Kvalsvig, who provided expert evidence, including the Otago University Report and the Second Otago University Report (discussed further below).

[21] We will first outline the evidence from the Directors-General and the Ministers, given their evidence is central to understanding the decision to include face covering requirements in the Orders. We will also outline the Otago University Report, the Second Otago University Report and the evidence of Professor Baker.[16] Then, we will summarise the appellant's evidence.[17]

Respondents' evidence at the High Court

Dr Bloomfield

[22] Dr Bloomfield was the Director-General of Health and Chief Executive of the Ministry of Health (the Ministry) from 11 June 2018 to 29 July 2022. He was therefore responsible for advising the Minister for COVID-19 Response at the time the 2021 Order was made.

[23] Dr Bloomfield's evidence that COVID-19 placed a significant strain on the New Zealand healthcare system is not disputed. Dr Bloomfield described COVID-19 as representing "an unprecedented public health challenge", saying "at various points

[16] We do not consider it necessary to discuss the evidence of Dr Town, Dr Greenbrook-Held and Ms Rapley, nor the individual evidence of Associate Professor Kvalsvig.

[17] We do not discuss the evidence of Mr Miller, Mr Anderson or the appellant's chairman.

during the pandemic, I was required to advise the government on the basis of less than perfect information". He explained that the speed of development of the pandemic precluded the exclusive reliance on peer reviewed literature. He said that the Science and Technical Advisory team regularly reviewed the available literature, drawing on their familiarity with the process of peer review and expertise in relevant fields, including statistics, epidemiology, clinical and laboratory medicine, vaccinology and microbiology.

[24] Multiple sources of information were used to inform advice to ministers. This included: scientific literature; local data; external experts who were consulted or coopted onto advisory groups; international relationships; government organisations, particularly those in the United States and United Kingdom; and information provided by Airfinity, an organisation specialising in the collection and collation of COVID-19 (and other) data.

[25] Dr Bloomfield discussed the evolving advice and evidence on the use of face coverings to limit COVID-19 transmission:

(a) *6 April 2020:* The WHO advised that there was at that time no evidence that wearing a face covering could prevent a healthy person in the wider community setting from becoming infected.

(b) *6 May 2020:* The Ministry completed a review of the science and policy around face coverings and COVID-19, noting there were no clinical trials of their efficacy and the WHO found no current evidence to recommend their use. The potential benefits of their use were identified, as were their risks and potential downsides.

(c) *10 May 2020:* Based on the 6 May 2020 review, the Ministry recommended medical/surgical face coverings for use in contexts where the risk of exposure to COVID-19 was higher, including healthcare settings and border management of people coming into New Zealand from overseas.

(d) *5 June 2020:* The WHO updated its advice in the context of the growing recognition of airborne transmission of COVID-19, saying:

> Many countries have recommended the use of fabric masks/face coverings for the general public. At the present time, the widespread use of masks by healthy people in the community setting is not yet supported by high quality or direct scientific evidence and there are potential benefits and harms to consider …
>
> However, taking into account the available scientific studies evaluating pre- and asymptomatic transmission, a growing compendium of observational evidence on the use of masks by the general public in several countries, individual values and preferences, as well as the difficulty of physical distancing in many contexts, WHO has updated its guidance to advise that to prevent COVID-19 transmission effectively in areas of community transmission, governments should encourage the general public to wear masks in specific situations and settings as part of a comprehensive approach to suppress SARS-CoV-2 transmission …

(e) *5 August 2020:* The Ministry and Dr Bloomfield provided advice based on the WHO's guidance that face coverings would be most useful when COVID-19 was present in the community and people were mingling in close proximity with each other. The advice recommended requiring face covering usage at Alert Levels 3 and 4 and encouraging face covering usage at Alert Level 2.

(f) *31 August 2020:* It became compulsory for everyone aged 12 or over to wear a face covering on public transport and planes under Alert Level 2.

(g) *10 September 2020:* Dr Bloomfield's advice to Mr Hipkins in a joint report with the All-of-Government COVID-19 Group was that, due to increasing evidence supporting the use of face coverings where there was widespread community transmission, face coverings should be mandated at Alert Level 4 and strongly recommended at Alert Level 3 in public enclosed spaces. The Minister was advised that, as well as source control and protection, face coverings were associated with wider societal benefits that could help the broader COVID-19 response. The advice discussed the effectiveness of different grades of face coverings, together with the potential harms of face covering use. The advice was based on advice from the WHO:

83. … suggesting that where there is known or suspected widespread community transmission, wearing masks or face coverings can reduce the risk of infected people spreading COVID-19, particularly in situations where people are in close proximity to each other, and especially when they are unable to physically distance (such as on public transport). The WHO also made clear:

83.1 The use of face coverings and masks should be proportionate to the public health risk;

83.2 Face coverings were not recommended for everyone and exemptions should apply in some circumstances (e.g. for children aged under 12 or those with a physical or mental health illness, condition, or disability that makes wearing a face covering unsuitable);

83.3 Clear guidance on the proper use of masks and mask hygiene (including settings where they are to be used) is essential for them to be effective. Incorrect use was considered to undermine the public health benefits of face coverings and exacerbate health risk (e.g. due to the risk of contamination).

(h) *1 December 2020:* The WHO updated its interim guidance on face covering use in the context of COVID-19, advising the use of face coverings as part of a comprehensive package of prevention and control measures to limit the spread of COVID-19. Face coverings could be used for protection of healthy persons or to prevent onward transmission.

(i) *April and May 2021:* The WHO further updated its advice. Shortly after, the Centers for Disease Control and Prevention in the United States (CDC) published a scientific brief on transmission of COVID-19, which concluded community use of well-fitting face coverings was an effective tool to prevent transmission.

(j) *Mid-2021:* By this time, Dr Bloomfield considered the clear trend of the evidence was that physical distancing was of lower effectiveness to mitigate airborne transmission. He considered it "now widely recognised" that face coverings were effective at limiting the spread of COVID-19. Given the high transmissibility of the Delta variant and the

speed at which an outbreak could get out of hand, he considered it important to use all effective and non-invasive measures, including face coverings, to mitigate potential spread to the greatest extent possible.

(k) *6 August 2021:* Cabinet received a briefing on mandatory face coverings.

(l) *13 September 2021:* Dr Bloomfield advised the Minister on proposals for interim changes to Alert Level 1 in the context of Delta, including maintaining the requirement for face coverings on public transport only. This was on the basis that face covering requirements on public transport would ensure people remained accustomed to face covering etiquette, provide additional protection in crowded indoor spaces with limited ventilation and mitigate the difficulty of contact tracing on public transport.

(m) *2 December 2021:* The 2021 Order came into force. At this time, the Omicron variant was first appearing in South Africa and New Zealand was moving from the alert level framework to the CPF mitigation strategy.

(n) *22 December 2021:* The WHO published a new guideline on face covering use in community settings, recommending their use as part of a comprehensive package of control measures. It identified the advantages as reducing the spread of potentially infectious aerosols or droplets, including from infected people before they were symptomatic, encouraging concurrent transmission prevention behaviours and preventing transmission of other respiratory illnesses. It also considered potential disadvantages of face covering use by healthy people. The WHO noted that, given the increased transmissibility of Delta, most Guidance Development Group members agreed that the benefits of face covering wearing in the community setting outweighed potential harms.

(o) *25 January 2022:* Mr Hipkins proposed changes to strengthen face covering requirements at "red" in the traffic light framework, including requiring face coverings to be attached to the head via an ear or head loop, as well as updating public messaging to encourage the use of higher-grade face coverings. The strengthened face covering requirements came into effect on 3 February 2022 but were not subject to a specific challenge in these proceedings.

(p) *March 2022:* The Ministry advised that a requirement to wear face coverings be maintained based on "the significant body of available international evidence on their efficacy around reducing the spread of COVID-19". Cabinet relaxed certain other restrictions, at which point face coverings became the key tool in mitigating transmission of COVID-19 in New Zealand.

[26] Dr Bloomfield emphasised:[18]

> 127. At the outset I note that the Ministry of Health consistently advised the adoption of a layered response to COVID-19, as reflected in the strategy of minimisation and protection. In this multi-layered approach, measures contained in the CPF sit alongside high levels of vaccination, good hygiene, physical distancing, the wearing of masks, testing and where appropriate, personal protective equipment, in order to minimise spread of COVID-19. The more layers of protection in place, the harder it is for the virus to spread. Slowing down the spread of the virus is an important public health objective to help ensure the health system does not become overwhelmed by a high number of cases requiring hospitalisation at the same time.

Mr Hipkins

[27] Mr Hipkins was the Minister for Health from 2 July 2020 to 6 November 2020 and then Minister for the COVID-19 Response until 14 June 2022, when he was succeeded by Dr Verrall. As both Minister of Health and Minister for COVID-19 Response, he acted under the authority of the Prime Minister in administering the Act and making orders pursuant to ss 9 and 11, including the 2021 Order. He received public health advice from the Director-General of Health and a wide range of officials.

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[18] Footnote omitted.

[28] Mr Hipkins emphasised that his decision-making was carried out in accordance with s 9 of the Act,[19] and, when assessing relevant considerations, he kept in mind that no one public health measure is a failsafe but together they add to the overall effectiveness of the response. He was also mindful that there were a lot of unknowns during the course of the pandemic, with information relating to COVID-19 and the effectiveness of various public health measures evolving over time.

[29] Mr Hipkins was mindful that not acting could result in significant and potentially irreversible consequences to the public health of everyone in New Zealand and, in assessing the impact of public health measures, he gave weight to the interests of protecting public health because of the significant and potentially irreversible consequences of not sufficiently doing so.

[30] In all his decisions, he was satisfied the impacts were proportionate and justified in the circumstances that existed at the time of the relevant decision/review.

[31] Mr Hipkins' evidence covered the development of advice he received on the effectiveness of face coverings and their pros and cons, beginning 6 May 2020. This included advice from the Director-General in early August 2020, which referenced the updated WHO advice of 5 June 2020. The advice he received from the Director-General indicated that: the early deployment of face coverings could help reduce further transmission, particularly by reducing the risk of infected people spreading COVID-19 (source control); face coverings were particularly useful if there was known community transmission and people were in close proximity; promoting the appropriate use of face coverings by the general population could help reinforce other public health measures, such as physical distancing; face coverings complemented other public health measures; and, to be effective, face coverings needed to be used correctly.

[32] Mr Hipkins discussed the orders he made and the exemptions which applied. He noted the continual reviews and advice received from the Director-General, for example in September 2020, that there was increasing evidence supporting the use of face coverings when there was widespread community transmission.

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[19] Set out below at [131].

[33] Mr Hipkins' evidence covered the various shifts between alert levels and the impact of the Delta outbreak, including the implementation of the traffic light framework which came into force on 2 December 2021. He discussed the health and non-health considerations relevant to that decision. There were regular reviews of the settings informed by advice from the Director-General and a wide range of officials. Crown Law provided NZBORA assessments to provide assurance that the proposals were a justified limit on rights.

[34] The Minister discussed the ongoing review of the public health measures, which ensured measures remained fit for purpose based on available evidence. The ongoing review eventually led to the removal of more rights-limiting measures like COVID-19 vaccination certificates and capacity limits, as well as changes to the requirements for face coverings. He referred to the reviews and changes made to the face covering requirements up until June 2022.

Dr Sarfati

[35] Dr Sarfati was the Director-General of Health and Chief Executive of the Ministry after Dr Bloomfield. She was the Acting Director-General of Health from 29 July 2022 and was appointed to that position full-time from 1 December 2022. As Dr Bloomfield was before her, Dr Sarfati was responsible for providing advice to the Minister in respect of COVID-19. She received advice from officials within the Ministry and the Public Health Agency.

[36] Dr Sarfati explained that the Ministry conducted regular public health risk assessments (PHRAs) undertaken by a committee of experts drawn from across the health system. She discussed the PHRA procedure, which involved the Director of Public Health providing the Director-General with a memorandum containing the recommended response and advice Crown Law had given on any NZBORA implications.

