



COVERSHEET

Minister	Hon Rachel Brooking	Portfolio	Immigration
Title of Cabinet paper	Government Response to the Petition of Juliana Carvalho: <i>Let Arianna stay in New Zealand New Zealand</i>	Date to be published	15 August 2023

List of documents that have been proactively released		
Date	Title	Author
June 2023	Government Response to Referral of petition of Juliana Carvalho: <i>Let Arianna stay in New Zealand New Zealand</i>	Office of the Associate Minister of Immigration
29 June 2023	Government Response to the Petition of Juliana Carvalho: <i>Let Arianna stay in New Zealand New Zealand</i> LEG-23-MIN-0112 Minute of Decision	Cabinet Office
1 June 2023	Briefing – Proposed Response to the Petitions Committee – petition of Juliana Carvalho – <i>Let Arianna stay in New Zealand</i>	MBIE

Information redacted

YES

Any information redacted in this document is redacted in accordance with MBIE's policy on Proactive Release and is labelled with the reason for redaction. This may include information that would be redacted if this information was requested under Official Information Act 1982. Where this is the case, the reasons for withholding information are listed below. Where information has been withheld, no public interest has been identified that would outweigh the reasons for withholding it.

Some information has been withheld for the reason of privacy of natural persons.

**Government Response to
Referral of petition from Juliana Carvalho:
“Let Arianna stay in New Zealand”**

**Presented to the House of Representatives
In accordance with Standing Order 380**

Introduction

- 1 The Government welcomes the Petition Committee's referral of this petition, and we thank the petitioner for bringing this matter to the Government's attention.
- 2 The Government has carefully considered the Petition Committee's referral of the petition entitled "Let Arianna stay in New Zealand."
- 3 The Government is responding to the report in accordance with Standing Order 380.

Request from petitioner

- 4 Request: *That the House of Representatives urge the Associate Minister of Immigration to exempt Arianna Alfonzo from the Acceptable Standards of Health policy and grant Arianna residence so she can live with her parents in New Zealand; and note that 4,179 people have signed an online petition in support of this.*
- 5 The petitioner's reason is stated as:
"Arianna's father, Allan, holds a permanent resident visa and has been living and working in New Zealand for 6 years. But because of the unfortunate and discriminatory immigration situation, our family have been forcefully separated during this period."
"Arianna is entitled to all rights guaranteed to children under the United Nations Convention on the Rights of the Child (UNCROC)..."
"...Children with disabilities are also specifically cited in the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD)..."
"The discrimination Arianna is facing as a result of the ASH criteria breaches and deny human rights in a number of respects domestically and internationally."
- 6 The petition of Juliana Carvalho was presented to Parliament on 4 May 2022 and 4,179 people signed an online petition to this effect.

Government response

Immigration health settings – Section A4 of the Immigration New Zealand Operational Manual

- 7 Immigration New Zealand (INZ), part of the Ministry of Business, Innovation and Employment (MBIE) must determine whether a person has an acceptable standard of health (ASH) when assessing a visa application. This assessment considers whether the person:
 - is likely to be a danger to public health
 - will impose significant costs and demands on health and education services, and

- is able to undertake the work or study on the basis of which they are applying for a visa.
- 8 The immigration officer holds a warrant of designation to make immigration decisions under the Immigration Act 2009. This warrant allows the immigration officer to use discretion to make informed decisions on visa applications.
 - 9 In some cases, the overriding issue of concern may not be the cost of services required or the ability of an applicant to undertake the purposes of their visa, but the need for services and resources which are already under pressure, such as renal services and residential care services. Having a disability does not pre-determine whether a person has an acceptable level of health.
 - 10 INZ has the ability to grant a medical waiver in certain circumstances and takes account of each individual's situation, including the degree to which the applicant would impose significant costs or demands on New Zealand's health or education services, whether the applicant has immediate family who are resident in New Zealand, the length of intended stay in New Zealand, and whether the applicant's potential contribution to New Zealand will be significant. Disabled applicants may be eligible for medical waivers even when the costs or demands on health and education services are assessed as significant.
 - 11 Consideration is not given to an applicant's ability to self-fund any treatment required or to arrange private insurance cover, as they automatically become eligible for publicly funded health services once they hold a work visa for more than two years or are granted residence.
 - 12 Applicants for residence class visas who are declined a medical waiver may submit a case to the Immigration and Protection Tribunal (IPT), which operates independently of INZ and can hear and determine appeals of visa decisions. In some cases, the IPT may confirm the decision as having been correct in terms of the residence instructions applicable at the time the visa application was made, but recommend that the special circumstances of the applicant are such as to warrant consideration by the Minister as an exception to those instructions, as per section 188(f) of the Immigration Act 2009.
 - 13 The IPT has been asked to adjudicate on 109 non-ASH appeal cases since 2018. In 15 out of the 109 cases, the IPT found that the INZ decision was correct, but recommended to the Minister that special circumstances warranted consideration as an exception to instructions. In 55 cases, the IPT found that the INZ decision to decline the application was correct under applicable residence instructions. In response to the remaining 39 cases, the applications were referred back to INZ for reconsideration.

