IMMIGRATION AND PROTECTION TRIBUNAL NEW ZEALAND **[2013] NZIPT 800413**

AT AUCKLAND

Appellant:	**AF (Kiribati)**
Before:	B L Burson (Member)
Counsel for the Appellant:	M Kidd
Counsel for the Respondent:	No Appearance
Date of Hearing:	21 March 2013
Date of Decision:	25 June 2013

DECISION

INTRODUCTION

[1] This is an appeal against a decision of a refugee and protection officer, declining to grant refugee status and/or protected person status to the appellant, a citizen of Kiribati.

[2] The appellant claims an entitlement to be recognised as a refugee on the basis of changes to his environment in Kiribati caused by sea-level-rise associated with climate change. The issue for determination is whether the appellant is able to bring himself within the Refugee Convention or New Zealand's protected person jurisdiction on this basis.

[3] Given that the same claim is relied upon in respect of all limbs of the appeal, it is appropriate to record it first.

[4] Before turning to the appellant's evidence, it is appropriate to begin with the evidence before the Tribunal about Kiribati itself, which provides the necessary context for the evidence of the appellant and his wife.

COUNTRY INFORMATION AND EXPERT EVIDENCE ON KIRIBATI

The 2007 National Adaptation Programme of Action (the 2007 NAPA)

[5] The 2007 NAPA, filed by Kiribati under the United Nations Framework Convention on Climate Change sets out the relevant human and physical geography. It states at pp4-5:

> Kiribati is situated in the Central Pacific Ocean and consists of 33 atolls with a total land area of about 800 sq km. The atolls exist in three separate groups – the Gilberts, Line and Phoenix. Each group has a separate Exclusive Economic Zone, with the total EEZ for Kiribati being around 3.5 million sq km. The atolls have a maximum height of 3 to 4 m above mean sea level.
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> Not all of the atolls are inhabited, and some are not capable of being inhabited. The total population of Kiribati during the 2000 census was 84494 and grew during the preceding 5 years at an annual growth rate of 1.7%. For the great majority, the livelihood is at the subsistence level, dependent heavily on natural environment resources. Monetized socioeconomic systems are predominating in urban Tarawa and on Kiritimati Island, but there is strong interdependency between these systems and that of the quality of the state of the environment.
>
> Subsistence and sustainable means of livelihood are based on indigenous tree crops, namely coconut tree, pandanus tree, bwabwai (giant taro), breadfruit and banana. The productivity of these tree crops is dependent on a healthy environment. The coconut tree produces the important export product, copra; the pandanus tree bears fruits which are traditionally preserved for consumption especially during drought years; bwabwai is a prestigious crop; breadfruit and banana are the only fruit trees that provide varied diet from the mainstay of coconut, bwabwai, and fish.
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> Larger atolls contain a fresh groundwater lens which 'floats' on seawater. The quality and depth of the groundwater lens varies within an atoll, and affects the agricultural productivity of crops, particularly bwabwai plantations. For most people the groundwater lens is the only source of potable water. Recharge to the groundwater lens is from precipitation of about 2350 mm per year, with the Northern Gilbert and Line Islands being wetter than the Southern Gilbert. Risks to the land resource based livelihood of the people are from droughts, inundation of land from storm surges, salt water intrusion to water lenses, and excessive rainfall creating runoff into drinking groundwater wells.
>
> Global temperature increase affects coral growth and sea level. It is known that the heat content of the oceans has increased, and this could mean increase in internal energy (turbidity enhancement) of the oceans and/or increase in sea level. In Kiribati, coastal erosion, sea water from storm surges inundating the land, extensive sea spray, and coral bleaching are being observed - quite consistent with what to expect from climate change. These changes are adversely affecting the people's livelihood.
>
> Tuna resources are seasonal but are abundant within Kiribati EEZ during El Nino. Kiribati could lose out if climate change causes the tuna fisheries to migrate further to the north. Inshore fisheries are also known to be less productive during drought conditions, normally associated with the La Nina.

[6] The 2007 NAPA goes on to detail a range of issues arising from existing and projected effects of climate change related events and processes in the areas

of housing, land and property (HLP), fisheries and agriculture, and health. In relation to HLP issues, it notes, at pp10-12, that land is privately owned, often "by multiple owners of clear lineal connection, but registered under the most senior among them". The most likely climate change affecting HLP is coastal erosion and accretion. Traditional methods of checking erosion were no longer effective as coastal land erosion became "more extensive, intensive, and persistent". Protection of public assets such as roads from erosion was performed by the Government, while owners of private assets protected those. Protection took the form of sea-defence of various designs and construction but none had been "totally effective". Existing causeways and seawalls needed upgrading and strengthening. New causeways and seawalls, however, continued to be constructed. For the whole of South Tarawa, the total number of constructed seawalls was 60 in 2005.

[7] Storm surges or extra high spring tides had caused flooding of residential areas. Traditional houses have raised floors, and this design had proved appropriate in times of flooding for the time being. Where flooding leads to erosion, or when persistent, people have to relocate themselves or retreat.

[8] As regards South Tarawa specifically, increasing urbanisation was one of the "key drivers" to changes to the shoreline. Other problems cited included illegal settlement (squatters), and unclear rights between landowners and land leased by the Government.

[9] In relation to fishing, the 2007 NAPA noted, at p13, concern over depletion of fish stocks. While this was largely attributed to overfishing, anecdotal evidence suggested changes in aggregation areas meant environmental stress may also be affecting fish behaviour. In relation to agriculture, the 2007 NAPA observed, at pp13-15, that a limited range of agricultural crops could be grown in an atoll environment, and stressors such as coastal erosion, salt-water inundation and drought were therefore serious problems in terms of both food security and sustaining livelihoods through cash crops such as coconuts. Attempts were being made to diversify crop production which had trended in some areas towards cash crops production. However, most nutritious crops were available and could be prepared into long-term preserved food.