[37] Dr Sarfati discussed the PHRA held on 17 August 2022, which recommended maintaining face covering requirements on public transport and in healthcare settings but removing them in other settings. Dr Sarfati's resulting recommendation to the

Minister was in line with that. Following that recommendation, the 2021 Order was revoked and the 2022 Order was made.

Dr Verrall

[38] Dr Verrall was Minister for COVID-19 Response from 14 June 2022 to 1 February 2023. She has a Bachelor of Medicine and a Bachelor of Surgery, a PhD in tuberculosis epidemiology and was an infectious diseases physician prior to being elected a Member of Parliament.

[39] Dr Verrall considered all the orders and amendments made by her were appropriate to achieve the purpose of the Act and either did not limit or justifiably limited the rights and freedoms affirmed in NZBORA.

[40] On 8 August 2022, Dr Verrall requested a briefing from the Ministry on the value of ongoing face covering mandates and the potential public health risk of removing them. Dr Verrall received Dr Sarfati's advice following the 17 August 2022 PHRA but considered face covering requirements should be retained only in healthcare settings rather than also on public transport. She was conscious of face covering fatigue and that face coverings were a key measure that would be looked to if COVID-19 risk increased and measures had to be tightened. As to the retention of the face covering requirements in healthcare settings, she considered face coverings were a tool that could reduce the transmission of COVID-19; adherence to wearing them was higher when it was a legal requirement as opposed to guidance; and healthcare settings were particularly vulnerable.

[41] Dr Verrall advised Cabinet of this and, on 12 September, Cabinet formally agreed to revoke the 2021 Order and implement the face covering settings recommended by Dr Verrall. That led to Dr Verrall making the 2022 Order.

The Otago University Report

[42] The Otago University Report dated 20 January 2023 was produced for the purpose of these proceedings. The report aimed to present and critique scientific evidence relating to the rationale, benefits and adverse effects from population face

covering. It stressed the specific strengths of wearing a face covering as a COVID-19 protection measure but also referred to limitations, saying face coverings should be considered and used as part of a suite of public health measures, including vaccinations, indoor air ventilation and testing.

[43] From its review of the evidence, the Otago University Report answered the following questions, "Yes, at a very high level of scientific certainty.":

- Whether face covering reduces transmission at the individual or population level.

- Whether population face covering has a health advantage over individual face covering.

- Whether asymptomatic persons can transmit the infection to others.

[44] The response to the question whether face covering requirements have a health advantage over advice to the public to wear a face covering was, "Yes, at a high level of scientific certainty."; and whether the risks of infection outweigh the adverse effects of population face covering, "Yes, at a high level of scientific certainty from a health perspective."

[45] It concluded:

> **Evaluating the evidence as a whole**
>
> - The evidence we have examined indicates that there is a coherent and consistent body of high quality evidence to support community mask mandates as an effective contribution to measures to prevent the transmission and spread of respiratory viruses including Covid-19.
>
> - As shown in this review, the totality of evidence across multiple fields and studies constitutes high-quality evidence in support. The evidence does not and should not rely on any single study.
>
> - Instead, our review shows strong and consistent evidence in favour of population masking, with additional effectiveness when masking is mandated in high-risk public settings. The evidence is consistent with public health principles and the evidence that we have reviewed shows coherence across multiple fields of investigation including virology, physics, engineering, and epidemiology.

…

[46] The report noted that in the earlier stages of the pandemic some major policy decisions had to be made before there had been sufficient time to develop a body of high-quality, established evidence specific to COVID-19. The need to make policy decisions in an evolving emergency with high evidence uncertainty was an important challenge.

[47] The report acknowledged there was no shortcut to a robust assessment of study quality and said:

> Uncritically applying the hierarchy of evidence framework to the body of published evidence about masks would lead to reliance on a sparse literature of poor-quality or non-relevant randomised controlled trials. Instead, we have applied a critical approach based on the principles of causal epidemiology. We found a body of evidence that, although challenging to produce during an active pandemic, nevertheless demonstrates consistent findings and coherence with the principles and rationale of public health.

The Second Otago University Report

[48] The respondents' evidence included a second report from Otago University dated 20 April 2023 (the Second Otago University Report). It contained a methodological critique of the Cochrane Review concerning the effectiveness of physical interventions to interrupt or reduce the spread of acute respiratory viruses that was published on 30 January 2023 (the 2023 Cochrane Review). The plain language summary of the 2023 Cochrane Review was:

> *Medical or surgical masks*
>
> Ten studies took place in the community, and two studies in healthcare workers. Compared with wearing no mask in the community studies only, wearing a mask may make little to no difference in how many people caught a flu-like illness/COVID-like illness (9 studies; 276,917 people); and probably makes little or no difference in how many people have flu/COVID confirmed by a laboratory test (6 studies; 13,919 people). Unwanted effects were rarely reported; discomfort was mentioned.
>
> *N95/P2 respirators*
>
> Four studies were in healthcare workers, and one small study was in the community. Compared with wearing medical or surgical masks, wearing N95/P2 respirators probably makes little to no difference in how many people have confirmed flu (5 studies; 8407 people); and may make little to no difference in how many people catch a flu-like illness (5 studies; 8407 people),

> or respiratory illness (3 studies; 7799 people). Unwanted effects were not well-reported; discomfort was mentioned.

[49] The Second Otago University Report noted that the studies included in the 2023 Cochrane Review could be vulnerable to selection bias, measurement error and random error arising from a lack of study power,[20] as well as discrepancies in how the findings were reported and disseminated. It noted that, on 10 March 2023, Cochrane issued a public statement and apology, saying the review had been "widely misinterpreted":

> Many commentators have claimed that a recently-updated Cochrane Review shows that 'masks don't work', which is an inaccurate and misleading interpretation.
>
> It would be accurate to say that the review examined whether interventions to promote mask wearing help to slow the spread of respiratory viruses, and that the results were inconclusive. Given the limitations in the primary evidence, the review is not able to address the question of whether mask-wearing itself reduces people's risk of contracting or spreading respiratory viruses.
>
> The review authors are clear on the limitations in the abstract: 'The high risk of bias in the trials, variation in outcome measurement, and relatively low adherence with the interventions during the studies hampers drawing firm conclusions.' Adherence in this context refers to the number of people who actually wore the provided masks when encouraged to do so as part of the intervention. For example, in the most heavily-weighted trial of interventions to promote community mask wearing, 42.3% of people in the intervention arm wore masks compared to 13.3% of those in the control arm.
>
> The original Plain Language Summary for this review stated that 'We are uncertain whether wearing masks or N95/P2 respirators helps to slow the spread of respiratory viruses based on the studies we assessed.' This wording was open to misinterpretation, for which we apologize. …

[50] The Second Otago University Report concluded:

> The Cochrane review can be read as a statement that the RCT component of the evidence about the effectiveness of mask use is small and inadequate to support robust conclusions. That leaves the large volume of other higher-quality scientific evidence about the effectiveness of mask use. Consequently, the summary contained in our previous report still stands: "...our review shows strong and consistent evidence in favour of population masking, with additional effectiveness when masking is mandated in high-risk public settings. The evidence is consistent with public health principles and the evidence that we have reviewed shows coherence across multiple fields of investigation including virology, physics, engineering, and epidemiology."

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[20] We understand "study power" to refer to the likelihood of detecting an effect if an effect actually exists.

Professor Baker

[51] Professor Baker, of the Department of Public Health at the University of Otago, was the Director of the Health Environment & Infection Research Unit (HEIRU) at the University of Otago. The HEIRU was a collaboration of researchers focused on reducing the impact of infectious diseases and adverse environmental factors on population health. It aimed to provide evidence-based recommendations and advice to support New Zealand and international agencies and practitioners in their disease prevention and control activities. Professor Baker worked with members of HEIRU to prepare the Otago University Report and, later, the Second Otago University Report.

[52] Professor Baker acknowledged that, in early 2020, he publicly commented that he did not consider face coverings very effective, particularly given the virus could infect via a person's eyes but said that was no longer his view and the effectiveness of face coverings as a prevention measure "is now widely accepted by the scientific community".

Appellant's evidence at the High Court

Dr Bridle

[53] Dr Bridle is an Associate Professor of Viral Immunology at the University of Guelph in Ontario, Canada. He has a PhD in immunology and is both an immunologist and virologist.

[54] Dr Bridle acknowledged the value of wearing medical grade surgical face coverings to reduce the transmission of respiratory pathogens from individuals who have signs and symptoms of illness. However, in his opinion, policies that require asymptomatic people to face cover results in net harm. His view is that the way testing was conducted in many countries, including New Zealand, led to erroneous labelling of asymptomatic people as potential spreaders of COVID-19. This, he considered, resulted in inappropriate mandating of face covering for people who do not represent a risk to the health of others.

[55] Dr Bridle referred to the recognition that COVID-19 was effectively spread via aerosols coming from the respiratory system and that the face coverings in common usage (surgical and cloth face coverings, and even KN95 masks) lacked the ability to prevent the spread of aerosols. In any event, he said that it was "futile" to wear a mask covering the nose and mouth, given the infectious agent can enter the body via the eyes.

[56] Dr Bridle conducted a search of the published peer-reviewed scientific literature, describing that as the gold standard of evidence. He reviewed one study in Bangladesh and another conducted in Denmark, concluding that there was no trustworthy evidence to suggest a benefit of face covering in preventing infection with COVID-19 specifically. Discussing recent pre-pandemic randomised controlled trials (RCTs) conducted in the context of other respiratory pathogens, he stated that two supported face covering but 14 did not. He said meta-analyses published during the pandemic were contradictory, 10 not supporting face covering, five reporting it was effective and one being equivocal.

[57] Dr Bridle regarded the peer reviewed scientific publications suggesting low-cost face coverings are effective at reducing the transmission of COVID-19 as flawed because the publications argued that asymptomatic people are a substantial source of transmission. Dr Bridle said most of the studies that claimed to report a benefit of face coverings were based on experiments conducted in highly controlled and artificial laboratory environments. They failed to capture the many nuances of real-world face covering, for example non-sealing facial features like beards.

[58] Dr Bridle then critiqued the WHO's advice and said:

> 132 … the interim guidance documents provided by the WHO did build up a reasonable, yet limited number of peer-reviewed studies that focused on face masks, not just respirators. However, they seem to have been selective in their disclosure of the literature, with an apparent bias towards only citing ones that supported their recommendations. … There was no discussion about the severe limitations, nor fatal flaws of any of the studies.

[59] Dr Bridle concluded that "based on the overwhelming rate of the evidence… face coverings cannot achieve the purpose of the [A]ct and [the Orders]". He explained:

> 210 In my professional and expert opinion, it is reasonable to require people who are sick with the disease known as COVID-19, meaning that they have signs and/or symptoms of illness, to wear a mask if they must go into public places. Better yet, staying home and away from public places would be the ideal way for these individuals to practice respectful social hygiene.
>
> 211 It is also my professional and expert opinion, based on the overall weight of the scientific evidence as provided in this affidavit, that requiring asymptomatic individuals to wear masks, regardless of their age, is non-sensical and causes net harm to the individual, those around them, the environment, and wildlife. In some cases, such as young children whose immune systems are rapidly maturing, prolonged masking can cause irreparable immunoregulatory damage that will increase the suffering of this demographic from allergies, asthma and/or autoimmune diseases throughout their lifetimes. The environmental impact of masking could take hundreds of years to resolve.

Mr Gabriel

[60] Mr Gabriel is an industrial hygienist, occupational safety and health professional based in the United States. In his professional opinion, any competent response to dealing with COVID-19 would be focused on dilution, filtration and destruction of the pathogen, and that face coverings do not seal to the face and cannot offer protection.

[61] In Mr Gabriel's opinion, face covering does not work to prevent infectious disease transmission. He concluded that the face covering mechanism studies, such as the Bangladesh study, always assumed that face coverings had efficacy that met scientific standards and best practice, and did not address the alternative position. He considered that the face covering health studies did not emulate the real-world scenarios of children and adults wearing face coverings for hours in a day and that the public were not informed of the health risk in wearing face coverings. In his opinion, the WHO cherry-picked studies by scientists who "lacked integrity and the proper expertise" and studies did not evaluate when face coverings became a source of contamination.

