

23 December 2021

Hon Nanaia Mahuta  
Minister of Foreign Affairs  
By email: [Nanaia.Mahuta@parliament.govt.nz](mailto:Nanaia.Mahuta@parliament.govt.nz)

Hon Kris Faafoi  
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Tēnā kōrua Minister Mahuta raua ko Minister Faafoi

### **Urgent assistance for Afghan nationals who eligible to be granted New Zealand visas**

I am writing to you as the President of the New Zealand Law Society | Te Kāhui Ture o Aotearoa regarding the current situation in Afghanistan, and the limited options available to Afghan nationals seeking to travel to New Zealand.

The Law Society is concerned the Ministry of Business, Innovation and Employment (**MBIE**) and the Ministry of Foreign Affairs and Trade (**MFAT**) are acting contrary to a recent High Court decision, and frustrating Cabinet's August decision on the assisted expatriation from Afghanistan of certain Afghan nationals to New Zealand.

#### *Background*

A large group of Afghan nationals were originally identified as being at risk of persecution by the Taliban because they assisted the New Zealand Defence Force and other allied forces in Afghanistan (or had family members who provided such assistance). This led to the eventual formation of Operation Whakahokinga Mai (**Operation**), that was designed to expatriate and resettle these identified Afghan nationals.

On 16 August 2021, the COVID-19 Ministerial Group agreed (as recorded in minute CMG-21-MIN-0001) that Afghan nationals could be considered for *resettlement* in New Zealand if they met certain criteria, which are set out in that minute.<sup>1</sup>

That minute also confirmed:<sup>2</sup>

1. work was being undertaken to identify and support New Zealanders and eligible Afghans for safe travel to New Zealand; and

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<sup>1</sup> COVID-19 Ministerial Group Minute CMG-21-MIN-0001, at 1.2.1 to 1.2.4 (inclusive). A copy of this minute is available here: <https://www.mfat.govt.nz/assets/OIA/CMG-21-MIN-0001-Minute.pdf>.

<sup>2</sup> At points 3 and 4 respectively.

2. People in Afghanistan with a valid New Zealand visa could also be *included in exit flights if space permitted*, and granted a border exception to enter New Zealand.

On 25 August 2021, Cabinet (as recorded in Cabinet Minute CBC-21-MIN-0080) agreed to:

1. strictly apply the *resettlement criteria* in the face of significantly higher numbers than expected;
2. direct officials to investigate options available in relation to *any visas* that were currently being processed for those individuals who *may not meet* the previously approved *resettlement criteria*; and
3. stop accepting applications under the *resettlement criteria* at 11.59pm on Wednesday, 25 August 2021.<sup>3</sup>

Therefore, there were two defined cohorts of individuals who were approved for expatriation under the Operation. The first cohort comprised of individuals who met the resettlement criteria, and the second comprised of those who held valid visas that permitted entry via New Zealand's closed border. The Operation, and expatriation assistance, focussed on both cohorts (where space permitted for the second group). However, only the first cohort was entitled to full resettlement assistance in New Zealand.

#### *The Afghan Nationals judgment*

In its recent *Afghan Nationals v The Minister for Immigration (Afghan Nationals)* judgment, the High Court found MBIE had misapplied the law when it suspended processing resident visa applications due to COVID-19 border restrictions.<sup>4</sup> The Court has ordered MBIE to promptly consider and determine the Refugee Family Support Category (RFSC) visa applications which relate to that proceeding.<sup>5</sup>

The Court also found MBIE had erred in law in declining Critical Purpose Visitor (CPV) visas<sup>6</sup> under the 'humanitarian reasons' exception to the border restrictions.<sup>7</sup> The Court held that the exceptions were not limited to humanitarian considerations arising *within* New Zealand, and clearly applied to the circumstances arising in Afghanistan.<sup>8</sup> Immigration Instructions have now been amended so that CPV visas can be considered only where the humanitarian considerations arise within New Zealand.