[10] Nevertheless, there has been a general deterioration in the state of health of the population. The 2007 NAPA observed, at p15:

> A Ministry of Health and Medical Services report indicates a deteriorating state of the general health of Kiribati people: out of 5 persons below the age of 10, 3 are

> affected by Vitamin A deficiencies and malnutrition. A social survey report (McKenzie,2004) indicates that 56% have rated the change in the health of the people as "bad", and 46% as "plenty bad", reflecting the problem of food insecurity.

[11] The 2007 NAPA goes on to note that there had been outbreaks of dengue fever in 2003 and 2004. However, more common was fish poisoning and diarrhoea, the latter being particularly prevalent among infants and children during spring tides.

The Evidence of John Corcoran

[12] John Corcoran is a national of Kiribati who is now resident in New Zealand. Prior to coming to New Zealand he worked for a number of years as the clerk to the Chief Justice in Tarawa. He has also worked as an academic and researcher in Kiribati and in New Zealand, specialising in urbanisation, climate change and its economic and cultural impacts upon the population of Kiribati. He has attended a number of conferences and presented many papers on the subject. He is currently undertaking his doctorate at the University of Waikato in this area. The Tribunal finds that Mr Corcoran is appropriately qualified as an expert on these issues.

[13] Mr Corcoran described Kiribati as a society "in crisis" as the result of population pressure and climate change. Geographically the islands are small, fragmented, and all are no more than three metres above sea level. Soils are generally poor and infertile. Unemployment is high. Population increases in outlying islands, coupled with improved air and sea transportation links, has facilitated internal migration from outlying islands to Tarawa, causing overcrowding in the latter. Aware of the problem, the Kiribati Government has tried to alleviate this problem by relocating basic community services such as hospitals and primary schools on some outlying islands, but this has had little effect on the overall trend.

[14] Mr Corcoran produced a study for the Tribunal that he had prepared for an international conference in Japan, which cited statistics showing that the population on South Tarawa has increased from 1,641 in 1947 to 50,000 in 2010. To put this in context, he states in his paper, at pp3-4:

> South Tarawa is situated on the southern-most part of Tarawa atoll and it includes six individual islets… The islands were originally separated by channels but [are] now connected by causeways and a bridge. The total land area is estimated to be approximately 400ha, about 43% of the total land area of 920ha of Tarawa atoll and a combined length of 28 kilometres. Most of the land area is very narrow in terms of distance from the lagoon to the ocean side with an average elevation of not more than 4metres above sea level. In most places, the width of the island is less than 200 metres.

[15] Unsurprisingly, overcrowding has had a negative impact upon the environment and people's standard of living. Migrants often live in slum-like conditions on the outskirts of established settlements in Tarawa. Family landholdings increasingly have to be made available for more and more members of the family or group. This has led to social tension. Houses encroach on the land of other family members as well as neighbours and this has resulted in conflict. Fights, often involving knives, break out and, from time to time, people are injured and killed. This was, he added, not simply a problem on Tarawa. During his time as clerk to the court in the 1980s, he was aware that the court had to intervene in cases of this kind on some of the outlying islands.

[16] Rapid population growth and urbanisation in South Tarawa has had a damaging effect on the fresh water supply. No island in Kiribati has surface fresh water. The water supply comes from a fresh water lens sitting just beneath the atoll. Increased population pressure has meant water is being extracted from the lens at a greater rate than it can be refilled through percolation of rain water. Furthermore, there is no mainline sewage system on Kiribati and the discharge of human waste by the burgeoning population on Tarawa has contributed to pollution of the fresh water lens. This has rendered some of five underground water reserves unfit for the supply of fresh drinking water. On Tarawa there are three main sources of water: rain water, household dug wells and public utilities board piped water. Of these, rain water catchment systems are only available in permanent material homes and most of these private homes have roof gutters. Household dug wells in high density housing areas are increasingly contaminated and not used for consumption.

[17] Sea-level-rise and other environmental factors have compounded this problem. Rising sea level causes more regular and frequent breaches of sea walls. More intense storms generate stronger storm surges which further inundate the land. Salt water is seeping into the fresh water lens, affecting those reserves which have not already been rendered unfit for human consumption as a result of population pressure. While sea walls are in place, they are typically not high enough to prevent salt water intrusion over the land in the high tides. While people build sea walls, the materials come from beaches and other locations of the island which is an unsatisfactory solution. The vegetation has died back in many places, leaving a barren land.

[18] The community is often forced to rely on fresh water being supplied by the public utilities board. This is rationed. Approximately 60 per cent of the urban population on South Tarawa relies solely on public utilities board water.

[19] Mr Corcoran is aware of there being health problems for young children, in particular because of the salt water intrusion. There have been increases in cases of diarrhoea in children and some deaths have been reported. Salt water intrusion onto the land has also negatively impacted upon crops. It is difficult for crops to grow because of the salt water intrusion into the land and the submersion of the land increasingly during high tide. Land is submerged in places on South Tarawa, often three or four times per month, rendering the land uninhabitable. Rubbish is washed onto the beach posing health hazards for the local landowners.

[20] The Government of Kiribati is taking some steps to address this. It has a programme of action in place, helping communities to adapt to climate change.

[21] Attached to Mr Corcoran's evidence were a number of slides which he took during 2011 and 2012 while there on research trips. They showed the inundation of the land during high tides and the destruction of the coconut plantations in places. Some of the photographs showed villagers whose properties had been inundated and their possessions washed away.

THE APPELLANT'S CASE

[22] The account which follows is that given at the appeal hearing. It is assessed later.

Evidence of the Appellant

[23] The appellant was born in the 1970s on an islet situated three days journey by boat, or two hours by plane, north of Tarawa, the main island and capital of Kiribati. As is common in the Kiribati island group, his home island is a low-lying atoll with houses built on coral debris which has accreted over time. When aged in his early teens, the appellant was sent to school on a nearby island. Upon completion of his secondary schooling in the mid-1990s, he went to live with relatives on Tarawa having first gained a high school certificate. The appellant sought and eventually obtained employment working for a trading company but this employment ceased in the mid-1990s when the company was wound up.