Dr Jefferson

[62] Dr Jefferson is a medically qualified public health physician and a clinical epidemiologist. His past roles include being a medical advisor to the WHO and Medical Officer to the United Nations. Dr Jefferson was the lead author of the 2023 Cochrane Review, introduced above, as well as earlier Cochrane reviews on influenza vaccines and antivirals.[21]

[63] Dr Jefferson addressed the 2023 Cochrane Review, which is the fifth update of prior reviews on physical interventions to interrupt the spread of respiratory viruses published in 2007, 2009, 2010, 2011 and 2020. The update included an additional 11 RCTs, bringing the total number of RCTs to 78. Dr Jefferson summarised the results as follows:

> 13. However, by way of summary, in terms of the effects of wearing medical or surgical masks, the results show that compared to no masks, the 12 trials in the review found that wearing masks in the community probably makes little or no difference to the outcome of influenza-like o[r] covid-19 like illness. Equally masks showed no effect on laboratory-confirmed influenza or SARS-COV-2 outcomes. The five further included trials showed no difference between one type of mask over the other. In addition, the differences between the trials' results that identified the agent and those that did not are low, indicating the[y] all give much the same result — that is the nature of the agent does not affect the outcome.
>
> 14. The overall conclusion is that [we] are uncertain whether wearing masks of N95/P2 respirators helps to slow the spread of respiratory viruses based on the studies we assessed. Hand hygiene programmes may help to slow the spread of respiratory viruses. However, as soon [as] a structured programme ends, the effects disappear.

[64] Dr Jefferson did not consider there was good data to support face covering mandates. He said the review findings report relatively low adherence to face covering wearing, akin to what happens in the real world. With better adherence and high-quality face coverings, there might be a reduction in risk in specified settings. He noted that data over the lifetime of the pandemic showed that mandates which affected the whole population did not work. Even in high adherence populations such as Japan and China they have not changed the viral circulation or stopped a rise in infections.

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[21] See above at [48]–[50].

[65] Dr Jefferson critiqued the Otago University Report, for example saying that what the report described as certainty was the product of beliefs based on poor quality studies. In his opinion, when higher quality evidence was assessed, no effect of face coverings in any setting was visible. Over 20 years of evidence from RCTs in different settings, populations and agent circulation has failed to find any evidence of effect.

Judgment under appeal

[66] Six grounds of judicial review were advanced by the appellant in the High Court:[22]

> (a) Ultra vires — that the Orders were unlawful "because face coverings are largely ineffective at contributing to preventing or limiting the risk of the outbreak or spread of COVID-19".
>
> (b) Mistake of fact — that the relevant Ministers were "labouring under a material mistake of fact, namely that face coverings are an effective measure to contribute to preventing or limiting the risk of the outbreak or spread of COVID-19".
>
> (c) Breach of s 11 of the New Zealand Bill of Rights Act 1990 (NZBORA) — that the decisions infringed the right to refuse to undergo a medical treatment.
>
> (d) Breach of s 14 of NZBORA — that the decisions breached the right of freedom of expression.
>
> (e) Breach of s 8 NZBORA — that the decisions breached the right to life.
>
> (f) Irrationality — that the Orders were irrational "as they lacked efficacy of purpose and the reasoned decision-making necessary for validity".

Mistake of fact (and ultra vires)

[67] As to the ultra vires and mistake of fact grounds,[23] the Judge described the challenge as based on the proposition that face coverings have no material benefit in preventing the spread of COVID-19 and have health disadvantages.[24] He noted the extensive opinion evidence from the appellant's witnesses and the focus of counsel's

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22 Judgment under appeal, above n 4, at [3].

23 At [27], the Judge noted that no discernible argument was advanced on the ultra vires ground but rather the written and oral submissions focused on medical/scientific evidence and the alleged mistake of fact.

24 At [26].

submissions on the reasons why face coverings were said to be both ineffective and potentially harmful.[25]

[68] The Judge accepted that mistake of fact can be a ground of challenge to a discretionary decision by way of judicial review.[26] He canvassed the evidence of the Ministers and the Directors-General of Health.[27] He accepted that Mr Hipkins considered that the face covering requirements were appropriate as part of the measures covered by the 2021 Order and that he considered they contributed to inhibiting the transmission of COVID-19.[28] The Minister had received detailed advice from the Director-General over a considerable period.[29] In light of that advice and the expert views provided, the Judge concluded there was no basis for a challenge to the 2021 Order based on mistake of fact and that the views of the WHO beginning June 2020 were a complete answer to this ground of review.[30] Referring to the evidence from Dr Sarfati and Dr Verrall, the Judge found there was also no basis for a challenge to the 2022 based on mistake of fact.[31]

[69] In the Judge's view, the best the appellant could do was establish there were experts who held contrary opinions to those relied upon by the Ministers and that, he said, did not establish mistake of fact as a ground of judicial review.[32]

Reformulation of the argument

[70] It appears that the appellant's argument in the High Court morphed into a submission that the focus of challenge was not mistake of fact but rather the adequacy of the advice given to the Ministers.[33] This line of argument relied on the principle that, in certain circumstances, ministers must have particular matters drawn to their

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25 At [26].
26 At [29].
27 At [46]–[58].
28 At [51].
29 At [51].
30 At [51].
31 At [57].
32 At [45].
33 At [59]–[60].

attention by way of a fair, accurate and adequate report before a legitimate decision could be said to have been made.[34]

[71] The Judge noted the difficulties with the reformulation.[35] Not only was it not pleaded or advanced in written submissions, but the considerations allegedly not taken into account were not identified to enable the respondents an opportunity to respond to the contention.[36] He regarded it as difficult and potentially procedurally unfair for the Court to address the argument.[37] In any event, he dismissed the argument on its merits, finding the advice to the Ministers was adequate and that the Ministers were aware that face coverings had potential disadvantages.[38]

Section 14 of NZBORA – freedom of expression

[72] The Judge concluded s 14 was clearly engaged by the face covering requirement because:[39]

(a) requiring a person to wear a face covering interferes with their ability to verbally communicate — the WHO had noted a disadvantage of "difficulty with communicating clearly";

(b) verbal communication can be assisted by the physical presentation of the face and particularly the mouth; and

(c) the presentation of the face can portray meaning in the absence of verbal communication.

[73] However, the Judge was satisfied the limitation was demonstrably justified.[40]

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34 At [60], citing *Air Nelson Ltd v Minister of Transport* [2008] NZCA 26, [2008] NZAR 139 at [41]–[56].

35 Judgment under appeal, above n 4, at [62]–[68].

36 At [62]. See *CREEDNZ Inc v Governor-General* [1981] 1 NZLR 172 (CA); and *Carltona Ltd v Commissioners of Works* [1943] 2 All ER 560 (CA) for discussions on mandatory relevant considerations.

37 Judgment under appeal, above n 4, at [62].

38 At [63]–[69].

39 At [74].

40 At [81]. See below at [173]–[175] for a summary of the Judge's reasons for this finding.

Section 11 of NZBORA – right to refuse to undergo medical treatment

[74] The Judge noted that Mr Hipkins had not been advised that s 11 was relevant and Dr Verrall did not address this right in her evidence either.[41] The advice papers to the Ministers did not suggest the right was engaged.[42]

[75] The Judge viewed the application of s 11 as ultimately a question of degree.[43] He accepted some preventative measures could become medical treatments, for example fluoridation crossed the line (referring to *New Health New Zealand Inc v South Taranaki District Council*)[44] because it effectively involved the compulsory ingestion of a pharmacologically active substance to treat dental decay.[45] However, in the present case, there was no requirement to ingest or apply a substance.[46] It was purely a preventative step which did not engage the right to refuse to undergo medical treatment.[47]

[76] The Judge referred to the academic writings of Andrew Butler and Petra Butler in *The New Zealand Bill of Rights Act: A Commentary*, saying the s 11 right is amongst a family of rights with personal autonomy and human dignity as their underlying purpose.[48] On that basis, he was satisfied that even if the s 11 right was engaged, the Ministers turned their minds to the limitation in the substantive sense required for them to make the Orders; there was no need for the Ministers to make explicit reference to the particular section of NZBORA.[49]

[77] Had he considered s 11 engaged, the Judge would have been satisfied that the limitation of rights was demonstrably justified.[50]

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41 Judgment under appeal, above n 4, at [85].
42 At [85].
43 At [89].
44 At [86], citing *New Health New Zealand Inc v South Taranaki District Council* [2018] NZSC 59, [2018] 1 NZLR 948.
45 Judgment under appeal, above n 4, at [91].
46 At [91].
47 At [91].
48 At [92], citing Andrew Butler and Petra Butler *The New Zealand Bill of Rights Act: A Commentary* (2nd ed, LexisNexis, Wellington, 2015) at [11.7.2]–[11.7.4].
49 Judgment under appeal, above n 4, at [92].
50 At [93].

[78] The appellant had also claimed that the Orders breached the right in s 8 of NZBORA not to be deprived of life.[51] The Judge dismissed this argument out of hand, considering there was no basis for contending that the face covering requirement engaged it.[52] We interpose to note that, although this formed part of the grounds of appeal, it was not addressed by the appellant in either written or oral submissions. Like the Judge, we dismiss it out of hand.

Irrationality

[79] Finally, the Judge addressed the appellant's challenge to the Orders on the grounds of irrationality.[53] The Judge referred to the appellant's argument as to the alleged lack of reliable, high-quality evidence sufficient to justify the Orders, that the rapid spread of COVID-19 demonstrated their ineffectiveness and that the measures were not coordinated, orderly or proportionate.[54]

[80] The Judge considered he had already addressed the substance of the appellant's argument.[55] He addressed two additional matters: alleged inconsistent and contradictory rules and guidance relating to face covering requirements, and the extent of the exemptions to the requirements.[56]

Conclusion

[81] The Judge concluded by distinguishing the present case from many of the other challenges to COVID-19 related decisions, which he described as involving important issues concerning the protection of the rights of the individual when the State has exercised coercive powers for the greater good.[57] In his view, while there were views held by some scientists that face coverings were not likely to be effective, that did not mean it was unlawful to require them.[58] The debate about their efficacy might have been more relevant if a face covering mandate involved a significant transgression of

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51 At [95].
52 At [95].
53 At [96]–[103].
54 At [99].
55 At [100].
56 At [100]–[103].
57 At [105].
58 At [106].

individual rights but the Judge decided they did not.[59] He concluded that the judicial review challenge was not well-founded.[60]

Were the Orders made in reliance on a material mistake of fact?

The appellant's challenge

[82] The amended statement of claim relevantly pleaded:

> 65. In making both the Orders, the first respondent was labouring under a material mistake of fact, namely that face coverings are an effective measure to contribute to preventing or limiting the risk of the outbreak or spread of COVID-19.
>
> 66. In making public health decisions, a decision maker must base their decision on credible, reliable, and high-quality scientific evidence and data.
>
> 67. There are no high-quality scientific data that show masks are effective at preventing the transmission of respiratory viruses.

[83] In their amended statement of defence, the respondents admitted that:

> 55.1 there was reliance on the fact that face coverings are an effective measure to contribute to preventing or limiting the risk of the outbreak or spread of COVID-19.
>
> 55.2 this was a material factor in the decision making.

Mistake of fact as a judicial review ground

[84] In New Zealand, mistake of fact as a ground of judicial review has received approval from appellate courts in recent years.[61] Many New Zealand cases, including the judgment under appeal, cite *E v Secretary of State for the Home Department*, the leading case in the United Kingdom.[62] Conceptually, mistake of fact may overlap with

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59 At [106].

60 At [106].

61 *Ririnui v Landcorp Farming Ltd* [2016] NZSC 62, [2016] 1 NZLR 1056 at [54]; *Health and Disability Commissioner v S (CA231/2023)* [2025] NZCA 190 at [154]; *Winton Property Investments Ltd v Minister of Finance* [2023] NZCA 368 at [103]; *Charter Holdings Ltd v Commissioner of Inland Revenue* [2016] NZCA 499, (2016) 27 NZTC 22-075 at [76]; and *Taylor v Chief Executive of the Department of Corrections* [2015] NZCA 477, [2015] NZAR 1648 at [94].