#### *Current approach*

Since the *Afghan Nationals* decision was issued, we have received reports of MBIE failing to reconsider CPV visa applications which were wrongly declined because MBIE misinterpreted the relevant Immigration Instructions. It appears MBIE has informed some applicants that "*there is no*

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<sup>3</sup> A copy of this minute is available here: <https://www.mfat.govt.nz/assets/OIA/CBC-21-MIN-0080-Minute.pdf>.

<sup>4</sup> *Afghan Nationals v The Minister for Immigration and Chief Executive of Ministry of Business, Innovation and Employment* [2021] NZHC 3154.

<sup>5</sup> *Afghan Nationals v The Minister for Immigration*, at [141].

<sup>6</sup> Critical Purpose Visitor visas were created for the purpose of granting border exemptions for a prescribed set of reasons, including humanitarian reasons.

<sup>7</sup> *Afghan Nationals v The Minister for Immigration*, at [118].

<sup>8</sup> *Afghan Nationals v The Minister for Immigration*, at [140].

*legal right of review or reconsideration for [expressions of interest] that do not result in an invitation to apply [and MBIE] has no legal ability to re-open or review EOIs once a decision has been made”.*<sup>9</sup>

We note there is nothing prohibiting MBIE from re-opening or reviewing the expressions of interest. Further, if a review or reconsideration is not undertaken, a new expression of interest would be required. The recent changes to the Immigration Instructions, which now require humanitarian circumstances to arise *in New Zealand*,<sup>10</sup> leaves those individuals without any remedy. This approach significantly impedes access to justice, and this would not have been the Court’s intent. Insofar as this affects individuals whose CPV visa decisions were made incorrectly, this is an improper and obstructive response to the Court’s findings, and to MBIE’s obligation to observe the law.

MBIE cannot properly and absolutely discharge its statutory functions in circumstances where its decisions are found to be unlawful.<sup>11</sup> We therefore urge you to direct MBIE officials to exercise the statutory powers available to them to reconsider any expressions of interest which were previously incorrectly declined.<sup>12</sup>

### *Options for leaving Afghanistan*

We believe a large group of Afghan nationals who have applied for RFSC and CPV visas (including individuals whose CPV visa applications that were incorrectly declined) may be eligible to secure expatriation assistance in accordance with the 16 August Cabinet decision.

In our view, it would be inequitable to refuse assistance to these individuals, as they would have been eligible to be included on expatriation flights if their resident and/or CPV visas were processed and determined correctly under the criteria that applied at the time their applications were submitted to MBIE. These individuals should not now be further disadvantaged due to an earlier incorrect determination by officials which the court has clearly indicated needs to be addressed.

We therefore ask that you consider the following options:

1. **Reconsidering any CPV visa applications which were previously incorrectly declined:** these applications were declined because MBIE erred in law by misinterpreting the relevant Immigration Instructions. Had MBIE correctly interpreted and applied the Immigration Instructions, the applicants would be eligible to be granted a CPV visa and would have boarded flights out of Afghanistan.
2. **Priority processing for RFSC applications submitted by Afghan nationals:** MBIE is now required to process all RFSC residence visas which were submitted prior to the 19 March 2020 border closure, in accordance with the law and the *Afghan Nationals* judgment. We understand a number of these RFSC visa applications may even be ‘decision-ready’, and we

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<sup>9</sup> See, for example, the appended letter from Community Law Centres o Aotearoa, dated 17 December 2021.

<sup>10</sup> The relevant criteria for the ‘humanitarian reasons’ border exception were previously set out in Immigration Instruction H5.30.25. Instruction H5.30.25 was amended on 29 November 2021, after the *Afghan Nationals* decision was issued, to clarify that this border exception only applies to humanitarian crises occurring in New Zealand.

<sup>11</sup> *Afghan Nationals v The Minister for Immigration*, at [108].

<sup>12</sup> Section 13 of the Interpretation Act 1999 provides a statutory support for this approach. Section 13 states: “[t]he power to make an appointment or do any other act or thing may be exercised to correct an error or omission in a previous exercise of the power even though the power is not generally capable of being exercised more than once”.

urge you to direct MBIE to process any remaining applications as a priority to allow those individuals to be issued resident visas and expatriated from Afghanistan.