Convention on the Rights of Persons with Disabilities

- 14 The United Nations Convention on the Rights of Persons with Disabilities (UNCRPD) was adopted by the United Nations General Assembly on

13 December 2006 and entered into force on 3 May 2008. New Zealand ratified the UNCRPD on 25 September 2008.

- 15 The UNCRPD provides both a general obligation in article 5 of non-discrimination on the grounds of disability and in article 18, a specific obligation in respect of freedom of movement and nationality.
- 16 Section 392 of the Immigration Act 2009 identifies the relationship between the Immigration Act 2009 and the Human Rights Act 1993, and recognises that immigration matters are inherently discriminatory, as individuals are treated differently based on personal characteristics. Nevertheless, INZ still endeavours to make sure that human rights legislation is complied with, and where apparent departures do occur, that there is sufficient reason for maintaining a distinction.
- 17 It is further noted that in a recent decision of the IPT in *AK (No Category) [2021] NZIPT 206087* the Tribunal Member stated that “The United Nations Convention on the Rights of Persons with Disabilities does not impose a mandatory requirement on New Zealand to grant residence to any person who has long-term physical, mental, intellectual or sensory impairments which may hinder their full and effective participation in society on an equal basis with others”.
- 18 As noted above, while potential migrants need to meet an acceptable standard of health, so they do not impose significant costs or demands on New Zealand’s publicly funded health system, those with minor or routine medical conditions are not impacted. MBIE considers that immigration health settings are appropriate under the UNCRPD.

United Nations Convention on the Rights of the Child

- 19 The United Nations Convention on the Rights of the Child (UNROC) was adopted by the United Nations General Assembly on 20 November 1989 and entered into force on 2 November 1989. New Zealand ratified the UNROC on 6 April 1993.
- 20 International obligations are primary, but not paramount, considerations in discretionary immigration decision making. It is noted however, that the rights in the convention generally apply to children within the jurisdiction of the signatory country. In this particular case, Arianna is not in New Zealand
- 21 The UNROC contains a wide range of rights. The most common UNCRPD rights are:
 - in all actions concerning children, their best interests shall be a primary consideration: article 3
 - the State shall respect the responsibilities, rights and duties of parents: article 5

- the right to know and be cared for by their parents as far as possible: article 7.1
- the right to preserve his or her identity, including family relations as recognised by the law without unlawful interference: article 8
- the right of any child who is capable of forming his or her own views to express those views in all matters affecting them: article 12,¹
- no child shall be subjected to arbitrary or unlawful interference with his or her family: article 16
- the state is to use its best efforts to ensure recognition of the principle that both parents have common responsibilities for the up-bringing and development of the child: article 18.1
- the right to the highest attainable standard of physical and mental health: article 24
- the right to an adequate standard of living for their physical, mental, spiritual, moral and social development: article 27
- a right to education: article 28.

Ministerial consideration

- 22 Ministers generally do not have the ability to intervene in individual cases, however, the Minister of Immigration is one of the major exceptions and exercising discretionary ministerial powers imposes a significant workload. While it is possible for a Minister of Immigration to retain all decision-making powers regarding cases where individuals have asked for ministerial intervention, traditionally, Ministers of Immigration have exercised the option for individual case work to be delegated to the Associate Minister of Immigration.
- 23 Immigration Ministers have traditionally accepted requests for intervention in individual cases, such as those seeking the grant of a visa as an exception. The majority of requests are for the exercise of absolute discretion under the Immigration Act 2009. As set out in section 11, when a decision is a matter of absolute discretion for the decision maker:
- people have no right to apply for the matter or decision (they can only make a request)
 - there is no obligation on the decision maker to consider the request or make any inquiries as a result of the request
 - if a request is considered, the decision maker is not obliged to give reasons for their decision

¹ This is also reflected in Section 377 of the Immigration Act 2009

- the Official Information Act 1982 and the Privacy Act 2020 do not apply in relation to reasons for any decision making on the request.

Conclusion

- 24 Intervention in the particular case of Arianna Alfonzo has been considered by Hon Phil Twyford in his previous capacity as the Associate Minister of Immigration and was declined.
- 25 Hon Twyford had been briefed regarding the role of New Zealand's international obligations in decision making related to immigration cases. This included obligations under the United Nations Convention on the Rights of the Child, and the Convention on the Rights of Persons with Disabilities.
- 26 The current Associate Minister of Immigration will not be revisiting the decision made in this case.