IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV 2007-404-004732

UNDER	the Judicature Amendment Act 1972 and the Immigration Act 1987
BETWEEN	AUDOLINA CARRASCO CORNEJO First Plaintiff
AND	LUIS GONZALO ROJAS BLANCO Second Plaintiff
AND	GONZALO ANDRES ROJAS CARRASCO, JAVIERA ALEJANDRA ROJAS CARRASCO AND MARIA FERNANDA ROJAS CARRASCO Third Plaintiffs
AND	ATTORNEY GENERAL Defendant

Hearing: 31 October 2007

Appearances: C Curtis for Applicants
S J Mount for Defendant

Judgment: 5 November 2007 at 4.00 pm

JUDGMENT OF WINKELMANN J

This judgment was delivered by me on 5 November 2007 at 4.00 pm pursuant to Rule540(4) of the High Court Rules.

Registrar/ Deputy Registrar

Marshall Bird & Curtis, Auckland
Crown Solicitor, Auckland

[1] The plaintiffs seek to judicially review the decisions of Immigration New Zealand (INZ) to make and implement removal orders in respect of the first and second plaintiffs and two of the third plaintiffs Gonzalo and Javiera Carrasco. All plaintiffs are Chilean born with the exception of the third plaintiff Maria Carrasco who was born in New Zealand and is a New Zealand citizen. Although the judicial review proceeding has a hearing date on 22 November 2007, INZ has stated its intention to take steps to remove the plaintiffs who are subject to removal orders from New Zealand (with the exception of the second plaintiff who has already been removed) at any time after 7 November 2007. The plaintiffs seek various interim orders by way of declaration designed to prevent their removal prior to this Court's determination of the application for judicial review. They also seek declarations that whilst they remain in New Zealand they not be separated or held in custody.

Relevant background facts

[2] Audolina Cornejo and Luis Blanco are Chilean citizens. In June 2003 they arrived in New Zealand with their children Javiera Carrasco and Gonzalo Carrasco. They applied for and were granted three month visitor's permits valid until 26 September 2003. Subsequently they applied for and were granted two further visitor's permits on 12 August 2003 and 9 March 2004, the last of which expired on 9 September 2004. The family were not eligible for further visitor's permits as immigration policy states that visitors to New Zealand are limited to a maximum stay on a visitor's permit of nine months in any 18 month period.

[3] On 7 August 2003 Ms Cornejo and her family lodged a claim with the Refugee Status Branch for refugee status. That claim was declined on 29 June 2004. The family appealed to the Refugee Status Appeals Authority. The claimed basis for refugee status before the Authority was that Ms Cornejo was fearful of persecution by three individuals if she returned to Chile. The first individual AB was a former senior military man. Ms Cornejo claimed that she knew details about arms smuggling by AB and as a consequence he wished her harm. In relation to the other two individuals DB and GH, the first plaintiff claimed that she had been accused of

being involved in a robbery with them. By reason of her dealings with the authorities in the course of clearing her name, DB and GH now also wished her harm. The appeal before the Refugee Status Appeals Authority was declined on 8 June 2005, the Authority finding that Ms Cornejo's evidence in support of her claim to refugee status was not credible.

[4] While the plaintiffs' claim for refugee status was being considered the family were granted a number of temporary permits. The last permit was revoked effective 1 August 2005 and the first and second plaintiffs, and the children Gonzalo and Javiera, have remained unlawfully in New Zealand since that time.

[5] On 4 March 2005 the plaintiff Maria was born. She was diagnosed at birth as having bilateral dislocated hips, a congenital condition. This was successfully treated with a Pavlik harness, a non-surgical intervention.

[6] On 12 September 2005 the family appealed to the Removal Review Authority. The Removal Review Authority had before it a letter from the paediatric surgeon who was in charge of Maria's care. He said that the treatment with the Pavlik harness had been successful, and that he would see her again when she was aged 9 months, 12 months, 18 months and 24 months. He said that if everything progressed as planned she would not require any further surgical intervention, but it was possible that she might require something further in the future.