Although the appellant looked for work as a carpenter and labourer he was unsuccessful in his endeavours and has not worked since he was in Kiribati.

[24] In 2002, the appellant married his wife and moved in with her family in another village situated on Tarawa. He lived there with his wife's family in a traditionally constructed dwelling which had been built on coral, which had accreted on a sea wall built some years previously. The dwelling was situated on ground level and had electricity. Water was obtained from a well and from supplies provided by the Government. There were no sewerage facilities.

[25] Over time, the villages on Tarawa in which the appellant resided became overcrowded. People travelled to Tarawa from outlying islands because this was where most government services such as the main hospital were located. Land was purchased from existing landholders or acquired through kinship ties to Tarawa. As the villages became overcrowded, tensions were generated and there were often physical fights in which people were injured, and on occasion, killed. When this happened, the police intervened, taking the injured to hospital and arresting those responsible.

[26] Life generally became progressively more insecure on Tarawa as a result of sea-level-rise. From the late 1990s onwards, Tarawa suffered significant amounts of coastal erosion during high tides. Also the land surface was regularly flooded and land could be submerged up to knee-deep during king tides. Transportation was affected as the main causeway separating north and south Tarawa was often flooded.

[27] This caused significant hardship for the appellant, his wife and family as well as other inhabitants on Tarawa. The wells upon which they depended for water became salty. Salt water was deposited onto the ground destroying crops. Crops were difficult to grow and the land was stripped of vegetation in many places.

[28] The sea wall in front of the appellant's parents-in-law's house was often damaged and required constant repair. The family existed largely by subsistence fishing and agriculture. One of the appellant's brothers-in-law works at a local government port agency and provides cash income for the whole family as best as he is able. However life is generally becoming more difficult. The Government's supplies of water are coming under pressure through overpopulation and because people can increasingly no longer rely on well-water for an alternative source.

[29] The appellant and his wife wished to have a family. However they were concerned that the information they were receiving from television, media and from other sources meant that there would be no possibility of living on Tarawa. They therefore decided to emigrate to New Zealand. The appellant's parents live on his home island but they face similar environmental pressures and population pressures.

[30] The appellant was aware that the Government was taking what steps it could. The Government has bought land in Fiji to grow crops to sustain the livelihoods of the people in Kiribati. In his area the Government has also built sea walls but these are ineffective and are prone to frequent damage. However, it was powerless to stop sea-level-rise.

[31] He also accepted that his experiences were common to people throughout Kiribati. He had been in contact with his family and understood they were facing similar problems in his home island. His relatives whom he had lived with when he initially moved to Tarawa moved to another island and they too were experiencing similar problems. There was simply no land anywhere in Kiribati for the family to relocate and avoid the onset of sea-level-rise.

Evidence of the Wife

[32] The wife was born in the late 1970s on Arorae Island in the south of Kiribati. In 2000, her family moved to Tarawa where she met her husband. They married in 2002. The couple lived with her parents in a house built on the edge of a sea wall. The house and land were not owned by her parents but belonged to a neighbour. Since she has been in New Zealand, this neighbour has passed away and his children are demanding that her family vacate the house. Her father, who has no claim over the land, has asked for time to enable him to save money to purchase a fare so that he can travel with the other family members back to Arorae Island. The family is being supported by one of her brothers who had employment in South Tarawa. That brother will go and live with his wife's family in South Tarawa so that he can retain his employment. All other family members will have to travel back to Arorae Island and settle on a small piece of land.

[33] The wife has concerns for their health and wellbeing if the family returned to Kiribati. The land was being eaten away because of the effects of sea-level-rise. Their drinking water was being contaminated with salt. Crops were dying, as were the coconut trees. She was particularly concerned for the safety of her children.

They are young. The youngest is six months old, the eldest five years. She has heard stories of children getting diarrhoea and even dying because of problems associated with the poor drinking water. Land is becoming very overcrowded and houses are very close to each other which leads to the spread of disease.

Documents and Submissions

[34] On 8 March 2013, the Tribunal received an affidavit from the husband, wife and Mr Corcoran. Attached to Mr Corcoran's affidavit were two papers which he had written, namely:

(a) "Organisation and Urban Water Issues on South Tarawa in the Republic of Kiribati"; and

(b) "Migration and Climate Change in the Pacific: An Overview", co-written with Professor Richard Bedford, Professor Graham Hugo, Charlotte Bedford and Jenny Cooper. He also produced slides he had taken.

[35] Further written submissions were received from counsel on 12 April 2013. On 22 April 2013 the Tribunal received a bundle of material, comprising:

(a) W Kalin *Annotations to the Guiding principles on Internal Displacement* (Brookings Institute, Washington, 2008);

(b) the UN Principles on Housing and Property Restitution for Refugees and Displaced Person (the Pinheiro Principles) Centre on Housing Rights and Evictions;

(c) United Nations Office for Co-ordination of Humanitarian Affairs (OCHA) *Guiding Principles on Internal Displacement* (2004);

(d) "UN Chief and Kiribati Leader Warn Over Climate Change Threat to Pacific Islands" *United Nations News Service* (5 September 2011);

(e) J McAdam "Climate Change Displacement International Law" (2010);

(f) J H Knox "Linking Human Rights and Climate Change at the United Nations" 33 *Harvard Environmental Law Review* 477-498;

(g) Human Rights Council Resolution 7/23 *Human Rights and Climate Change* (28 March 2008);

(h) "Climate Change Refugees Lack Legal Protection" *Deutsche Welle* (29 January 2013) and;

(i) Printout of Latin etymology of having followed.

ASSESSMENT

[36] Under section 198 of the Immigration Act 2009, on an appeal under section 194(1)(c) the Tribunal must determine (in this order) whether to recognise the appellant as:

(a) a refugee under the 1951 Convention Relating to the Status of Refugees ("the Refugee Convention") (section 129); and

(b) a protected person under the 1984 Convention Against Torture (section 130); and

(c) a protected person under the 1966 International Covenant on Civil and Political Rights ("the ICCPR") (section 131).