62 Judgment under appeal, above n 4, at [29], citing *E v Secretary of State for the Home Department* [2004] EWCA Civ 49, [2004] QB 1044. See also *Ririnui v Landcorp Farming Ltd*, above n 61, at [54], n 58; *Smith v Attorney-General* [2017] NZHC 136, [2017] NZAR 331 at [55]; *Zhao v Legal Complaints Review Officer* [2012] NZHC 3247, [2013] NZAR 193 at [70]; and *Zafirov v Minister of Immigration* [2009] NZAR 457 (HC) at [80].

or could be advanced within the traditional grounds of judicial review, although the mistake of fact ground helpfully focuses on the particular alleged error at issue.

Appeals on questions of law vs judicial review

[85] Many cases concerning mistake of fact are appeals on questions of law rather than judicial reviews. Both *E* and *Bryson*, a decision of the New Zealand Supreme Court we discuss below,[63] were appeals on questions of law rather than judicial review proceedings.

[86] As a matter of general principle, both appeals on questions of law and judicial review are concerned with whether the impeached decision is affected by an error of law. Accordingly, it is generally recognised that there is no real distinction between the available grounds on appeals on questions of law and the available grounds of judicial review.[64] As Carnwath LJ put it in *E*, "the various procedures have evolved to the point where it has become a generally safe working rule that the substantive grounds for intervention are identical".[65]

Relevant case law

[87] Given the importance of *E v Secretary of State for the Home Department*, we begin with an analysis of that decision before moving to discuss other relevant authority.

[88] *E* concerned two appeals on questions of law against decisions of an immigration tribunal.[66] The two appeals raised the same issue: after the tribunal hearing, but before the promulgation of the tribunal's decision, further evidence supporting the appellant's case for asylum became available.[67] The evidence was referred to the tribunal after it issued its decision but the tribunal declined to change

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63 *Bryson v Three Foot Six Ltd* [2005] NZSC 34, [2005] 3 NZLR 721. See below at [91]–[93].

64 *Chorus Ltd v Commerce Commission* [2014] NZHC 690 at [11]. See also Philip A Joseph *Joseph on Constitutional and Administrative Law* (5th ed, Thomson Reuters, Wellington, 2021) at 1062–1063.

65 *E v Secretary of State for the Home Department*, above n 62, at [42].

66 At [1] and [6]–[16].

67 At [9] and [14].

its decision on the grounds that it lacked the power to do so.[68] The Court of Appeal disagreed and remitted the proceedings back to the tribunal for redetermination.[69]

[89] The Court discussed in detail whether a mistake of fact can amount to an error of law. After discussing case law, primarily in the immigration context, the Court reached the following conclusions:[70]

> In our view, the *Criminal Injuries Compensation Board case* points the way to a separate ground of review, based on the principle of fairness. It is true that Lord Slynn distinguished between "ignorance of fact" and "unfairness" as grounds of review. However, we doubt if there is a real distinction. The decision turned, not on issues of fault or lack of fault on either side; it was sufficient that "objectively" there was unfairness. On analysis, the "unfairness" arose from the combination of five factors: (i) an erroneous impression created by a mistake as to, or ignorance of, a relevant fact (the availability of reliable evidence to support her case); (ii) the fact was "established", in the sense that, if attention had been drawn to the point, the correct position could have been shown by objective and uncontentious evidence; (iii) the claimant could not fairly be held responsible for the error; (iv) although there was no duty on the Board itself, or the police, to do the claimant's work of proving her case, all the participants had a shared interest in co-operating to achieve the correct result; (v) the mistaken impression played a material part in the reasoning.

[90] While the Court in *E* was not attempting to set out a "precise code" for when a mistake of fact will amount to an error of law,[71] it focused on the objective unlawfulness of the decision, referring to a combination of the five factors set out in the passage above.

[91] The 2005 Supreme Court decision of *Bryson v Three Foot Six Ltd* addressed mistake in the context of an appeal (restricted to questions of law) from the Employment Court regarding employment status. It did not refer to *E*. Mr Bryson claimed he was an employee of Three Foot Six Ltd rather than an independent contractor.[72] In the Supreme Court, the possibility was raised that Mr Bryson's employment status might be a question of fact incapable of appeal to the Court of Appeal (appeals to the Court of Appeal being limited to questions of law).[73]

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68 At [11] and [15].
69 At [97]–[98].
70 At [63] (citation omitted).
71 At [66].
72 *Bryson v Three Foot Six Ltd*, above n 63, at [1].
73 At [17].

[92] The Supreme Court then made the following observations about when flawed fact-finding might give rise to an error of law:[74]

> [26] An ultimate conclusion of a fact-finding body can sometimes be so insupportable – so clearly untenable – as to amount to an error of law: proper application of the law requires a different answer. That will be the position only in the rare case in which there has been, in the well-known words of Lord Radcliffe in *Edwards v Bairstow*, a state of affairs "in which there is no evidence to support the determination" or "one in which the evidence is inconsistent with and contradictory of the determination" or "one in which the true and only reasonable conclusion contradicts the determination". Lord Radcliffe preferred the last of these three phrases but he said that each propounded the same test. In *Lee Ting Sang* itself the Privy Council concluded that reliance upon dicta of Denning LJ in two cases "of a wholly dissimilar character" may have misled the Courts in Hong Kong in the assessment of the facts and amounted in the circumstances to an error of law justifying setting aside concurrent findings of fact. Their Lordships were of the opinion that the facts pointed so clearly to the existence of a contract of service that the finding that the applicant was working as an independent contractor was, quoting the words of Viscount Simonds in *Edwards v Bairstow*, "a view of the facts which could not reasonably be entertained", which was to be regarded as an error of law. In *Lee Ting Sang* the facts demonstrated so clearly that the applicant was an employee that it was the true and only reasonable conclusion.
>
> [27] It must be emphasised that an intending appellant seeking to assert that there was no evidence to support a finding of the Employment Court or that, to use Lord Radcliffe's preferred phrase, "the true and only reasonable conclusion contradicts the determination", faces a very high hurdle. It is important that appellate Judges keep this firmly in mind. …
>
> [28] It should also be understood that an error concerning a particular fact which is only one element in an overall factual finding, where there is support for that overall finding in other portions of the evidence, cannot be said to give rise to a finding on "no evidence". It could nonetheless lead or contribute to an outcome which is insupportable.

[93] The *Bryson* ground is therefore primarily concerned with flawed factual evaluation. Its approach means it is an error of law if a decision-maker's factual evaluation has reached a conclusion that is insupportable on the evidence before it. This includes situations where there is no evidence at all to support a decision-maker's conclusion (such as where a decision-maker has assumed a fact exists without evidence).

[94] The Supreme Court's remarks in *Bryson* are consistent with the Privy Council's 1983 judgment in *Air New Zealand v Mahon*, where the Board addressed the

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74 Footnotes omitted.

circumstances when a decision-maker's factual findings can be challenged through judicial review.[75] The Board explained that:[76]

> As Courts whose functions in the instant case have been restricted to those of judicial review, both the Court of Appeal and this Board are disentitled to disturb findings of fact by the decision-maker whose decision is the subject of review, unless (1) the procedure by which such findings were reached was unlawful (in casu by failure to observe the rule of audi alteram partem) or (2) primary facts were found that were not supported by any probative evidence or (3) the reasoning by which the decision-maker justified inferences of fact that he had drawn is self-contradictory or otherwise based upon an evident logical fallacy.

[95] The latter two circumstances — finding primary facts without "any probative evidence", or drawing inferences of fact based on "self-contradictory" reasoning or "an evident logical fallacy" — essentially align with the *Bryson* ground and, importantly for current purposes, do so in the context of a judicial review.

[96] The 2016 Supreme Court case of *Ririnui v Landcorp Farming Ltd* concerned a judicial review of a decision founded on a material mistake as to whether a claim by Ngāti Whakahemo had been settled.[77] Arnold J gave the reasons for himself and Elias CJ. In a section of Arnold J's reasons (with which Glazebrook and O'Regan JJ agreed)[78] he said:[79]

> [53] There is now no dispute that OTS, and thereby the Crown, was wrong throughout the relevant period in considering that Ngāti Whakahemo's Wai 1471 claim had been settled. Further, it is beyond dispute that the responsibility for the error lies with the Crown – through its solicitors, Ngāti Whakahemo explained carefully why the Crown's view was incorrect, but the Crown refused to accept the explanation, at least until these proceedings were issued. Moreover, there seems little doubt that the mistake was material, in the sense that it influenced decisions made by both the Ministers and Landcorp, a point to which we will return.
>
> [54] Ngāti Whakahemo characterise the Crown's error as one of law, a characterisation accepted in both the High Court and the Court of Appeal and not challenged in this Court. There may be scope for argument about whether the mistake was one of fact or of law, a distinction which may, in some instances, be significant in a judicial review context. But in the circumstances of this case, we do not regard the distinction as material. Even if it is regarded as a mistake of fact, it is a mistake made in circumstances which would render

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75 *Re Erebus Royal Commission; Air New Zealand Ltd v Mahon* [1983] NZLR 662 (PC).
76 At 681.
77 *Ririnui v Landcorp Farming Ltd*, above n 61.
78 At [147] per Glazebrook J and [150] per O'Regan J.
79 Footnotes omitted.

> a decision based on it susceptible to review (assuming the decision was otherwise reviewable).

[97] Although it is not entirely clear, Arnold J effectively applied the criteria for a mistake of fact in *E*, then proceeded to endorse *E* as a ground of review in New Zealand. He did not cite *Bryson*, even though *Bryson* predates *Ririnui*. That is consistent with an approach which sees *Bryson* as addressing a different type of mistake from that in *E*.

Discussion

[98] While it has been suggested that the *Bryson* ground has subsumed mistake of fact as an independent ground of review,[80] we do not read *Bryson* that way. There is no express indication of that intention in *Bryson* itself, nor did the Supreme Court in *Ririnui* refer to *Bryson* when citing and appearing to apply *E* (with *E* being the leading case for mistake of fact as an independent ground of review).[81] We emphasise that *Bryson* and mistake of fact in the *E* sense are not equivalent grounds. If *Bryson* is regarded as subsuming mistake of fact, the *E* ground is lost.

[99] *Bryson* establishes a strict threshold for flawed factual evaluation to amount to an error of law. The *Bryson* ground is satisfied only when the "overall" or "ultimate" factual conclusion(s) underpinning a decision are insupportable.[82]

[100] The *E* ground's threshold of materiality is less stringent than the *Bryson* ground's threshold of insupportable ultimate conclusion, reflecting the *E* ground's basis in concepts of fairness.[83] The *Bryson* ground does not address situations where a decision-maker has reached a supportable conclusion given the evidence before them, but evidence not before the decision-maker renders the decision-maker's conclusion insupportable or suspect. By contrast, that is the typical situation the *E* ground is designed to address.[84]

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80 See for example Joseph, above n 64, at 1062–1065.

81 *Ririnui v Landcorp Farming Ltd*, above n 61, at [53]–[55].

82 *Bryson v Three Foot Six Ltd*, above n 63, at [28].

83 *E v Secretary of State for the Home Department*, above n 62, at [63] and [66].

84 See for example *E v Secretary of State for the Home Department*, above n 62; *Zafirov v Minister of Immigration*, above n 62; and *Regina v Criminal Injuries Compensation Board, Ex parte A* [1999] 2 AC 330 (HL).

[101] And, as Professor Joseph KC says in endorsing *Bryson*, "[t]he law would be deficient were it not to condemn a decision made in 'ignorance or defiance of an incontrovertible fact'".[85] That is what the *E* ground does.