3. **Visa-holders in Afghanistan must be allowed to board flights out of Afghanistan if space permits, and they are granted a border exception to enter New Zealand:** the High Court has determined that the applicable border entry requirements are those that were in effect at the time the entry permission is sought (rather than those in force at the time the visa applications were submitted).<sup>13</sup> On this basis, these applicants should be granted border exceptions to enter New Zealand. The decision of the COVID-19 Ministerial Group clearly provides for people in Afghanistan with a valid New Zealand visa to board flights out of Afghanistan, if space permits and they are granted a border exception to enter New Zealand. In light of this policy, ensuring that the court's decision can be given effect will send a strong message of New Zealand's respect of the rule of law in this situation. We therefore urge you to give effect to this decision and provide some assurances that Afghan visa-holders will be allowed to board flights where seats are available.

#### *Next steps*

The personal safety of these Afghan nationals is at grave risk while they remain in Afghanistan, and we respectfully ask that you consider the issues we have raised in this letter on an urgent basis. These issues are time-critical, and any delay in promptly addressing these issues (including after the Christmas break) could significantly increase the risk to the personal safety of these individuals, in a situation where had MBIE applied the law appropriately, many of those individuals would now be safely in New Zealand.

If you have any questions, or if further discussion would assist, please feel free to contact me via the Law Society's Law Reform & Advocacy Manager, Aimee Bryant ([aimee.bryant@lawsociety.org.nz](mailto:aimee.bryant@lawsociety.org.nz)).

Nāku iti noa, nā



Tiana Epati  
**President**

Appended: Community Law Centres o Aotearoa letter to MBIE, dated 17 December 2021.

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<sup>13</sup> *Afghan Nationals v The Minister for Immigration*, at [141].

17 December 2021

**Carolyn Tremain**  
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Tēnā koe Ms Tremain,

### **Afghan Nationals v The Minister for Immigration**

1. We refer to the judgement in *Afghan Nationals v The Minister for Immigration* [2021] NZHC 3154. We are concerned at the approach by INZ in applying Cooke J's findings to both Refugee Family Support Category ('RFSC') resident visa applications and Critical Purpose Visitor Visa applications on humanitarian grounds ('humanitarian CPVVs').

#### **Reconsideration of humanitarian CPVVs**

2. Following this judgement, some of our Community Law Centres (CLCs) have submitted requests that INZ reconsider the decline of applications for humanitarian CPVVs. We have been disappointed to see a variety of inconsistent response from INZ. Some CPVV applications have been reconsidered and granted while others have received responses from INZ stipulating that applicants who cannot demonstrate that their family members assisted a NZ agency in Afghanistan will not meet the humanitarian exception criteria. Further, INZ has refused to reconsider some requests at all stating '*there is no legal right of review or reconsideration for EOIs that do not result in an invitation to apply. Immigration New Zealand (INZ) has no legal ability to re-open or review EOIs once a decision has been made, so unfortunately we are not able to reconsider your previous EOI.*'
3. We are very concerned at these inconsistent approaches. We are astounded at INZ's refusal to consider some declined humanitarian CPVVs given that the *Afghan Nationals* judgement found that INZ '*erred in law in declining the applicants' Critical Purpose Visitor Visa applications by reason of a misinterpretation of H5.30.25*'.<sup>1</sup>
4. Most, if not all, of the humanitarian CPVVs that have now been reconsidered and approved had been declined at the Expression of Interest ('EOI') stage. Given that INZ clearly is reconsidering

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<sup>1</sup> *Afghan Nationals v The Minister for Immigration* [2021] NZHC 3154 at [141(d)]



some EOIs the statement that INZ *'has no legal ability to re-open or review EOIs once a decision has been made'* is incorrect.