[37] In determining whether the appellant is a refugee or a protected person, it is necessary first to identify the facts against which the assessment is to be made. That requires consideration of the credibility of the appellant's account.

Credibility and Findings

[38] The Tribunal finds the appellant to be credible. His account was told candidly and openly. It is accepted in its entirety.

[39] The Tribunal finds that the limited capacity of South Tarawa to carry its population is being significantly compromised by the effects of population growth, urbanisation, and limited infrastructure development, particularly in relation to sanitation. The negative impacts of these factors on the carrying capacity of the land on Tarawa atoll are being exacerbated by the effects of both sudden onset environmental events (storms) and slow-onset processes (sea-level-rise).

[40] As for the appellant, the Tribunal finds the appellant is from Kiribati and has been living with his wife's family in their village on South Tarawa. For a number of years prior to coming to New Zealand in 2007, he was unemployed, relying on subsistence agriculture and fishing, supplemented by support from his wife's

brother who is in employment there. Concerned about the coastal erosion which he witnessed from 2000 onwards and the increasing intrusion of salt water onto the land during high tides, and aware of the debate around climate change, the appellant and his wife came to New Zealand in 2007. They have three children born here.

[41] The appellant does not wish to return to Kiribati because of the difficulties they faced due to the combined pressures of over-population and sea-level-rise. The house they were living in on South Tarawa is no longer available to them on a long term basis. Although their families have land on other islands, these face similar environmental pressures and the land available is of limited size and has other family members living there.

The Refugee Convention

[42] Section 129(1) of the Act provides that:

> A person must be recognised as a refugee in accordance with this Act if he or she is a refugee within the meaning of the Refugee Convention.

[43] Article 1A(2) of the Refugee Convention provides that a refugee is a person who:

> ... owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.

[44] In terms of *Refugee Appeal No 70074* (17 September 1996), the principal issues are:

(a) Objectively, on the facts as found, is there a real chance of the appellant being persecuted if returned to the country of nationality?

(b) If the answer is yes, is there a Convention reason for that persecution?

Assessment of the Claim to Refugee Status

General Principles

[45] Mr Kidd submits that the appellant is an internally displaced person (IDP) and "has the right to claim refugee status in New Zealand as an internally displaced person". In support, he cites Principle 15 of the Guiding Principles on Internal Displacement (the Guiding Principles) which states:

> Internally displaced persons have:
>
> (a) The right to seek safety in another part of the country;
>
> (b) The right to leave their country;
>
> (c) The right to seek asylum in another country; and
>
> (d) The right to be protected against forcible return to or resettlement in any place where their life, safety, liberty and/or health would be at risk.

[46] While it is accepted, as Mr Kidd submits, that the Tribunal must have regard to relevant international human rights instruments, the Guiding Principles are not relevant in this case. The Guiding Principles is a soft-law instrument designed to deal with a scenario different to the Refugee Convention. Whatever Principle 15 might state, the former relates, as the name implies, to internal movement only; the latter to cross-border movement. As observed by Walter Kaelin 'The Legal Dimension' (2003) *Forced Migration Review: When Does Internal Displacement End* 17, at p15:

> As soon as an IDP leaves his or her country of origin, the Guiding Principles are no longer applicable. Such a person is no longer in the situation of internal displacement but instead becomes a refugee or a migrant as the case may be. Here, displacement ends when the person concerned crosses the frontier of that country.

[47] By definition, internally displaced persons cannot meet the requirement of the Refugee Convention. A fundamental element of the Article 1A(2) refugee definition is that the claimant is "outside their country of nationality". Unless or until cross-border movement takes place, the Refugee Convention simply has no application. While the causes and consequences of any internal displacement that occurs prior to the cross-border movement may well be relevant matters of enquiry in the context of refugee status determination, the status of any refugee claimant as a former IDP does not confer refugee status.

[48] In any event, at no stage was the appellant ever an internally displaced person, which the Guiding Principles define as follows:

> 2. For the purposes of these Principles, internally displaced persons are persons or groups of persons who have been forced or obliged to flee or to leave their homes or places of habitual residence, in particular as a result of or in order to avoid the effects of armed conflict, situations of generalized violence, violations of human rights or natural or human-made disasters, and who have not crossed an internationally recognized State border.

[49] Migration is generally regarded as existing somewhere along a voluntary – forced spectrum. While a substantial grey area exists between the ends and no bright-line demarcation can be made, displacement typically occurs towards the 'forced' end of this spectrum. In this case, it is clear to the Tribunal that this appellant has undertaken what may be termed a voluntary adaptive migration – that is, to adapt to changes in the environment in South Tarawa detailed in the 2007 NAPA, by migrating to avoid the worst effects of those environmental changes. While there is some degree of compulsion in his decision to migrate, his migration cannot be considered 'forced' and was to another country, New Zealand, and not to another place in Kiribati.

[50] Mr Kidd also cites Principle 12 of the Pinhiero Principles on housing and property restitution for refugees and displaced persons. The relevance of this principle, which relates to the need for states to establish appropriate procedures, institutions, mechanisms to assess and enforce housing, land, and property restitution claims, to the refugee inquiry is not immediately apparent and is not developed in any detail by Mr Kidd in his submissions.

[51] Mr Kidd also submits that the concept of 'being persecuted' does not require human agency and that the word 'refugee' is capable of encompassing persons having to flee irrespective of the cause. In support, counsel cites the Latin etymology of the word 'persecute' which, he submits, has a "passive voice of fleeing from something or an active quality of following somebody". Accordingly, persecution does not require an actor in the passive sense. In the appellant's case, it is the "act of fleeing climate change because of the serious harm it will do him and his family. The Kiribati Government is unwilling or unable to deal with factors "instituted by climate change".