[102] We therefore conclude that the Supreme Court decisions of *Bryson* and *Ririnui* establish that in New Zealand there are two categories that fall under the heading of mistake that are an available ground of judicial review: mistake in the *E* sense, being a material mistake as to an established fact; and mistake arising as a result of a flawed factual evaluation.[86]

[103] In the judgment under appeal, the Judge referred to *E* and concluded the following approach would be "consistent with the simple, untechnical and prompt approach to judicial review in New Zealand":[87]

> (a) There must be a mistake in relation to a matter of established fact. Judicial review is not an appropriate procedure for addressing factual contests, and the mistake of fact ground of review does not arise simply because the decision-maker could have reached a different conclusion on the facts.
>
> (b) The mistake must be of sufficient importance to lead the Court to conclude that there has been a failure by the decision-maker to exercise the discretionary power in a lawful way.

[104] The Judge's first proposed element of the mistake of fact ground — that the mistake must relate to a matter of established fact — reflects the *E* ground.[88] The second proposed element appropriately recognises that not every mistake of fact will render a decision unlawful. However, in light of the law as we have discussed it, the suggested test of "sufficient importance" is better framed in accordance with *E* and *Ririnui* as requiring the alleged mistake to be "material". This means the alleged

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85 Joseph, above n 64, at 1064, quoting *Isaac v Minister of Consumer Affairs* [1990] 2 NZLR 606 (HC) at 637.

86 See also Ivan Hare, Catherine Donnelly and Joanna Bell (eds) *De Smith's Judicial Review* (9th ed, Sweet & Maxwell, United Kingdom, 2023) at 333–337, which suggests there is a similar distinction in England and Wales; and Administrative Decisions (Judicial Review) Act 1977 (Cth), s 5, which establishes a similar distinction in Australian federal law.

87 Judgment under appeal, above n 4, at [29], citing *E v Secretary of State for Home Department*, above n 62, at [61]–[66].

88 *E v Secretary of Statement for the Home Department*, above n 62, at [63].

mistake must have "played a material (not necessarily decisive) part in the [decision-maker]'s reasoning" or "influenced" the decision-maker.[89]

[105] The Judge did not address mistake in the *Bryson* sense, given the appellant did not allege that category of mistake.

Evidence post-dating the Orders

[106] The evidence adduced in this case is voluminous. Much of the evidence involves information which was not available at the time of the Orders. The question is whether such evidence is relevant to assessing the lawfulness of the Orders.

Mistake of fact

[107] Challenges based on the *E* ground usually, but do not invariably, concern a mistake of fact not apparent on the evidence before the decision-maker.[90] Accordingly, evidence post-dating a decision which tends to show that decision was made under an *E*-type mistake of fact will, in principle, be relevant and admissible.

[108] However, evidence post-dating a decision will often be irrelevant to proving an *E*-type mistake of fact. This is because the "established" mistake of fact must be "uncontentious and objectively verifiable" *as at the time of the decision*: "the fact or evidence must have been 'established', in the sense that it *was* uncontentious and objectively verifiable".[91] This temporal restriction aligns with the approach to s 5 of NZBORA discussed below, with the principle being that the legality of a decision should generally fall to be assessed at the time of the decision rather than with the benefit of hindsight.

[109] In this case, after-the-event affidavits from the Ministers, to the extent they explain what advice, other evidence, and factual determinations the Ministers relied on in making the Orders, are relevant. Expert evidence pre-dating the Orders, but not before the decision-makers, which suggests face coverings are ineffective or

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89 At [66]; and *Ririnui v Landcorp Farming Ltd*, above n 61, at [53].

90 See for example *Regina v Criminal Injuries Compensation Board, Ex parte A*, above n 84; and *Zafirov v Minister of Immigration*, above n 62.

91 *E v Secretary of State for the Home Department*, above n 62, at [66] (emphasis added).

otherwise, is relevant. The same is true of expert evidence post-dating the Orders which is restricted to presenting information available when the Ministers made the Orders. But expert evidence impeaching or justifying the decision to make the Orders with the benefit of hindsight (such as evidence based on studies into face covering effectiveness that were published after the Orders were made) is irrelevant.

[110] The *E* ground's requirement of a material mistake as to an *established fact* means only a small amount of evidence should be required. If an applicant seeks to adduce a mountain of evidence (especially expert evidence) to prove their point, that itself suggests the *E* ground must fail because the alleged mistake relates to a contentious matter, not a matter of established fact.

NZBORA

[111] The operation of s 5 of NZBORA in the context of secondary legislation and changing circumstances has been considered in two recent decisions of this Court: *NZTSOS Inc v Minister for COVID-19 Response* and *Free to be Church Trust v Minister for COVID-19 Response*.[92]

[112] In *NZTSOS*, in the course of preliminary comments on the application of NZBORA to secondary legislation developed in response to the COVID-19 pandemic, this Court observed:[93]

> [53] The instrument under challenge is the Order amended by the Minister in October 2021 extending the Vaccination Order to the education sector. *The lawfulness of the Order must be assessed at that time in the context of the prevailing circumstances* in what was a national emergency arising out of a global pandemic. This would include *current* knowledge about the likely progression of the pandemic in New Zealand, the seriousness of the public health threats posed, the capacity of the health system to cope, and the range of available measures to respond adequately in the public interest. It needs to be *kept in mind that decisions were required* in circumstances of significant urgency and based on *imperfect information*.

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92 *NZTSOS Inc v Minister for COVID-19 Response* [2024] NZCA 74, [2024] 2 NZLR 624; and *Free to be Church Trust v Minister for COVID-19 Response* [2024] NZCA 81, [2024] 2 NZLR 746.

93 *NZTSOS Inc v Minister for COVID-19 Response*, above n 92 (emphasis added).

[113] Later, this Court again implied that the s 5 justification test should take into account the limited information available to the decision-maker:[94]

> [92] The Minister was entitled, and was arguably required, to take a precautionary approach in his decision-making in order to minimise the immediate and very real threat to public health posed by the outbreak of Omicron and the consequent likely demands on the health care system. The *lack of certainty as to the magnitude of the risk and the effectiveness of the measures available to mitigate it could not excuse the Minister from discharging his responsibility to take appropriate action* to protect the public, particularly the vulnerable. The greater the threat, the greater the justification for precautionary decision-making to protect the public against the threat in circumstances of uncertainty. …

[114] In *Free to be Church Trust*, this Court explored how NZBORA applies to secondary legislation that is initially lawfully made (ie complies with s 5 of NZBORA at the time it is made) but subsequently ceases to be justified in terms of s 5.[95]

[115] In line with *NZTSOS*, the Court held that the lawfulness of secondary legislation turns on whether it satisfies the s 5 justification test *at the time the secondary legislation is made*.[96] If secondary legislation subsequently ceases to be justified in terms of s 5, that should be addressed via a review of the secondary legislation by the Minister.[97] The Minister's decision following the review, or failure to review the secondary legislation in an appropriately timely manner, is itself reviewable.[98] However, even a Minister acting unlawfully in that respect does not invalidate the underlying secondary legislation; rather, the remedy should be directed at ensuring a review (or further review) takes place.[99]

[116] While neither *NZTSOS* nor *Free to be Church Trust* directly addressed the admissibility of large volumes of expert evidence seeking to impeach (or support) the challenged secondary legislation with the benefit of hindsight, the core principle is clear. In determining whether any limitations a decision places on an NZBORA right are demonstrably justified (and therefore the decision is lawful), the Court considers

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94 Emphasis added.
95 *Free to be Church Trust v Minister for COVID-19 Response*, above n 92.
96 At [119]–[120].
97 At [121]–[124].
98 At [128].
99 At [128].

justification *at the time the decision was made*. The Court takes a realistic approach which recognises the informational limitations on the decision-maker.

[117] Applying that principle, expert evidence drawing on material which post-dates the Orders is unlikely to be relevant to the NZBORA s 5 assessment. Expert evidence that seeks to show the proportionality or otherwise of the Orders based on scientific evidence not reasonably available to the Ministers when the Orders were made is therefore inadmissible.

Appellant's submissions

[118] In its amended statement of claim, the appellant claimed that, in making both Orders, the first respondent was labouring under a material mistake of fact, namely that face coverings are an effective measure to contribute to preventing or limiting the risk of the outbreak or spread of COVID-19.

[119] The appellant says there was both a mistake in relation to an established fact and that mistake was of sufficient importance to enable the Court to conclude there had been a failure by the decision-maker to exercise the discretionary power in a lawful way. Before us, Ms Hansen contended that the established fact was that there was *uncertainty* as to whether face coverings are effective. The Ministers considered there was no uncertainty and that face coverings were effective. That certainty was the material reason the Orders were made.

[120] The criticisms levelled by the appellant related to:

(a) the quality of the evidence regarding face coverings;

(b) types of face coverings and their effectiveness; and

(c) disadvantages of face coverings.

[121] In Ms Hansen's submission, the Judge erred in holding that the evidence about the uncertainty of face coverings being effective was not a matter of established fact. She said it was an established fact that the Cochrane reviews of November 2020 and

January 2023 found there was uncertainty as to whether face coverings were effective. That was the highest quality evidence available. Ms Hansen noted that the Judge acknowledged that RCTs are a superior form of evidence for ascertaining the effectiveness of particular measures but suggested there was a practical difficulty in undertaking them or that there may be ethical considerations in undertaking them during a pandemic.[100] Ms Hansen submitted that was wrong on both counts. She referred to Dr Jefferson's evidence that any suggestion there are ethical restrictions on conducting RCTs reflects ideology and not clinical epidemiology.

[122] It was the reliance by the Minister principally on observational studies that was at the heart of the claimed mistake of fact. These types of studies, she suggested, are the lowest quality evidence in the hierarchy.

[123] Ms Hansen made five main points:

(a) that face coverings were not designed to prevent transmission of a virus which spreads via aerosols;

(b) that the guidelines on correct face covering use would never be adhered to, referring to Mr Gabriel's evidence to the effect that the most critical aspect of a compliance programme is human behaviour;

(c) eyes are a portal of transmission and face coverings could also worsen someone's own infection;

(d) the Cochrane reviews, which Ms Hansen described as the highest quality evidence, noted uncertainty as to the effectiveness of wearing face coverings; and

(e) the harms from wearing face coverings were never properly considered.

[124] In Ms Hansen's submission, Mr Hipkins was clearly of the view that wearing face coverings was effective and therefore justified. She referred to references in the

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[100] Judgment under appeal, above n 4, at [38]–[39].

material before Cabinet to the "significant body" of evidence on their efficacy and that face coverings were "highly effective". In Ms Hansen's submission, this demonstrates that both Ministers were relying on advice that wearing face coverings was effective in preventing transmission. (We interpose to point out that the document containing the "highly effective" statement is a briefing paper to Cabinet from the Department of the Prime Minister and Cabinet and was related to the issue of wearing face coverings in voting places. It did not relate to the 2021 Order and did not inform Dr Verrall's advice in respect of the 2022 Order.)

[125] While the appellant's evidence was not commissioned at the time the Orders were made, in Ms Hansen submission, it showed that the advice was overstated. Both sides' evidence referred to studies which were not before the Ministers. In her submission, the expert evidence reinforced the pre-COVID-19 position, noting that there was already research about the spread of respiratory viruses and face covering use, even before the pandemic.

[126] Ms Hansen contended that the precautionary principle was not invoked by the Ministers because they did not consider there was doubt about the effectiveness of face coverings. Furthermore, in her submission, the precautionary approach cannot be applied without considering the harms that might accrue, as discussed by Dr Jefferson.

Respondents' submissions

[127] The respondents referred to the Judge's finding that Mr Hipkins was aware of the WHO guidance and his decision was informed by a number of briefings on the benefits and risks of the use of face coverings.[101] Furthermore, from the outset, the legal requirements for wearing face coverings were introduced in a way so as to address the potential risks and disadvantages. The risks from improper face covering use and disposal were identified and addressed through clear public health messaging. The potential health risks were identified and addressed through exemptions for those who had physical or mental health illnesses, conditions or disabilities, as well as

[101] At [64]–[66].

exceptions for children under the age of 12 and for those communicating with a person deaf or hard of hearing.

[128] Ms Bell said the issue was whether the Ministers, in making the Orders, relied on a factual position that was clearly wrong. In Ms Bell's submission, the mistake of fact advanced on appeal is different from that pleaded and argued in the High Court, the appellant now asserting that the fact relied on was that "there is uncertainty as to whether face coverings are effective".