[7] Several arguments were advanced before the Review Authority as to why it would be unduly harsh for the plaintiffs to be removed from New Zealand. These included that the first and second plaintiffs had a New Zealand born child, the medical and psychological safety Ms Cornejo, the credibility findings of the Refugee Status Appeals Authority and the current situation in Chile. The Review Authority said that it had considered detailed submissions regarding the welfare of the New Zealand citizen child Maria. It noted that it had not been submitted that appropriate care would not be available for her in Chile and also that the second plaintiff had stated in his submission to the Authority that he was born with dislocated hips and received treatment in Chile over three years to enable him to walk properly.

[8] The Authority came to the same conclusion as the Refugee Status Appeals Authority in relation to the credibility of Ms Cornejo. It said that having considered all of the arguments advanced, there were no exceptional circumstances of a humanitarian nature that would make it unjust or unduly harsh for the first and second plaintiffs to be removed from New Zealand.

[9] On 22 August 2006, the family made representations to the Minister of Immigration in support of a request for a special direction to allow the plaintiffs to remain in New Zealand. The Minister declined to intervene and suggested that the family should make plans to leave New Zealand immediately. On 9 November 2006 the family lodged a complaint with the Ombudsman. On 18 January 2007 the Ombudsman advised the family that he was not going to investigate their complaint further.

[10] On 8 January 2007 the family made further submissions to the Minister of Immigration who on 7 March 2007 advised the family that they had not identified any new issues to warrant his further consideration of their situation and the family was strongly advised to make immediate plans to depart New Zealand.

[11] On 14 March 2007, the family lodged a further complaint with the Ombudsman who advised the family on 7 June 2007 that he was not going to investigate their complaint.

[12] On 12 June 2007, the family were served with removal orders.

[13] On 15 June 2007 the family made a third submission to the Minister of Immigration in support of a request for a special direction to stop removal. By letter dated 19 June 2007 the Minister of Immigration responded that he had considered the representations closely and had considered the rights and well-being of the citizen child, Maria. He said that on balance he did not consider the family's circumstances to be sufficiently exceptional to warrant his intervention. He strongly advised the family to finalise their plans to depart New Zealand as soon as possible.

[14] The second plaintiff was detained pending removal and brought habeas corpus proceedings in the High Court challenging his detention. Those proceedings came before Keane J (HC AK CIV2007-404-3468, 19 June 2007). The Judge, noting the narrow scope of the habeas corpus jurisdiction, said that he would proceed on the basis that he had inherent jurisdiction to grant interim relief to prevent the second plaintiff's removal from New Zealand to enable him to issue judicial review proceedings. He then considered the application for a writ of habeas corpus and as an alternative, whether interim relief should be granted to allow review proceedings to be commenced. He applied a low threshold for relief: that interim relief ought to be granted unless there was no prospect of success with the proposed proceeding. In declining interim relief and the application for release on the writ of habeas corpus, Keane J said (at [32]-[34]):

> Whether or not Mr Blanco has applied for the right remedy, an issue that I do not think to be insuperable, he faces this immediate difficulty. He and his wife have had every basis on which they might stay in New Zealand appraised on two statutory appeals and they have not succeeded on either. Nor have they succeeded in their appeals either to the Minister or to the Ombudsman. Mr Blanco is in New Zealand unlawfully and in that sense both the removal order and the warrant for his detention are beyond challenge.
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> Should then Mr Blanco be able to remain in New Zealand to pursue an application for review, anticipating that the Court of Appeal, on the appeal from the *Ding* case, will elevate the welfare of Maria, a New Zealand citizen, from a primary to the paramount consideration? That would only be justifiable, I consider, if on the inquiry that would then have to be made some consequence for Maria would be identified that would be harsh or unjust. There is no evidence of either.
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> On this application Mr Blanco's counsel argued for a wider inquiry into Maria's wellbeing, as a potentially alien child, in Chile. But that has never been argued before. The only risk that the Removal Appeal Authority was asked to consider was whether Maria could be treated adequately for hip dysplasia in Chile. The Authority discounted any such risk, relying on the surgeon's five month appraisal and his prognosis. In deciding whether on humanitarian grounds the removal order should cease, the immigration officer came to the same conclusion from what Mr Blanco told him and what he saw himself. That, I consider, was not unreasonable.

[15] The second plaintiff was removed from New Zealand.

[16] On 21 June 2007 the lawyer for the plaintiffs contacted INZ requesting time for Ms Cornejo and her children to depart New Zealand. The family requested time

to arrange a travel document for Maria and to sell household items, but said that they wished to leave New Zealand as soon as possible.