[52] This submission must be rejected. It draws on what has been described by Astri Suhkre in "Environmental Degradation and Population Flows" 47(2) *Journal of International Affairs* at p482 as a distinction between a 'sociological conception' of refugee-hood and a legal one. The fundamental difficulty Mr Kidd's submission faces is that the former is broader than the latter. The legal concept is governed by the refugee definition contained in Article 1A(2) of the Refugee Convention. Section 129 only permits recognition as a refugee if the requirements of the

Convention are met. It is the legal conception which applies, not the sociological one relied on by Mr Kidd. This legal conception requires that the applicant establish that he is at risk of 'being persecuted', and that status be linked to one of the five Convention grounds.

[53] New Zealand refugee law has for some time adopted and applied the Hathaway concept of "being persecuted" as the sustained or systemic violation of core human rights, demonstrative of a failure of state protection. For a full account of the human rights approach, see *Refugee Appeal No 74665* (7 July 2004), at [36]-[90]. The application of this approach in the context of economic social and cultural rights emphasised by counsel in his submissions, is fully explored in *BG (Fiji)* [2012] NZIPT 800035, at [85]-[133]. The risk of being persecuted must be "well-founded" under Article 1A(2) of the Convention. In determining what is meant by "well-founded", the Tribunal, like the Refugee Status Appeals Authority (RSAA) before it, has adopted the approach in *Chan v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379, where it was held that a fear of being persecuted is established as well-founded when there is a real, as opposed to a remote or speculative, chance of it occurring. The standard is entirely objective – see *Refugee Appeal No 76044* (11 September 2008), at [57].

[54] The legal concept of 'being persecuted' rests on human agency. Although, historically, there has been variation in state practice on the issue, international refugee law has, in recent years, coalesced around the notion that it can emanate from the conduct of either state or non-state actors. In the former case, the failure of state protection derives from the inability of the state or lack of will to control its own agents who commit human rights violations, or its failure to take steps it is obliged to take under international human rights law. In the latter case, it derives from the failure of the state, via its human agents tasked with the requisite legal or regulatory authority, to take steps within their power to reduce the risk of harm being perpetrated by non-state actors.

[55] But this requirement of some form of human agency does not mean that environmental degradation, whether associated with climate change or not, can never create pathways into the Refugee Convention or protected person jurisdiction.

Environmental Degradation, Natural Disasters and International Protection: A complex relationship

[56] Courts of high judicial authority have made general statements that "persons fleeing natural disaster" cannot obtain Convention-based protection: see *Applicant A v Minister of Immigration and Multiethnic Affairs* [1998] INLR 1 at p19 and *AH (Sudan) v Secretary of State* [2007] 3 WLR 832, 844. Insofar as these statements point out that the effects of natural disasters are often felt indiscriminately and do not distinguish on grounds of race, religion, nationality, membership of a particular social group or political opinion they are uncontroversial. This statement of principle will hold true in many cases, if not most cases, involving natural disasters. See here, W Kaelin and N Scherepfer *Protecting People Crossing Borders In The Context Of Climate Change: Normative Gaps and Possible Approaches*, UNHCR Legal and Protection Policy Research Series (February 2012), at p31; J McAdam *Climate Change Displacement and Complementary Protection Standards* UNHCR Legal and Protection Policy Research Series (May 2011).

[57] However, it is also recognised that broad generalisations about natural disasters and protection regimes mask a more complex reality. The relationship between natural disasters, environmental degradation, and human vulnerability to those disasters and degradation is complex. It is within this complexity that pathways can, in some circumstances, be created into international protection regimes, including Convention-based recognition.

[58] First, the reality is that natural disasters do not always occur in democratic states which respect the human rights of the affected population. Studies conducted in the aftermath of famine and other natural disasters provide evidence of a political weighting of state response in which the recovery needs of marginalised groups are sometimes not met. See here M Pelling and K Dill 2006, *Natural Disasters as Catalysts of Political Action in Human Security and Resilience* ISP/NSC Briefing Paper 06/01 Royal Institute of International Affairs, London at p5; C Raleigh, L Jordan and S Salehyan *Assessing the Impact of Climate Change on Migration and Conflict Paper Commissioned For Social Dimensions Of Climate Change Workshop*, Special Development Department (World Bank, Washington DC, 2008). A report conducted by the Secretariat of the International Law Commission *Protection of persons in the event of disasters* A/CN.4/590 (11 December 2007), at pp21-22 shows widespread state concern that support for international assistance in the wake of natural disasters could be used to promote

interference in the domestic affairs of another State. In other words, the provision of post-disaster humanitarian relief may become politicised.

[59] Second, although the work is controversial, increasing attention has been given to the linkage between environmental issues and armed conflict and security. There is some general acceptance amongst scholars that environmental issues can pose threats to security and induce violent conflict and displacement, albeit in a highly uncertain manner and through complex social and political processes: see, for example, G Baechler (1999) "Environmental Degradation in the South as a Cause of Armed Conflict" in A Carius and K M Litzmann (eds) *Environmental Change and Security*, (Springer Berlin), at pp107-109; N P Gleditsch "Armed Conflict and the Environment" 35(3) *Journal of Peace Research*, at pp381-400; and C F Ronnfelt "Three Generations of Environment and Security Research" (1997) 34(4) *Journal of Peace Research* at pp473-482. Again, this complex relationship can create pathways into Convention recognition in certain circumstances. An obvious example is where environmental degradation is used as a direct weapon of oppression against an entire section of the population, such as occurred with the Iraqi Marsh Arabs following the first Gulf War: see here Human Rights Watch *The Iraqi Government Assault on the Marsh Arabs* (2003), at p4.

Environmental degradation and international human rights law

[60] The question of whether there exists a human right to a healthy environment has been a matter of some debate for at least 25 years. Nevertheless, within international human rights law there is now a growing recognition that states can have responsibilities in respect of environmental matters under existing human rights treaties in both the civil/political and socio-economic spheres.

[61] The International Covenant on Civil and Political Rights contains a number of important participatory rights such as the right to freedom of belief (Article 18); the right to freedom of expression, including the right to receive and impart information (Article 19); and the right to freedom of assembly (Article 21). This framework of participatory rights, along with substantive rights regarding freedom from arbitrary arrest and detention and the right not to be subjected to torture or cruel, inhuman or degrading treatment (Article 7) provides a framework by which the predicament of individuals who raise concerns about development or

despoliation of the environmental can fall within the bounds of the existing protection mechanisms.