[129] The respondents objected to the appeal proceeding on this basis, noting that, had it been so pleaded, the respondents' case would have been different in terms of both argument and evidence. The respondents emphasised that there is a substantial body of evidence that face coverings are effective and the WHO recommended their use as part of a comprehensive package of prevention and control measures to limit the spread of COVID-19. Further, the legal test for the Orders did not require certainty, only that the measure contribute to or was likely to contribute to preventing or limiting the risk of the outbreak or spread of COVID-19.

[130] Ms Bell submitted the Judge was correct when he observed that it was not enough for the appellant to establish alternative opinions: there had to be a mistake as to an established fact.[102]

Analysis

[131] We have set out s 11 of the Act above at [10]. The Orders were made by the Ministers. Section 9 imposed further requirements on the making of the Orders:

> **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

[102] At [32]–[34].

(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.

(2) Nothing in this section requires the Minister to receive specific advice from the Director-General about the content of a proposed order or proposal to amend, extend, or revoke an order.

[132] The Judge described the "fundamental difficulty" with the appellant's challenge to be that the effectiveness of face coverings as a measure to address the risk of the spread of COVID-19 was a matter of medical or scientific opinion rather than a matter of fact.[103] Addressing the context of the pandemic, the Judge observed that it was inevitable that there would be differences of opinion. He said:[104]

> The evidence filed by the [appellant], and the other sources it has relied upon, show that there is a body of expert opinion that disagrees with the proposition that face coverings assist in reducing the risk of spread of COVID-19. But equally there is a body of expert opinion that face coverings do so assist. And it is this body of expert opinion, including from the New Zealand Director-Generals of Health, that have been relied upon by the Ministers, as is contemplated by s 9(1)(a) of the Act. The fact that the [appellant] disagrees with these views, and is able to present alternative opinions to the Court, does not establish a ground of judicial review.

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103 At [32].
104 At [33].

[133] We agree with the Judge that:

(a) The appellant's pleaded mistake of fact, concerning the effectiveness of face coverings, was a matter of medical or scientific opinion rather than a matter of fact.

(b) The appellant cannot establish this ground of review simply by establishing that alternative opinions are available. They need to establish that their expert opinions were matters of established fact which they did not do.

(c) A difference of opinion is not a mistake of fact. The best the appellant can do is establish there are experts who hold contrary opinions to the experts relied on by the decision-makers.

[134] The mistake alleged in the appellant's pleading was the effectiveness of face coverings, not the uncertainty as to their effectiveness. The appellant had to show that was wrong in terms of established fact. It has not done so, as the respondents' evidence comprehensively demonstrates.

[135] Essentially, the appellant attempted to elevate the Cochrane reviews, one predating COVID-19 and the other well after the date of the Orders in 2023, to being the definitive work on whether or not face coverings are effective. There are three errors in this approach. First, it fails to acknowledge the context of the pandemic and circumstances of the Orders. Secondly, it fails to accurately state the evidence that was available to the Ministers at the time of the Orders. Thirdly, it fails to consider the requirements under s 9 of the Act and the mandatory considerations.

[136] Dr Bloomfield's evidence was that the speed of the development of the pandemic precluded the exclusive reliance on peer reviewed literature and that throughout New Zealand's response, decision-making proceeded based on the precautionary principle.

[137] This Court discussed the precautionary principle in *NZTSOS*:[105]

> [92] The Minister was entitled, and was arguably required, to take a precautionary approach in his decision-making in order to minimise the immediate and very real threat to public health posed by the outbreak of Omicron and the consequent likely demands on the health care system. The lack of certainty as to the magnitude of the risk and the effectiveness of the measures available to mitigate it could not excuse the Minister from discharging his responsibility to take appropriate action to protect the public, particularly the vulnerable. The greater the threat, the greater the justification for precautionary decision-making to protect the public against the threat in circumstances of uncertainty. As Sourgens suggests, there are three elements to the precautionary principle, all of which we consider apply here:[106]
>
> > First, it has a threat element: it is applicable when there is a certain kind of threat, typically a threat of serious or irreparable damage. Second, it has an uncertainty element: a state may not or should not use scientific uncertainty as a reason for postponing action. Third, the first two elements are [operationalised] by means of a precautionary measure: the state adopts measures in order to anticipate, prevent or minimise the relevant threat.

[138] In this case, we consider the precautionary principle confirms that the Ministers were entitled to rely on all evidence of logical relevance when making the Orders, rather than delaying action in the hope that higher quality scientific evidence — for example, peer-reviewed literature based on well-designed RCTs — would eventually become available.

[139] The appellant's reformulated ground — that the Ministers making the Orders were labouring under a mistake of fact because they did not appreciate there was uncertainty as to the effectiveness of face coverings — must fail for two slightly different reasons.

[140] First, we accept the respondents' submission that the reformulated ground was not pleaded and the respondents' case would have been different if it was so pleaded. The evidence provided by the Ministers would have had a different focus.

[141] Secondly, addressing the reformulated ground on its merits, we are not satisfied that certainty as to the effectiveness of face coverings was a material factor in the

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105 *NZTSOS Inc v Minister for COVID-19 Response*, above n 92 (footnote in original).

106 Frédéric Gilles Sourgens "The Precaution Presumption" (2020) 31 EJIL 1277 at 1278 (footnotes omitted).

Ministers' decisions to make the Orders. The evidence of the Ministers confirms that they were aware the effectiveness of face coverings depended on a number of factors and ultimately face covering requirements were merely one part of a suite of measures.

[142] As the Judge observed, the advice provided to Mr Hipkins was balanced, accepting there was some evidence that face coverings as part of a comprehensive package of measures could help limit the spread of COVID-19, but also that the use of face coverings alone was insufficient. It identified disadvantages of wearing face coverings. The Minister in his evidence described his own evaluation of the position. The uncertainties on which the appellant relied were recognised in the decision-making process leading up to the making of the 2021 Order.

[143] We also agree with the Judge that the evidence from Dr Sarfati and Dr Verrall confirms there is no basis for judicial review based on mistake of fact in respect of the 2022 Order. The advice given to the Minister was consistent with the requirements of the Act and took into account evidence that had developed over time about the effectiveness of face coverings and their requirements. We note too the context of the Orders was that the Government was reducing restrictive measures.

[144] Having reviewed the evidence as a whole, and in particular the way in which the public health advice evolved, it is apparent that the adverse effects of face covering wearing were referred to from the beginning and addressed through exemptions. Mr Hipkins and Dr Verrall discussed their relatively fulsome briefings to Cabinet, including the equivocal evidence about the effectiveness of face coverings and the risks and disadvantages of their use.

[145] In our view, the Judge was correct to conclude that the Orders were not made in reliance on a material mistake of fact. Rather the Orders were made within the power conferred under ss 9 and 11 of the Act.

Did the Orders engage the right to refuse to undergo medical treatment?

Appellant's submissions

[146] The appellant contends that the Judge erred in holding that the requirement to wear a face covering was not "medical treatment" for the purposes of s 11 of NZBORA. Further, that the Judge was wrong to say, even if s 11 was engaged, the Ministers had considered the right in substance and justified it.

[147] The claimed error was the conclusion that, because no pharmacologically active substance was involved, it was not a preventive medical treatment and in effect it was simply a preventive measure not captured by s 11. In the appellant's submission, a preventive medical treatment does not require a pharmacologically active substance to be used.

[148] Ms Hansen began by referring to arts 3, 4, 5 and 6(1) of the Universal Declaration on Bioethics and Human Rights as providing a broader context within which the right is to be interpreted and the exercise of the statutory power considered:[107]

> *Article 3 – Human dignity and human rights*
>
> 1. Human dignity, human rights and fundamental freedoms are to be fully respected.
>
> 2. The interest and welfare of the individual should have priority over the sole interest of science or society.
>
> *Article 4 – Benefit and harm*
>
> In applying and advancing scientific knowledge, medical practice and associated technologies, direct and indirect benefits to patients, research participants and other affected individuals should be maximised and any possible harm to such individuals should be minimized.
>
> *Article 5 – Autonomy and individual responsibility*
>
> The autonomy of persons to make decisions, while taking responsibility for those decisions and respecting the autonomy of others, is to be respected. For

[107] United Nations Educational, Scientific and Cultural Organization *Universal Declaration on Bioethics and Human Rights* SHS/EST/BIO/06/1, SHS.2006/WS/14 (19 October 2005).

persons who are not capable of exercising autonomy, special measures are to be taken to protect their rights and interests.

Article 6 – Consent

1. Any preventive, diagnostic or therapeutic medical intervention is only to be carried out with the prior, free and informed consent of the person concerned, based on adequate information. The consent should, where appropriate, be express and may be withdrawn by the person concerned at any time and for any reason without disadvantage or prejudice.

…

[149] In Ms Hansen's submission, a face covering comes within a definition of a "medical device" in s 3A of the Medicines Act 1981, which provides:[108]

3A Meaning of medical device

In this Act, unless the context otherwise requires, **medical device**—

(a) means any device, instrument, apparatus, appliance, *or other article that*—

(i) *is intended to be used in, on, or for human beings for a therapeutic purpose*; and

(ii) *does not achieve its principal intended action in or on the human body by pharmacological, immunological, or metabolic means* (but may be assisted in its function by such means); and

(b) *includes a material* that—

(i) *is intended to be used in or on human beings for a therapeutic purpose*; and

(ii) *does not achieve its principal intended action in or on the human body by pharmacological, immunological, or metabolic means* (but may be assisted in its function by such means); and

…

[108] Emphasis added.

[150] "Therapeutic purpose" is defined in s 4 as follows:[109]

> **4 Meaning of therapeutic purpose**
>
> In this Act, unless the context otherwise requires, **therapeutic purpose** means any of the following purposes, or a purpose in connection with any of the following purposes:
>
> (a) *preventing*, diagnosing, monitoring, alleviating, treating, curing, or compensating for, a disease, ailment, defect, or injury; or
>
> (b) influencing, inhibiting, or modifying a physiological process; or
>
> (c) testing the susceptibility of persons to a disease or ailment; or
>
> (d) influencing, controlling, or preventing conception; or
>
> (e) testing for pregnancy; or
>
> (f) investigating, replacing, or modifying parts of the human anatomy.

[151] In Ms Hansen's submission, "[i]t cannot be seriously disputed" that, in the context of their use in the pandemic, a face covering is an article or material intended to be used on an individual for a therapeutic purpose. She noted that face coverings are defined as medical devices in other jurisdictions, for example the United States, and that they can meet the definition of a medical device in certain circumstances in Australia, including when a face covering is to be used for the prevention of the transmission of disease between people.

[152] Ms Hansen noted that the Therapeutic Products Act 2023 (which is now repealed) defined a medical device in s 24 as a therapeutic product that "achieves, or is likely to achieve, its principal intended action by means other than pharmacological, immunological, metabolic or genetic means". This, she said, included a vast array of products from tongue depressors, condoms and bandages to implantable devices such as pacemakers, diagnostic software and robotic surgery machines.

[153] As to the definition of medical treatment, in Ms Hansen's submission Parliament intended "medical" to have an unrestrictive definition and the meaning of

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[109] Emphasis added.

the term "treatment" is also broad. She referred to medical dictionaries in support of that proposition. She noted that medical treatment does not require a doctor-patient relationship and applies to public health measures such as water fluoridation, relying on *New Health New Zealand Inc v South Taranaki District Council*.[110]

[154] Ms Hansen referred to the evidence of Dr Jefferson who addressed the question of whether face coverings are medical interventions. He said there is no simple answer in the European Union given the "chaotic regulation rules", concluding:

> 22. So, if by medical intervention one means an intervention which is manufactured and tested specifically to interrupt transmission of virions the answer is no.
>
> 23. However, to the extent that face coverings are being promoted as being capable of interrupting transmission, then they may be able to be regarded as a preventive medical intervention.