[17] On 25 June 2007 INZ advised Ms Cornejo that time would be allowed for that, but required that it receive a completed travel itinerary for travel no later than 31 July 2007. INZ reserved the right to take the family into custody for the purposes of executing the removal order served on them on 12 June 2007 should the family not comply with those requests.

[18] On 3 September 2007, Ms Cornejo was requested to supply INZ with a confirmed travel itinerary valid for travel before 21 September 2007, and to surrender Maria's passport before 5 September 2007. Ms Cornejo was again told that removal action may be a possibility if she failed to take the opportunity to depart New Zealand voluntarily.

[19] On 5 September 2007 a decision was made to conduct a humanitarian interview with Ms Cornejo to reassess the removal option. That interview was conducted by Immigration Officer Karen McGilvary on 10 September 2007. Present at the interview were Ms Cornejo, her lawyer and a translator. Ms McGilvary has filed an affidavit in which she says that at the time of the interview she had not formed any opinion as to whether removal would take place and annexes the record of the interview signed by Ms Cornejo. She asked Ms Cornejo to surrender Maria's passport. She told her that although she was not required to surrender the document it would be viewed as a sign of good faith if she did so. She says she explained to Ms Cornejo that it was common practice for compliance officers to request all valid travel documents. The passport was provided.

[20] Ms McGilvary says she explained to Ms Cornejo that the purpose of the interview was to determine whether or not she would be removed and that if the decision was that she would be removed from New Zealand then a meeting would take place to discuss removal options. She told her that INZ would be prepared to consider granting her a temporary permit under s 35A of the Immigration Act, which would have allowed her to apply for a work permit if she met the criteria for the skilled migrant category. She invited Ms Cornejo to make submissions on the issue

after the interview. Submissions were made in support of the issue of a work permit in relation to both the first and second plaintiffs, but neither met the relevant criteria for skilled migrants.

[21] The humanitarian interview was completed on 13 September 2007. The lawyer for the plaintiffs was requested to have any further submissions to INZ by 14 September 2007, and was told that a decision would be completed by 21 September 2007.

[22] A further submission was received from the lawyer for the plaintiffs on 17 September 2007. That submission said that the central plank of the family's claim to stay in New Zealand was that Maria, a New Zealand citizen, has a medical condition which requires on-going supervision to avoid possible serious life affecting deterioration. As Maria will be a foreigner in Chile and in other countries, her access to competent, speedy treatment is severely prejudiced by the deportation of her family. Maria, it was said, has a right to stay in New Zealand for medical care and has a right to family life here in New Zealand.

[23] Ms McGilvary says that on 24 September 2007 she decided that removal should proceed after taking into account all the information she had gathered. She told Ms Cornejo of that outcome on 25 September 2007, but said that INZ was prepared to wait until 7 November 2007 for the family to depart New Zealand, to allow Maria to attend an appointment at Auckland Starship Hospital for a check-up on 30 October 2007. In her affidavit Ms McGilvary says that the decision to wait for the medical appointment was made out of consideration for the family.

[24] Ms Cornejo has filed an affidavit in support of the application for interim relief. She claims that the outcome had already been determined before the humanitarian interview. This is on the basis that she was told by Ms McGilvary that:

> When the decision was made whether I could go or stay, there would be meeting between me and Immigration to negotiate a non-custodial removal. I believe that this indicates that despite the interview being to determine whether I should stay in fact the decision against my staying had already been made before the 10 September.

[25] She also says that Starship Hospital has changed her daughter's appointment to 11 December 2007 and notes in that regard "I have no influence over the hospital". She annexes a letter from Mr Richard Harman. Mr Harman is a surgeon at Waitemata District Health Board for whom Ms Cornejo has worked as a housekeeper. In the letter he says that Ms Cornejo had told him about her child Maria, and that he subsequently spoke to Maria's consultant at Starship Hospital, Dr Terri Bidwell. Although she had not seen her before, Dr Bidwell agreed to see Maria, but that necessitated a later appointment. Mr Harman said he explained to Dr Bidwell that "it was very important for Lola [Ms Cornejo] in terms of having her child seen as it had a major consequence on her ability to stay in New Zealand". Whatever the reason for his intervention, it had the effect of postponing the appointment past the 7 November 2007 date that INZ had agreed it would delay removal action prior to, and also past the date of the judicial review hearing on 22 November 2007.