5. As Cooke J found that INZ misinterpreted the humanitarian exception and applied the wrong criteria when considering humanitarian CPVV applications, we submit that INZ must consider and review any requests for reconsideration of humanitarian CPVV decisions including those that were declined at the Eoi stage. To refuse to do so is to act in contravention of the High Court judgement.
6. We are also concerned that, in response to some requests for reconsideration, INZ has required that applicants demonstrate family links to the NZ Defence Force or other NZ agencies, making statements such as this:

*'It is noted that we hold no information (either from the EOI or on our files) that indicate that this client, nor their family in New Zealand, provided assistance to a New Zealand agency in Afghanistan. Cooke J noted in his judgement that an association with New Zealand agencies during the Afghanistan War put particular people at a significantly greater risk that would meet the humanitarian threshold. This put their risk above and beyond the risk a general population faced in times of extraordinary circumstances around the world.'*

7. This approach indicates a misinterpretation of the *Afghan Nationals* judgement. While assistance to NZ agencies was **one factor** considered as constituting exceptional humanitarian circumstances, the judgement specifically refers to other factors as meeting the humanitarian circumstances requirements as well, such as belonging to a persecuted minority and having lodged a RFSC residence application with Immigration New Zealand:

*'There is a further factor that satisfies the requirement that the humanitarian circumstances of an exceptional kind make it desirable to allow the applicants' entry into New Zealand. That is that the applicants have applied for, and were on the cusp of being granted residency in New Zealand to allow them to join their family here under the Refugee Family Support category when the border was closed. Were it not for the border closure their applications to move to New Zealand could have been finalised. They have since been faced with the humanitarian crisis in Afghanistan, and have compelling reasons to be granted an exemption that allows them to travel to New Zealand in particular given their intention to re-settle here.'*<sup>2</sup>

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<sup>2</sup> *Afghan Nationals v The Minister for Immigration* [2021] NZHC 3154 at [102]



8. Nowhere in the judgement is there a requirement that CPVV applicants **must** demonstrate a connection to the NZ Defence Force, other considerations are listed at paragraph 105 of the judgement.
9. Interpreting the *Afghan Nationals* judgement as requiring applicants to show a family link with a NZ agency leads to perverse outcomes – outcomes that Cooke J stated should be avoided. Cooke J's findings could be applied to humanitarian CPVV applications<sup>3</sup> from other countries depending on applicants' specific humanitarian circumstances and links to NZ. Including a requirement that, prior to 29 November, any humanitarian CPVV applicant would have needed to show a family link to a NZ agency leads to absurd outcomes and essentially turns the humanitarian CPVV into an Afghan response visa – one that can only be available to those in Afghanistan with family links to a NZ agency. We do not agree that this is the outcome Cooke J had in mind. Links to a NZ agency should be considered as a strong factor leading to exceptional humanitarian circumstances but cannot be the only factor relied on.
10. Accordingly, we request that further steps are taken to ensure that this judgement is interpreted and applied correctly to all requests for reconsideration of humanitarian CPVVs.

#### **Refugee Family Support Category**

11. A further concern is that INZ appear to only be processing the RFSC applications of those involved in the court case, statements have been made in the media that only 17 are to be processed<sup>4</sup>. The judgement is clear that applicants who had submitted their residence application before the borders closed must have their visas processed as per the Immigration Instructions in place at the time they applied, irrespective of the country they come from or the circumstances.
12. Accordingly, we expect that all RFSC applications will now be processed, particularly those that had been processed to the 'furthest point' or a 'decision-ready point'. As Cooke J found that the border closure was *ultra vires*<sup>5</sup>, those decisions must be based on the circumstances of the applicants and sponsors on March 19 2020 when the borders closed.

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<sup>3</sup> Those applied for before 28 November when the criteria for this visa changed

<sup>4</sup> Statement by INZ General Manager Border and Visa Operations Nicola Hogg in [Immigration court ruling 'life-saving', but NGO frustrated with slow processing of Afghans | RNZ News](#)

<sup>5</sup> *Afghan Nationals v The Minister for Immigration* [2021] NZHC 3154 at [141(a)]



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Nāku noa, nā

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