[155] Noting that s 11 has no equivalent in the International Covenant on Civil and Political Rights, nor in any other international human rights instrument, Ms Hansen emphasised the need for a "generous and purposive" approach.[111] She contended that s 11 encapsulates the idea that every individual has the right to determine for themselves what they do or not do to their own body and has the right to be fully informed in order to give informed consent to medical treatment. Ms Hansen referred to the fact that s 11 is one of four provisions in Part 2 of NZBORA under the heading "Life and security of the person", the other rights being the right not to be deprived of life, not to be subjected to torture or cruel treatment or not to be subjected to medical or scientific experimentation. These four provisions recognise the right to dignity and security of the person, a view endorsed by Andrew Butler and Petra Butler in *The New Zealand Bill of Rights Act: A Commentary*.[112]

[156] In Ms Hansen's submission, face coverings were being used for a medical purpose, the prevention of the spread of COVID-19, and the method of prevention was the use of a barrier material. They obstructed the nose and mouth and were being applied to people's bodies for a medical purpose similar to a bandage. Ms Hansen

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110 *New Health New Zealand Inc v South Taranaki District Council*, above n 44.
111 Relying on *Ministry of Transport v Noort* [1992] 3 NZLR 260 (CA) at 286.
112 Butler and Butler, above n 48, at [11.7.2].

suggested that even social distancing can constitute medical treatment in certain circumstances. She emphasised that a face covering impedes breathing and its aim of preventing disease is quintessentially medical.

[157] As to whether the Ministers had given consideration to bodily autonomy and therefore considered the right in substance, Ms Hansen submitted that the right to refuse medical treatment encapsulates rights much wider than bodily autonomy. She further submitted that, in any event, the finding that the right was considered was contradicted by the evidence, as the Ministers confirmed no consideration was given to whether s 11 was engaged. On this basis, it was clear the both Ministers failed to satisfy themselves that s 11 was limited or there was a justified limitation of it as required under s 9(1)(ba) of the Act, an essential prerequisite for the making of the Orders. In her submission, the Orders therefore must be invalid due to an error of law.

Respondents' submissions

[158] The respondents submitted that the Judge correctly directed himself on the law following the approach in *New Health New Zealand Inc v South Taranaki District Council*.[113] They noted that the Supreme Court did not suggest all public health measures involve medical treatment and the ambit of s 11 should not be extended beyond that justified by the language of the section. Parliament did not affirm the right not to undergo "health measures" or "medical interventions" (the terms employed in the Universal Declaration of Bioethics and Human Rights). The Judge was correct, in the respondents' submission, to take a purposive approach and to consider ultimately it was a question of degree.[114] In the respondents' submission, the following factors may be relevant:

(a) The extent to which the public health measure involves recognised medical treatment delivered in a public health context.

(b) The degree of impact of bodily integrity and autonomy.

(c) Common usage.

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113 *New Health New Zealand Ltd v South Taranaki District Council*, above n 44.
114 Judgment under appeal, above n 4, at [89].

(d) The significance of a measure being preventive. While certain public health measures such as vaccinations or fluoridation would be preventive, others are preventive in that they create an external distance or barrier between the body and the potential source of harm only, such as hand washing, social distancing and the wearing of protective clothing.

[159] In Mr Jones' submission, who advanced the argument on NZBORA issues, there were three questions:

(a) What was the right limited and was it medical treatment?

(b) Did the Ministers satisfy themselves as required under s 9?

(c) Was the Judge correct to be satisfied?

[160] In Mr Jones' submission, whether a measure amounts to medical treatment is fact-dependent. Mr Jones referred to William Young J's dissent in *New Health* and submitted his "common usage" approach was unimpeachable.[115] William Young J gave the examples of applying sunscreen and brushing ones teeth as not constituting medical treatment.[116] The present case is, in Mr Jones' submission, similar.

[161] Mr Jones suggested that the Judge was entitled to look at the evidence contained in the Otago University reports. As discussed above,[117] we disagree. In our view, what was relevant was the material either before or available to the Ministers at the time they made the Orders.

Analysis

[162] Having noted the parties' competing submissions on the point, we have decided it is unnecessary in the context of a moot appeal, and without greater argument and analysis about international jurisprudence on the topic, to seek to determine the scope

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115 *New Health New Zealand Inc v South Taranaki District Council*, above n 44, at [203] and following per William Young J dissenting.

116 At [204].

117 See above at [106]–[117].

of the words "medical treatment" in s 11 of NZBORA. That is because we are well satisfied (as was the High Court)[118] that if the face covering requirements did limit the right in s 11, that limitation was demonstrably justified. In addition, we consider the Ministers were satisfied that the Orders "[did] not limit or [were] a justified limit on the rights and freedoms in [NZBORA]", as required by s 9(1)(ba) of the Act.

[163] It is true that Mr Hipkins was not expressly advised that the face covering requirements engaged rights under ss 8 or 11 of NZBORA. Accordingly, he did not specifically consider those rights in his decision-making. However, he was familiar with s 11 in the context of vaccination requirements. He was acutely aware that he needed to satisfy himself that an order did not limit or was not an unjustified limit under NZBORA and realised very early on there were unlikely to be any public health measure that did not engage or limit a right to some degree. He regularly received legal advice. In respect of the 2021 Order, Mr Hipkins was aware he had to be satisfied the restrictions were a justified limit on the rights and freedoms in NZBORA and said he was so satisfied.

[164] Mr Hipkins considered that face covering requirements were one of the least rights-intrusive measures contained in the 2021 Order and it was the measure he was least concerned about from an NZBORA perspective. He considered any limit on the freedom of expression to be minor but in any event justified and there were a number of exceptions to the requirements to address particular concerns. In his second affidavit, he said:

> I also considered generally the issue of restriction on autonomy (although not explicitly a right guaranteed) on the basis the requirements limited a person's autonomy to choose what they put on their face and when. I considered these concerns were mitigated by the flexibility of the face covering requirements at the time, and the evidence supporting the effectiveness of face coverings in reducing the spread of infectious diseases.

[165] Dr Verrall received advice on the application of NZBORA to public health measures. That advice noted the importance of appropriate exemptions to the requirements, advising that the requirements might engage the right of freedom of expression at a low level. She was not advised that the right to life or the right to

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[118] Judgment under appeal, above n 4, at [93].

refuse medical treatment was engaged. To the extent that any NZBORA rights were engaged, that is freedom of expression, she considered this to be a minimal intrusion and easily justified given the ability of face coverings to reduce transmission.

[166] We agree with the Judge that any limitation was demonstrably justified, even if the Orders did amount to medical treatment.[119] The Ministers had considered limitations on rights and autonomy issues in a broad sense. We accept that a decision-maker may have conducted an effective s 5 assessment as long as relevant matters are considered and given appropriate weight even when a particular NZBORA right is not expressly considered. There was a pressing public health issue in limiting the spread of COVID-19; there was a substantial body of opinion that the wearing of face coverings could limit the spread, particularly when combined with other public health measures; the measure was a low-risk and reversible form of treatment giving rise to little more than inconvenience or minor discomfort to most wearers; and it was a proportionate response with appropriate exemptions.

[167] We emphasise that s 9(1)(ba) required the Ministers to be "satisfied that [the Orders did] not limit *or [were] a justified limit* on the rights and freedoms in [NZBORA]".[120] To comply with that requirement, the Ministers did not need to reach a view as to whether or not the face covering requirements (which were merely one of many public health measures imposed by the Orders) limited each individual NZBORA right. Rather, it was sufficient for the Ministers to be satisfied that, notwithstanding the broad rights and autonomy issues raised by the face covering requirements, any potential limitation on rights arising out of face covering requirements would be demonstrably justified on public health grounds. That is what happened here.

Was the limitation on freedom of expression justified?

[168] Ms Hansen referred to the Judge's conclusion that the orders did engage the right to freedom of expression in s 14 of NZBORA[121] but submitted he erred in

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119 At [93].
120 Emphasis added.
121 Judgment under appeal, above n 4, at [74].

holding that the limitation on that right was justified.[122] Ms Hansen submitted that the Judge in effect trivialised the impact of wearing a face covering, thus implying that being able to communicate clearly is not important. She also submitted he was wrong when he suggested the 2021 Order only applied in certain environments and for limited periods.[123] Further, she submitted that the Minister did not rely on the precautionary approach before making the 2021 Order and referred to the evidence of Dr Jefferson in this regard.

[169] In Ms Hansen's submission, the Minister should have taken into account: that face coverings and respirators are not designed or intended to prevent respiratory virus transmission; that virus particles are substantially smaller than the pore size of a face covering; that face covering use is ineffectual due to contaminating behaviour and the potential harms recorded in the WHO guidance; and the fact that eyes remain a portal of transmission.

[170] In Ms Hansen's submission, if these matters had been considered, it would be plain that mandatory face covering was not a proportionate response.

[171] The respondents accept that the Orders were capable of limiting freedom of expression in that face coverings inhibit the physical mechanics of speaking and verbal communication can be assisted by the physical presentation of the face, particularly the mouth. They noted that the potential for face coverings to make face to face communication more difficult was alluded to in the WHO guidance document in December 2020. Not only was there no evidence that anyone encountered significant limitations on their ability to express themselves as a result of the Orders, but those who were likely to have found communication with a face covering particularly problematic were exempt.

[172] Mr Hipkins' affidavit evidence was that he considered the requirement for face coverings was a justified limit on the individual's freedom of expression. He said while he did not receive specific advice about the NZBORA considerations of face covering requirements before making the 2021 Order, he was familiar with those

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122 At [81].
123 At [81(b)].

considerations from earlier decisions. He considered the limitation minor and, in any event, justified, it being "one of the least rights-intrusive measures" and the measure he was "least concerned about from a Bill of Rights perspective". Dr Verrall was advised the face covering requirement limited the right of freedom of expression, albeit at a low level. She considered this a minimal intrusion, and easily justified given the ability of face coverings to reduce transmission of COVID-19.

[173] The Judge was satisfied that the limitation of the right of freedom of expression was demonstrably justified because there was a substantial body of expert opinion that face coverings were effective in restricting the spread of COVID-19.[124] The restriction on the right of expression was to a limited extent — it did not prevent expression, applied only to certain environments, and only for certain periods of time.[125] It was also proportionate to the need for which it was imposed.[126]

[174] The Judge considered a precautionary approach is permitted when making decisions addressing a need to minimise the spread of a potentially deadly illness.[127] Where evidence is uncertain such an approach can legitimately be applied.[128] It was so appropriate here.[129]

[175] The Judge was correct when he considered the limitation was justified and correct in the reasons he gave. We do not consider there was any error in his approach.

Costs appeal

[176] The appellant also appealed the decision of the High Court, which awarded costs of $117,889.50 to the respondents.[130] The award comprised scale costs of $43,139.50 plus fees rendered by Professor Baker and Associate Professor Kvalsvig

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124 At [81(a)].
125 At [81(b)].
126 At [81(b)].
127 At [81(c)], citing: *Orewa Community Church v Minister for Covid-19 Response* [2022] NZHC 2026, [2022] 3 NZLR 475; *Four Aviation Security Service Employees v Minister of COVID-19 Response* [2021] NZHC 3012, [2022] 2 NZLR 26; and *GF v Minister of COVID-19 Response* [2021] NZHC 2526, [2022] 2 NZLR 1.
128 Judgment under appeal, above n 4, at [81(c)].
129 At [81(c)].
130 *New Health New Zealand Inc v Minister for COVID-19 Response* [2023] NZHC 3132 [costs judgment].

for the Otago University Report and the Second Otago University Report totalling $74,750.00.

Judgment under appeal

[177] The Judge addressed three main issues:[131]

(a) whether the proceedings were advanced in the public interest;

(b) whether the respondents were entitled to a 50 per cent uplift for two of the steps given the manner in which the litigation was conducted; and

(c) the level of the respondents' expert evidence costs.