[26] INZ maintains that it should be entitled to remove the plaintiffs from New Zealand at any time after 7 November 2007. It says that the interim orders should not be granted as the plaintiffs have had every opportunity to explore any rights they might have had in New Zealand and have been unsuccessful. This proceeding is simply a further delaying tactic as it has no prospect of success. Finally, it is argued that Ms Cornejo has demonstrated a lack of good faith by shifting the hospital appointment until after the date of the judicial review proceedings.

Grounds upon which interim relief will be granted

[27] Interim relief is sought under s 8 of the Judicature Amendment Act 1972, which provides in material part:

> (1) Subject to subsection (2) of this section, at any time before the final determination of an application for review, and on the application of any party, the Court may, if in its opinion it is necessary to do so for the purpose of preserving the position of the applicant, make an interim order for all or any of the following purposes:
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> > (a) Prohibiting any respondent to the application for review from taking any further action that is or would be consequential on the exercise of the statutory power:

> (b) Prohibiting or staying any proceedings, civil or criminal, in connection with any matter to which the application for review relates:
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> (c) Declaring any licence that has been revoked or suspended in the exercise of the statutory power, or that will expire by effluxion of time before the final determination of the application for review, to continue and, where necessary, to be deemed to have continued in force.
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> (2) Where the Crown is the respondent (or one of the respondents) to the application for review the Court shall not have power to make any order against the Crown under paragraph (a) or paragraph (b) of this section; but, instead, in any such case the Court may, by interim order,-
>
> (a) Declare that the Crown ought not to take any further action that is or would be consequential on the exercise of the statutory power:
>
> (b) Declare that the Crown ought not to institute or continue with any proceedings, civil or criminal, in connection with any matter to which the application for review relates.

[28] In determining whether it is necessary to grant relief for the purpose of preserving the position of the applicant, the strength of the applicant's case is an important factor. An applicant is not entitled to interim relief where his or her case is meritless, otherwise the application becomes a mere delaying tactic: *Osborne v Minister of Education* M198/99, 4 October 1999 (Hammond J). In *H v Refugee Status Appeals Authority* CP203/97, 25 September 1997, Greig J said that:

> If it is obvious that the applicant cannot succeed it could not be right to give the relief sought.

[29] Other factors that may be relevant include the circumstances of the applicants, and the justice of the case. The expected duration of the interim order is also a factor.

[30] The desirability of enabling Maria to attend her medical appointment at Starship Childrens' Hospital is a factor weighing in favour of the grant of interim orders. But I also take into account that it is by reason of intervention by Mr Richard Harman, acting on behalf of Ms Cornejo, that the originally scheduled appointment of 30 October 2007 has been delayed to 11 December 2007. There is no medical reason for this delay.

[31] I also consider it significant that all of the medical evidence available on the file suggests that Maria's congenital condition has been successfully treated to date and that treatment of her condition is not on-going. The original October appointment was for an annual check up. The first plaintiff annexes a letter from the family doctor who confirms that Maria was treated successfully when a baby, and says:

> She is still under the care of Starship Hospital and at the last visit in October 2006 her hips appeared to be well positioned. This was confirmed by x-rays. She will require yearly follow-ups until the age of 8 years approximately to ensure the hips remain in a satisfactory position.

[32] The short duration of any stay of the removal orders is also a matter to be weighed. The judicial review proceedings are set down for a hearing on 22 November 2007. Accordingly, any interim order would be of a relatively short duration. Even so, I must consider the merits of the substantive proceeding because an interim order, however brief, cannot be justified where the proceeding is meritless.

[33] Mr Mount for the Crown submitted that there were effectively two grounds advanced for judicial review. First, that the decision to remove was taken without proper regard for the citizen child's rights and welfare, and second that the decision to proceed with removal was pre-determined in advance of the humanitarian interview. Ms Curtis for the plaintiff applicant agreed that these are the two principal grounds on which INZ's actions are challenged, but said in submissions that the primary ground is that relating to the welfare of Maria.