[62] As is reflected in the 2005 Hyogo Declaration and the 2005-1015 Hyogo Framework for Disaster Reduction, in respect of which over 160 states were present for its adoption, it is now generally accepted that states have a primary responsibility to protect persons and property on their territory from the impact of disasters and to undertake disaster risk reduction measures. Consistent with this understanding, the European Court of Human Rights (ECtHR) has examined the duty to protect the right to life in the context of natural disasters. In *Oneryaldiz v Turkey*, [2004] ECHR 657 at para 89 and *Budayeva & Ors v Russia* Application No 15339/02 (20 March 2008), the ECtHR found a violation of the right to life of those killed because the authorities in each case had not discharged positive obligations to protect life against risks from known and imminent environmental hazards. For a fuller discussion see, W Kaelin and J Kunzli *The Law of International Human Rights Protection* (Oxford, University Press, Oxford, 2010) at pp104-105; J Ginnetti and N Schrepfer ”Predicting Disasters and Protecting Rights” 41 *Forced Migration Review,* at pp13-14.

[63] In the socio-economic sphere, although there is no right to a healthy environment contained in the International Convention on Economic, Social and Cultural Rights (ICESCR), Article 11 does provide a right to an adequate standard of living. Plainly, where natural disasters and environmental degradation occur with frequency and intensity, this can have an adverse effect on the standard of living of persons living in affected areas. Also relevant in this context is Article 12(1) which provides for a right “to the highest attainable standard of physical and mental health”. In General Comment No 14 *The Right to the Highest Attainable Standard of Health* E/C12/2000 (11 August 2000) at [14], the Committee on Economic Social and Cultural Rights stated that Article 12(2)(b) obliges states to take steps aimed at the prevention and reduction of the population’s exposure to “detrimental environmental conditions that directly or indirectly impact on human health”. In the context of the right to adequate food, the Committee has stated that “States have a core obligation to take the necessary action to mitigate and alleviate hunger… even in times of natural or other disasters” General Comment No 12 *The Right to Adequate Food (Art11)* E/C12/1999/5 (12 May 1999) at [6].

[64] What these observations illustrate is that generalised assumptions about environmental change and natural disasters and the applicability of the Refugee Convention can be overstated. While in many cases the effects of environmental

change and natural disasters will not bring affected persons within the scope of the Refugee Convention, no hard and fast rules or presumptions of non-applicability exist. Care must be taken to examine the particular features of the case.

[65] A word of caution is warranted, however. While there is no presumption of non-applicability, no special rules exist either. It is indubitably correct that natural disasters and environmental degradation can involve significant human rights issues. Nevertheless, like any other case, in cases where such issues form the backdrop to the claim, the claimant must still establish that they meet the legal criteria set out in Article 1A(2) of the Refugee Convention (or, for that matter, the relevant legal standards in the protected person jurisdiction). This involves an assessment not simply of whether there has been breach of a human right in the past, but the assessment of a future risk of being persecuted. In the New Zealand context, the claimant's predicament must establish a real chance of a sustained or systemic violation of a core human right demonstrative of a failure of state protection which has sufficient nexus to a Convention ground.

Environmental Degradation and New Zealand's Refugee and Protection Jurisprudence

[66] This reality of a complex interrelationship between environmental degradation, vulnerability to natural hazards and international protection is reflected in New Zealand's refugee jurisprudence.

[67] A number of cases in 2000, relating to claimants from Tuvalu, argued that environmental factors such as inundation, coastal erosion, salination of the water table, combined with factors at the individual and household levels, meant that the appellants should be recognised as refugees. The claims were dismissed because the indiscriminate nature of these events and processes gave rise to no nexus to a Convention ground; see *Refugee Appeal No 72185* (10 August 2000); *Refugee Appeal No 72186* (10 August 2000); *Refugee Appeal Nos 72189-72195* (17 August 2000); *Refugee Appeal Nos 72179-72181* (31 August 2000); *Refugee Appeal No 72313* (19 October 2000); *Refugee Appeal No 72314* (19 October 2000); *Refugee Appeal No 72315* (19 October 2000); *Refugee Appeal No 72316* (19 October 2000).

[68] In *Refugee Appeal No 74665* (7 July 2004) at [89], the RSAA remarked, in the context of discussing its human rights approach to being persecuted, that "the right to life (Article 6 ICCPR) in conjunction with the right to adequate food (Article

11 ICESCR) should permit a finding of 'being persecuted' where an individual faces a real risk of starvation". This would encompass the discriminatory denial of food in the wake of a drought, which could support a finding of being persecuted.

[69] It has also been recognised that post-disaster humanitarian relief work can become highly politicised. Such circumstances occurred in the wake of Cyclone Nargis in Burma in May 2008 and, in *Refugee Appeal No 76374* (28 October 2009), refugee status was granted to a person who assisted in such relief work on the basis such activity would be perceived as the expression of an anti-regime political opinion.

[70] In *BG (Fiji)* [2012] NZIPT 800091, at [90]-[93], the Tribunal confirmed the relevance of the ICESCR to the refugee inquiry. It was also recognised that persons displaced by environmental degradation may also, over time, face problems with the host community which can give rise to protection needs. This case failed, not as a matter of principle, but on the facts. The appellant could not establish that he faced a real chance of serious harm arising from a sustained or systemic denial of his core human rights.

[71] With these observations in mind, it is now possible to turn to the facts of this case.

Objectively, on the facts as found, is there a real chance of the appellant being persecuted if returned to Kiribati?

[72] The general observations earlier regarding the potential for environmental degradation and natural disasters to result in conflict is demonstrated in the case of Kiribati. Credible evidence has been given that this can cause tension over land which has given rise to physical assaults and even deaths. However, the appellant himself had not been subjected to any such dispute in the past and is not involved in any land dispute. There is no evidence he faces a real chance of suffering serious physical harm from violence linked to HLP disputes in the future.