[178] The Judge began by considering r 14.7(e) of the High Court Rules 2016 whereby costs may be refused or reduced if the proceeding "concerned a matter of public interest, and the party opposing costs acted reasonably in the conduct of the proceedings".[132] The Judge referred to the appellant's submissions that there was a significant public interest in ensuring that coercive public measures such as face covering mandates are underpinned by the highest quality scientific argument.[133]

[179] The Judge did not consider the proceeding of that kind, concluding that the challenge was not well-founded.[134] He did so for the following reasons:[135]

(a) Unlike prior unsuccessful COVID-19 challenges where costs were not awarded, the appellant's fundamental rights were not affected and nor was there evidence of anyone whose rights were adversely affected by the Orders.

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131 At [1].
132 At [2].
133 At [4].
134 At [5].
135 At [5].

(b) By the time of the hearing, the Orders were in effect only in relation to medical facilities and by the time of judgment they had been entirely removed.

(c) The challenged measures were not held to restrict rights under NZBORA with the exception of freedom of expression and then in only a limited way. The Judge considered in substance the challenge involved the appellant's criticism of the Ministers' views and those advising them on the efficacy and appropriateness of a measure taken to respond to the pandemic.

(d) A challenge based on difference of expert opinion was artificially characterised as engaging a mistake of fact ground of judicial review.

(e) The challenge could be characterised as a comprehensive attack on the merits of the decisions on a wide range of issues. It was not a judicial review challenge to the legality of the decisions clearly based on established grounds of judicial review.

[180] For those reasons, the Judge saw no basis on which to disallow or reduce the normal award of costs under r 14.7(e).[136]

[181] The Judge refused the respondents the uplift they sought, but instead came to the same result by calculating the allowance under time band C rather than B in respect of the steps at issue.[137]

[182] The Judge rejected the appellant's challenge to some of the disbursements claimed by the respondents, saying the respondents had to engage that expertise to address the matters raised by the appellant's expert evidence.[138]

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136 At [6].
137 At [7]–[11].
138 At [12]–[17].

Grounds of appeal

[183] The grounds of appeal are:

(a) The Judge was wrong to hold there was no public interest in the proceeding, and wrong to refuse or reduce costs on the basis of public interest.

(b) The Judge was wrong to characterise the appellant's case as a difference of expert opinion. The Judge failed to acknowledge that he had concluded that there was uncertainty in the evidence of face covering efficacy and that as a consequence the respondent was labouring under a mistake of fact.

(c) The Judge was wrong to find that the appellant's arguments had little merit and to allow for an uplift.

(d) The Judge was wrong to award expert costs of $74,750. These costs were plainly excessive and unreasonable. The cost of the expert evidence was more than 30 times higher than the cost of expert evidence given in another COVID-19 case (*Grounded Kiwis Group Inc v Minister of Health*).[139]

(e) The Judge was wrong to find that Professor Baker and Associate Professor Kvalsig were not dedicated advocates of face coverings since June 2020 after Professor Baker changed his mind about the efficacy of face coverings.

(f) The Judge was wrong to say that the appellant's expert who charged the most for giving expert evidence was the expert whose evidence had been ruled inadmissible. The expert whose evidence was ruled inadmissible — Mr Miller — did not charge for his evidence. This was plain from the submission made to the Court by the appellant.

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139 *Grounded Kiwis Group Inc v Minister of Health* [2022] NZHC 832, (2022) 13 HRNZ 362.

Submissions

[184] The appellant maintained it sought to raise legitimate concerns about the lawfulness of two mandates affecting virtually the entire population of New Zealand over the age of 12 years. The appellant noted the mandates were a source of public interest and concern as evidenced by the parliamentary protests during February and early-March 2022 and the Government's decision to institute a public inquiry into its COVID-19 response. It noted no other case has considered a face covering mandate.

[185] Mr Reid conducted this aspect of the appellant's case. He contended the Judge erred in holding that there must be a "significant" public interest,[140] saying this was not a requirement of r 14.7, and that the Orders had to involve a significant transgression of individual rights protected under NZBORA to be of the public interest. The Judge had said there was a "legitimate debate" about the effectiveness of face coverings in restricting the spread of COVID-19 and Mr Reid accordingly submitted the claims were responsibly made.[141] He emphasised that the right to freedom of expression was clearly limited as the Judge found.

[186] The respondents accepted there is a level of public interest in challenging the Government's response to COVID-19 orders given the scope of executive power conferred by the Act. However, they supported the Judge's analysis that the challenge did not fall into the same category as other COVID-19 challenges.[142]

[187] In oral submissions, Ms Cameron, who dealt with this aspect of the respondents' case, submitted that, to the extent the proceeding concerned a matter of public interest, the public interest was limited only and, in any event, a reduction would be available only where the appellant acted reasonably. In Ms Cameron's submission, the Judge was best placed to assess costs and the Court should not interfere with his decision.

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140 Costs judgment, above n 130, at [5(c)].
141 Judgment under appeal, above n 4, [81(a)].
142 Costs judgment, above n 130, at [5(a)].

The law

The High Court Rules

[188] While costs are a matter of discretion, the High Court Rules provides that a party who fails in a proceeding should pay costs to the successful party.[143] As set out above, under r 14.7(e), the Court has a discretion to refuse to make an order for costs or otherwise reduce the costs payable where "the proceeding concerned a matter of public interest, and the party opposing costs acted reasonably in the conduct of the proceeding".

[189] Rule 14.7(g) allows the Court to refuse to make a costs order or otherwise reduce costs where "some other reason exists which justifies the court refusing costs or reducing costs despite the principle that the determination of costs should be predictable and expeditious". There is no express requirement for the party opposing costs to have acted reasonably in the conduct of the proceedings but this Court has cautioned against taking an overly expansive view of r 14.7(g).[144]

[190] The Supreme Court has confirmed that merely claiming the proceeding was brought in the public interest does not insulate the unsuccessful party from paying costs.[145] Rather, the outcome will be determined by the particular circumstances of the case.[146]

[191] Because costs are ultimately a matter of discretion, appeals against costs awards rarely succeed. Appellate courts will not interfere unless satisfied the judge "acted on a wrong principle, failed to take account of some relevant matter, factored in the irrelevant or was plainly wrong".[147]

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143 High Court Rules 2016, rr 14.1 and 14.2(1)(a).

144 *Roberts v Professional Conduct Committee of the Nursing Council of New Zealand* [2014] NZCA 141, (2014) 21 PRNZ 753 at [24].

145 *Environmental Defence Society Inc v New Zealand King Salmon Co Ltd* [2014] NZSC 167, (2014) 25 PRNZ 637 at [45] per McGrath, Glazebrook and Arnold JJ.

146 *Environmental Defence Society Inc v New Zealand King Salmon Co Ltd*, above n 145, at [45] per McGrath, Glazebrook and Arnold JJ.

147 *Kinney v Pardington* [2021] NZCA 174 at [1], citing *Shirley v Wairarapa District Health Board* [2006] NZSC 63, [2006] 3 NZLR 523 at [15].

NZBORA

[192] Mr Reid referred us to the observations of Radich J in *Greenhorn v Speaker of the House of Representatives*:[148]

> [63] As the Supreme Court said in *Attorney-General v Udompun*, applying normal costs rules in cases of this type may discourage litigants from bringing Bill of Rights Act claims.[149] This would have the result of weakening Bill of Rights Act protections. That will not always be the case. A case-by-case assessment will always be required. But, whether looked at through this lens or under the discretion in r 14.7(e) and (g) to refuse costs in a proceeding that is concerned with a matter of public interest or for some other valid reason, this is in my view an exceptional case in which it would not be appropriate for an individual seeking to uphold their perception of their fundamental rights to be required to pay a sum of money to the Speaker.

[193] *Attorney-General v Udompun*, a decision of a Full Court of the Court of Appeal concerned the award of indemnity costs to a partially successful litigant seeking *Baigent* damages. The majority held:[150]

> [186] In our view, the Judge was not wrong in principle to award indemnity costs, even though not all of Mrs Udompun's claims succeeded before him. In this area it may not always be appropriate to allow costs to follow the event. It is important to remember that *Baigent* damages are awarded only where other remedies are not sufficient and awards are, in any event, modest. Applying the normal costs rules in such circumstances may discourage litigants from bringing BORA claims. This would clearly have the result of weakening BORA protections. Indemnity costs could also, in suitable cases, be seen as necessary for a proper vindication of the right. This does not mean, however, that indemnity costs are to be awarded as a matter of course in BORA cases.

[194] However, we agree with the Judge's observation that raising an NZBORA argument that is unsuccessful does not mean the ordinary rule that costs follow the event will be displaced.[151] Notably, recent appellate authorities have awarded costs on ordinary principles in favour of the Crown in unsuccessful NZBORA proceedings.[152]

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148 *Greenhorn v Speaker of the House of Representatives* [2023] NZHC 2865 (footnote in original).

149 *Attorney-General v Udompun* [2005] 3 NZLR 204 (CA) at [186].

150 Hammond J, writing separately, essentially agreed with the majority on this point: see at [223]–[224].

151 Costs judgment, above n 130, at [5(c)].

152 See for example *Free to be Church Trust v Minister for COVID-19 Response*, above n 92, at [142]; and *Chief of Defence Force v Four Members of the Armed Forces* [2025] NZSC 34, [2025] 1 NZLR 21 at [157].

Analysis

[195] It is difficult to reconcile the respondents' approach to the substantive hearing and the question of mootness, not only before us but also in the High Court, with its submission that the proceedings did not involve the public interest. They clearly did. The Crown did not wish to pursue the mootness argument on the substantive appeal, saying it was in the public interest that these issues were aired, yet denied there was a public interest when it came to the question of costs.

[196] We accept Mr Reid's submission that the Orders were of exceedingly wide impact and there was a public interest in a challenge to them. We consider there was significantly more public interest in the proceedings than the Judge suggested and this aspect of the appeal has some merit.

[197] We acknowledge there has been recent Supreme Court authority in the case of *Chief of Defence Force v Four Members of the Armed Forces*, where the Supreme Court did not see reason to depart from the ordinary rule that the successful party should be awarded costs.[153] However, we view the present case as quite different given the much wider group of people affected by the face covering requirements.

[198] The appellant also had a measure of success in respect of its claim that s 14 of NZBORA was engaged by the Orders and that does not appear to have been taken into account in any meaningful way in the costs judgment.

[199] The level of disbursements incurred by the respondents also gives us pause. We have already discussed the law on the mistake alleged in this case and the admissibility of evidence which addresses information not available at the time of the decision. The most obvious example in this case is the evidence on the 2023 Cochrane Review. That necessitated the Second Otago University Report. While the respondents should not have been put to the cost of incurring that disbursement, both the appellant and the respondents contended that evidence post-dating the decisions was relevant.

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153 *Chief of Defence Force v Four Members of the Armed Forces*, above n 152, at [157].

[200] The real issue, and the one which appeared to exercise the Judge, is the requirement for a party to have acted reasonably even if the proceeding concerned a matter of public interest. As we have discussed, the appellant's original mistake of fact argument was untenable. The appellant's case in the High Court morphed from the original mistake of fact argument to the *Air Nelson* argument at a late stage.[154] We also acknowledge that the Judge was in a good position to assess the reasonableness or otherwise of how the appellant conducted the proceedings in the High Court.

[201] The task then is to balance the public interest in proceedings (assessed at a high level) and the measure of success against concerns as to the reasonableness of the appellant's conduct of the proceedings. We consider the appropriate result is to order the appellant to pay 25 per cent of the respondents' total costs and disbursements. That reflects the public interest in a challenge to the face covering requirements, tempered with the deficiencies in how the challenge was conducted.

[202] For these reasons, we allow the appeal in respect of costs and the High Court costs order is set aside. The appellant is, however, to pay the respondents costs of $29,472.38, being approximately 25 per cent of the total High Court award of costs and disbursements.

Costs in the Court of Appeal

[203] We have no concerns as to the conduct of the appeal. Given our view of the public interest in the proceedings, we are satisfied that costs in this Court should lie where they fall.

Result

[204] The substantive appeal is dismissed.

[205] The appeal against the High Court costs decision is allowed. The costs order is set aside and replaced with an order that the appellant pay the respondents $29,472.38 in costs.

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154 Judgment under appeal, above n 4, at [59]–[62].

[206] There is no order in this Court as to costs.

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