[34] I deal with the issue of pre-determination first. The allegation of pre-determination appears to be based upon the exchange during the interview described by Ms Cornejo in her affidavit and referred to above (at [25]). However, Ms McGilvary has addended to her affidavit a copy of the notes of the interview. The interview records that the official explained Ms Cornejo's immigration status and that the purpose of the interview was to decide whether INZ would execute the removal order served on Ms Cornejo. The notes record:

> If decision is to execute the removal order [client] given the opportunity to depart voluntarily. If decision is not to execute the removal order then invited to apply for a work permit.

[35] Since Ms Cornejo signed these notes it is difficult to see how the account Ms Cornejo now gives could be accepted. In the face of these matters, the plaintiffs' chances of succeeding on the ground of a pre-determination must be assessed as negligible.

[36] I then turn to consider the principal ground advanced, which is that the decision to remove was taken without proper regard for Maria's rights and welfare. In submissions before me Ms Curtis said that the challenge to the decision is based upon the High Court decision in *Ding v Minister of Immigration* (2006) 25 FRNZ 568. In that case Baragwanath J expressed the obiter view that the time had come for New Zealand Courts asked to review immigration cases affecting citizen children to adopt the child centred approach which informs the Care of Children Act 2004. Ms Curtis submitted that the approach articulated in *Ding* and other legislative policy would require the Courts to treat the interests of the child as more than simply a factor to be taken into account by the immigration authorities but rather the paramount consideration when considering removal of alien parents of a citizen child.

[37] Ms Curtis accepts that the decision in *Ding* does not represent the present law in New Zealand and that this Court remains bound by the Court of Appeal decision in *Puli'uvea v The Removal Authority & The Attorney General* CA 236/95 24 May 1996. In that case the Court said that while the best interests of the citizen child is a primary consideration, it is not the only or paramount consideration. In *Ding*, Baragwanath J accepted that *Puli'uvea* represents the present state of the law in New Zealand.

[38] Ms Curtis relies on the fact that a decision of the full Court of Appeal on appeal from the *Ding* decision is awaited. The plaintiffs are hopeful that the Court of Appeal decision will endorse the approach of Baragwanath J and affirm principles of general application such that the interests of a citizen child are paramount considerations in cases such as these. In this case, it is argued because monitoring

sessions for Maria's hip displacement must continue until she is eight and because she is unable to access essential medical care that she requires in Chile, the making of the removal order failed to take into account her rights and entitlements under the Care of Children Act in the manner *Ding* suggests is required. It is alleged that removal from New Zealand will impact severely upon her welfare and best interests, thus contravening the Care of Children Act and the New Zealand Bill of Rights Act.

[39] For the purposes of this application I proceed on the basis most favourable to the plaintiffs, which involves an assumption that Baragwanath J's obiter remarks in *Ding* are endorsed by the Court of Appeal. I assume that the Court of Appeal will decide to depart from existing authority (the decision in *Puli'uvea*) and adopt the approach discussed by Baragwanath J in *Ding*. I consider that the unusual approach of assuming a chance in the law is justified in the exercise of the discretion under s 8 where the applicant is seeking a preservation of the status quo of possibly as little as three weeks duration prior to a hearing, and when it is known that an important appeal decision with potential relevance to the review proceeding is imminent. This approach has the effect of setting the lowest possible threshold for the plaintiffs to establish that their claim has some merit.

[40] It is nevertheless necessary to state carefully what Baragwanath J did suggest as a possible approach for INZ and for our Courts. The approach he suggests is not as radical a departure from existing practice and law as the plaintiffs' counsel would have it. Baragwanath J did not propose that in immigration matters the interests of the citizen child should always be the paramount consideration for INZ or for the Courts sitting on review of immigration related decisions. He rejected a submission that the rights of a citizen child are absolute or that they carry with them the child's entitlement to have her alien parents remain in the jurisdiction so long as care is needed. He said that although the Care of Children Act 2004 and other statutes and conventions he referred to did not bear directly on immigration matters, their combined effect had altered the status of a New Zealand citizen child so that the child was the holder of a personal right to protection by the New Zealand Crown. He said that a dependent citizen child is entitled not to be compelled, by forced removal of his or her parents to unsafe conditions, either to accompany the parents or

to suffer the loss of their care, if to do so would be unjust or unduly harsh to them (at [226]). He suggests (at [283]):

> In cases where there is real reason to apprehend serious risk to a citizen child the hard look approach of *Pharmaceutical Management Agency Ltd v Roussel UCLAF Australia Pty Ltd* may well be necessary. Discharging this responsibility would not over-load busy immigration officers. A simple enquiry of the family as to where they would go and of the New Zealand Embassy as to the likely local conditions would provide the information necessary to avoid real risk. Such cases should be treated as falling within the limited sphere where independent inquiries cannot be avoided if the Crown is to perform its duty of protection.