[73] Although the house in which he lived is no longer available to him in the long-term, the wife's father is negotiating with the new owner of the land and an arrangement has been made whereby he is given time to relocate his family back to their home island in the south. The appellant told the Tribunal that it would be difficult to move to his wife's family's island or his own, as both face the same environmental pressures. Even assuming he cannot find a place to live in Tarawa and has to return to one or other of the home islands, land will be available to him

there. While he would need to share the available land with other members of the kin group, it will be available for him and he can utilise this to provide accommodation for himself and his family. This land can provide them with access to sufficient resources to sustain themselves to an adequate level. There is no evidence to support Mr Kidd's contention that the appellant is unable to grow food or obtain potable water. His evidence was that food has become difficult to grow with salt water intrusion onto the land, not impossible. Nor was it his evidence that he had no access to potable water.

[74] There is no evidence establishing that the environmental conditions that he faced or is likely to face on return are so parlous that his life will be placed in jeopardy, or that he and his family will not be able to resume their prior subsistence life with dignity. The appellant's brother-in-law, who remains in employment, will be able to provide continued support to the family, as he has done in the past, so as to allow them to continue to enjoy an adequate standard of living. While the appellant's standard of living will be less than that which he would enjoy in New Zealand that, in itself, does not amount to serious harm for the purposes of the Refugee Convention.

Is there a Convention reason for the persecution?

[75] In any event, the appellant's claim under the Refugee Convention must necessarily fail because the effects of environmental degradation on his standard of living were, by his own admission, faced by the population generally. The sad reality is that the environmental degradation caused by both slow and sudden-onset natural disasters is one which is faced by the Kiribati population generally. The photographic evidence produced by Mr Corcoran in the hearing graphically demonstrated that the underlying environmental events and processes favour no civil or political status. Nor has it been suggested that the Government of Kiribati has in some way failed to take adequate steps to protect him from such harm as it is able to for any applicable Convention ground.

Conclusion on Claim to Refugee Status

[76] For these reasons the appellant's refugee claim must fail. The appellant is not entitled to be recognised as a refugee under section 129 of the Act.

The Convention Against Torture

[77] Section 130(1) of the Act provides that:

> A person must be recognised as a protected person in New Zealand under the Convention Against Torture if there are substantial grounds for believing that he or she would be in danger of being subjected to torture if deported from New Zealand.

[78] Mr Kidd has, rightly, not argued that the facts of this case raise any issue under section 130. There are no substantial grounds for believing that he would be in danger of being subjected to torture, as this is defined under the Act, if deported from New Zealand.

The ICCPR

[79] Section 131 of the Act provides that:

> (1) A person must be recognised as a protected person in New Zealand under the Covenant on Civil and Political Rights if there are substantial grounds for believing that he or she would be in danger of being subjected to arbitrary deprivation of life or cruel treatment if deported from New Zealand.
>
> ...
>
> (6) In this section, cruel treatment means cruel, inhuman, or degrading treatment or punishment.

Assessment of the Claim under the ICCPR

As to the arbitrary deprivation of life

[80] Mr Kidd refers to the statement by the Office of the High Commissioner for Human Rights that one of the rights "most directly affected" by global warming will be the right to life. This statement may be broadly agreed with, insofar as the effects of global warming can be expected to negatively impact on some people's ability to hunt, fish, or undertake subsistence farming or agriculture to such an extent that their ability to sustain life may be imperilled.

[81] Article 6 of the ICCPR provides:

> 1. Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.

[82] The Human Rights Committee has stated that the right to life under Article 6, in keeping with its 'inherent' nature and importance to the enjoyment of other rights, must be interpreted broadly; *General Comment No 06: The Right to Life*

(Art 6) (30 April 1982) at [5]. In this regard, the Committee considered that "it would be desirable for States parties to take all possible measures to reduce infant mortality and to increase life expectancy, especially in adopting measures to eliminate malnutrition and epidemics". Consistent with this understanding, J Schultz and M Castan *The International Covenant on Civil and Political Rights: Cases, Material and Commentary* (Oxford University Press, Oxford, 2004) point to comments made by the Committee in Concluding Observations on States' reports on issues such as homelessness, infant mortality, and increased life expectancy for women in the context of Article 6. They also cite the decision of the Committee in *E H P v Canada* (1980) in which it was held, at [8], that a complaint regarding the threats of cancer and genetic defects arising from the proximity of a nuclear waste dump-site to a residential area "raised serious issues, with regard to the obligation of states to protect human life".

[83] Section 131 provides for protection from "arbitrary deprivation of life". In other words, it is not all risks to life which fall within the ambit of section 131, just those risks to life which arise by means of an "arbitrary deprivation". In contrast to 'torture' and 'cruel treatment', the other statutory components of the Tribunal's protected person jurisdiction, what constitutes arbitrary deprivation of life has not been statutorily defined.

[84] As to this, there have been few individual communications to the Human Rights Committee relating to arbitrary deprivation of life. Nevertheless, academic commentary on the international jurisprudence, including relevant regional analogues to Article 6, shows that to constitute an 'arbitrary' deprivation of life, the interference must be one which is:

(a) not prescribed by law;

(b) not proportional to the ends sought; and

(c) not necessary in the particular circumstances of the case

See M Nowak *The UN Covenant on Civil and Political Rights: CCPR Commentary* (Kiehl, N P Engel, 2005) at pp128-129; W Kaelin and J Kunzli *The Law of International Human Rights Protection* (Oxford, University Press, Oxford, 2010) at pp102-103; S. Joseph J. Schultz and M. Castan (*op cit*) at [8.04].

[85] As noted by W Kaelin and J Kunzli (*op cit*) at p273:

> Despite its name (right to life) it does not guarantee human existence as such. Rather, it protects against deprivation of life by state action or as a consequence of its omissions.