And further (at [293]):

> In the case of young children their best interests will probably be met by accompanying their parents, wherever they may happen to go, unless there is patent risk of harm.

[41] He suggested that the interests of a citizen child should not be regarded simply as just another *Wednesbury* factor, and that it would be open to the Court to select from a range of options of intrusiveness of review, a more exacting standard.

[42] In this case there is nothing to suggest that Maria will be subject to risk if she returns to Chile so as to trigger the "hard look" approach suggested by Baragwanath J. Maria had a significant medical condition at birth but that has been successfully treated. She is now subject only to an annual check up regime. In her immigration interviews Ms Cornejo confirmed that good quality medical care will be available to Maria on her return to Chile. The only concern she expressed was how quickly Maria could access these services if she had to go through the public system. The second plaintiff confirmed in earlier proceedings that he received treatment for the same condition when he was a child.

[43] In 2005 the Removal Review Authority noted that at that point in time treatment, although in its early phases, should mean that Maria would not require surgical intervention. The Authority also considered it relevant that the second plaintiff had stated in his submission to the Authority that he was born with dislocated hips and been successfully treated in Chile. Accordingly, the Authority

concluded that there was nothing to indicate that any of the plaintiffs would be in danger in Chile.

[44] Further consideration was given by the Minister to Maria's interests on the three occasions he was asked to intervene. During the humanitarian interview undertaken by INZ there was extensive discussion of the likely impact on Maria of a relocation of the family to Chile.

[45] On the basis of all the information that the interviewing officer gathered, a decision was taken that removal proceedings should continue. However, allowance was made for the child to attend a further follow up appointment which was to have occurred in late October.

[46] Having reviewed the information before me, it is clear that care has been taken over Maria's situation throughout this process, but at each stage no risk has been identified in relation to her. In such circumstances I conclude that should the law in New Zealand move in the direction as hoped for by the plaintiffs, the present judicial review proceeding will still have negligible chance of success.

[47] Removal prior to 11 December 2007 may mean that Maria misses her appointment but that will occur because of intervention on Ms Cornejo's behalf in postponing the appointment. In any case the appointment is only for a check up, not for treatment.

[48] A further matter I weigh in relation to the interim relief is the issue of access to justice. Maria is entitled to those rights prescribed in the New Zealand Bill of Rights Act which includes s 27. Ms Curtis submits that if the plaintiffs are removed from New Zealand these judicial review proceedings cannot continue as it is still necessary for Ms Curtis to put together medical evidence to support the judicial review proceeding. Since the medical appointment has been moved until after the date of hearing it is difficult to see what further medical evidence can be gathered in the matter that is not presently before the Court. In any case, should Ms Curtis require further evidence from the doctors involved, that can be arranged in the absence of the plaintiffs by a simple letter of authority provided by Ms Cornejo. I

therefore do not accept that the removal of the plaintiffs raises significant access to justice issues. The possibility of removal has been long heralded, and it can be assumed that the plaintiffs have made, and have been advised to make, some arrangements in anticipation of that.

[49] I therefore have regard to the length of time until hearing, the desirability of Maria attending the medical appointment, the fact that it has been moved effectively at the plaintiffs' instigation until a date after the date of hearing, and also the prospects of success. As part of the latter exercise I have considered whether there is material to suggest that relocation to Chile is likely to expose Maria to significant risk. I have concluded that there is no reason to apprehend that Maria will be subject to risk on relocating to Chile and that the judicial review proceeding has almost no prospect of success. I also have taken into account that the plaintiffs have rigorously explored every legal avenue to avoid removal from New Zealand and their rights have been exhaustively considered at each stage. I conclude therefore that interim relief sought under s 8 should be refused.

Winkelmann J