[86] At p298, they include as a component of the right to life an "obligation to take measures to enhance the protection of life". This is described as operating at a "programmatic level" and requires concrete steps to be taken to protect life in areas such as infant mortality, life expectancy or other areas where life is "particularly endangered".

[87] In light of the above, it is accepted that the prohibition on arbitrary deprivation of life must take into account the positive obligation on the state to fulfil the right to life by taking programmatic steps to provide for the basic necessities for life. Having regard to the decisions of the ECtHR in *Budeyeva* and *Oneryiliz,* it is accepted that states will have positive duties to protect life from risks arising from known natural hazards and that failure to do so may, in principle, constitute an omission in the sense articulated by Kaelin and Kunzli.

[88] However, the appellant cannot point to any act or omission by the Kiribati Government which might indicate a risk that he will be 'arbitrarily deprived' of his life within the scope of Article 6 of the ICCPR. The Kiribati Government is active on the international stage concerning the threats posed to both the state as a sovereign entity and its population by climate change-related events and processes. The 2007 NAPA shows that the Kiribati Government is acutely aware of the problems posed and is taking many steps at the regulatory and programme level in relation to these risks. The appellant himself acknowledged that the Government had been taking steps to protect inhabitants and property from sea-level-rise where it is able. It was building sea walls and provide potable water.

[89] A further reason why the appellant's claim under this aspect of section 131 must fail is that he cannot establish that there is a sufficient degree of risk to his life, or that of his family, at the present time. The case law of the Committee requires that, to be a victim for the purposes of bringing a complaint under the First Optional Protocol, the risk of violation of an ICCPR right must be "imminent". In *Aaldersberg and ors v Netherlands* CCPR/C/87/D/1440/2005 (14 August 2006), a complaint was made by over 2,000 Dutch citizens that Dutch law, which recognised the lawfulness of the potential use of nuclear weapons, put their and many others lives at risk. The complaint was declared inadmissible. The Committee stated:

> [6.3] For a person to claim to be a victim of a violation of a right protected by the Covenant, he or she must show either that an act or an omission of a State party

> has already adversely affected his or her enjoyment of such right, or that such an effect is imminent, for example on the basis of existing law and/or judicial or administrative decision or practice. The issue in this case is whether the State's stance on the use of nuclear weapons presented the authors with an existing or imminent violation of their right to life, specific to each of them. The Committee finds that the arguments presented by the authors do not demonstrate that they are victims whose right to life is violated or under any imminent prospect of being violated. Accordingly, the Committee concludes that the authors cannot claim to be "victims" within the meaning of article 1 of the Optional Protocol.

[90] Imminence should not be understood as imposing a test which requires the risk to life be something which is, at least, likely to occur. Rather, the concept of an 'imminent' risk to life is to be interpreted in light of the express wording of section 131. This requires no more than sufficient evidence to establish substantial grounds for believing the appellant would be in danger. In other words, these standards should be seen as largely synonymous requiring something akin to the refugee 'real chance' standard. That is to say, something which is more than above mere speculation and conjecture, but sitting below the civil balance of probability standard. See here *AI (South Africa)* [2011] NZIPT 80050 at [80]-[85].

[91] The Tribunal accepts that, given the greater predictability of the climate system, the risk to the appellant and his family from sea-level-rise and other natural disasters may, in a broad sense, be regarded as more 'imminent' than the risk posed to the life of complainants in *Aaldersberg*. Nevertheless, the risk to the appellant and his family still falls well short of the threshold required to establish substantial grounds for believing that they would be in danger of arbitrary deprivation of life within the scope of Article 6. It remains firmly in the realm of conjecture or surmise. As noted in relation to his refugee claim, there is no evidence establishing that his situation in Kiribati would be so precarious that his or his family's life is "in danger". The Tribunal notes the fear of the wife in particular that the young children could be drowned in a tidal event or storm surge. No evidence has been provided to establish that deaths from these events are occurring with such regularity as to raise the prospect of death occurring to the appellant or his family member to a level which rises beyond conjecture and surmise at all, let alone a risk which can be characterised as an arbitrary deprivation of life in the sense outlined above.

[92] For these reasons, there are no substantial grounds for believing that the appellant (or any of his family members for that matter) will be in danger of being subjected to arbitrary deprivation of life.

Cruel treatment

[93] As to whether it amounts to cruel treatment to return the appellant to Kiribati, in *BG (Fiji)* [2012] NZIPT 80035 at [180]-[184], the Tribunal considered developments by the ECtHR in which the regional analogue to Article 7 ICCPR was held to extend "in very exceptional cases" to situations where there was no qualifying treatment in the receiving country. The rationale behind such a development appears to be that it is inhuman to remove someone to a known situation of serious harm. The Tribunal noted, however, that the scope of application of this principle was a matter of some doctrinal controversy within the ECtHR given the absolute nature of the prohibition, and had not been followed more broadly in the international jurisprudence in relation to the scope of its interpretation of Article 7. Accordingly, the Tribunal has declined to follow this lead.

[94] New Zealand's protected person jurisdiction is a creature of statute. It is derived from the ICCPR and the Tribunal is bound by the wording of section 131. In *BG (Fiji)* it was held that the gaze of section 131 is firmly on qualifying treatment in the receiving state and that cases of the kind envisaged under the expanded ECtHR approach were, in the context of New Zealand's legislative framework, to be dealt with under the separate humanitarian appeal provisions of the Act.

[95] The appellant has not established that there are substantial grounds for believing that he is in danger of being subjected to cruel treatment, as that is defined in the Act, by reason of some act or omission that will occur in Kiribati.

Conclusion on Claim under ICCPR

[96] The appellant is not entitled to be recognised as a protected person under section 131 of the Act.

CONCLUSION

[97] For the foregoing reasons, the Tribunal finds that the appellant:

(a) is not a refugee within the meaning of the Refugee Convention;

(b) is not a protected person within the meaning of the Convention Against Torture;

(c) is not a protected person within the meaning of the Covenant on Civil and Political Rights.

[98] The appeal is dismissed.

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Member

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