IMMIGRATION AND PROTECTION TRIBUNAL NEW ZEALAND **[2017] NZIPT 801120-123**

AT AUCKLAND

Appellants:	**AJ (Tuvalu)**
Before:	B L Burson (Member)
Representative for the Appellants:	D Lim
Counsel for the Respondent:	No Appearance
Date of Decision:	20 March 2017

DECISION

INTRODUCTION

[1] These are appeals against a decision of a refugee and protection officer, declining to grant refugee status and/or protected person status to the appellants, a family comprising a husband, wife and two minor children. The husband and children are citizens of Tuvalu; the wife is a citizen of Fiji. The mother is the responsible adult for the two child appellants for the purposes of section 375 of the Immigration Act 2009 ("the Act").

[2] The appellants claim to be at risk of being persecuted or being subjected to forms of qualifying harm on a number of inter-related grounds. First, they raise concerns about the adverse affects of climate change on Tuvalu and, in particular, the effects on life and livelihoods because of rising sea levels and associated environmental processes and events. Further, it is claimed the family has no home to go to in Tuvalu and they will face extreme financial hardship. There is a lack of clean water and proper sanitation. No specific claim is raised by the wife in relation to Fiji.

[3] The husband and wife also claim that it is in the best interests of the children, both of whom were born in New Zealand but are not New Zealand

citizens, to remain here as part of an extended family unit. Also, the husband's mother, who is a New Zealand resident, suffered a serious stroke and is now reliant on the husband and wife for her care.

[4] The primary issues for determination by the Tribunal is whether the appellants' circumstances are such as to bring them within the scope of the Refugee Convention or alternatively within the scope of the Tribunal's protected person jurisdiction.

[5] For the reasons which now follow, the Tribunal finds that the appellants are not entitled to be recognised as either refugees or protected persons under the Act. Such humanitarian circumstances as may exist in regard to the adverse effects of climate change on the Tuvaluan population, the presence of family members here and the illness afflicting the husband's mother fall outside the scope of either jurisdiction.

[6] Given that the same matters are relied upon in respect of all limbs of the appeals, it is appropriate to record them first, before assessing each of the appellants' claims.

Decision Not to Offer an Interview

[7] The Tribunal may dispense with an interview if it considers that an appeal is, *prima facie*, manifestly unfounded or clearly abusive, or repeats a previous claim: see section 233(3) of the Act.

[8] The husband and wife were interviewed by the Refugee Status Branch ("RSB") in respect of their claims on 3 and 4 October 2016. Decisions declining their claims were made on 16 December 2016. On 6 January 2017, the Tribunal received the appellants' appeals against the decline of their refugee and protected person claims. Attached to those appeals were submissions from the appellants' representative together with copies of their passports, the child appellants' New Zealand birth certificates, a certificate of marriage and photographs of Tuvalu showing inundation of villages by seawater and a photograph of persons sleeping on the runway at Funafuti.

[9] By letter dated 22 February 2017, the Tribunal wrote to the appellants providing them with an opportunity to present submissions and/or evidence to show why the Tribunal should not regard the individual appeals as, *prima facie*, manifestly unfounded or clearly abusive. The appellants were advised that, unless

it was persuaded that this was not the case, the Tribunal could consider and determine their appeals without providing them an opportunity to attend an oral hearing. Particulars of the appellants' claims were set out and an explanation was given as to why they were considered to be, *prima facie*, manifestly unfounded. Those reasons are discussed below. The appellants were directed to file any submissions on this issue by no later than 8 March 2017.

[10] By email dated 8 March 2017, the appellants' representative advised that the appellants had "nothing more to add" to their refugee and protection appeals.

Whether the Appeals are, *Prima Facie,* Manifestly Unfounded

[11] For reasons which are discussed in more detail later, the Tribunal considers that the appeals of each of the appellants, to be, *prima facie*, manifestly unfounded.

[12] The Tribunal determines that section 233(3) of the Act applies. The adult appellants each attended an interview at the RSB giving evidence in respect of not only their appeals but on behalf of the child appellants. The Tribunal considers that the appeals are, *prima facie*, manifestly unfounded because, even accepting everything that the husband and wife have said, none of the appellants faces a risk of being persecuted by reason of a Convention ground in Tuvalu and none of the appellants are in danger there of being subjected to forms of qualifying harm within the ambit of the Tribunal's protected person jurisdiction. Further, the wife is not a national of Tuvalu but of Fiji. She does not face anything other than a remote or speculative risk of being persecuted for a Convention reason in Fiji.

[13] It determines not to provide the appellants with an oral hearing and to determine the appeals on the information and documentation on the file.

THE APPELLANTS' CASE

[14] The appellants' case is set out in their confirmation of claim forms, their RSB interviews and documents submitted in support of their claims to both the RSB and the Tribunal. Because the appeals arise from the same factual matrix, it is convenient to record the appellants' case in a single narrative.

[15] The husband was born in the early 1980s in Funafuti, Tuvalu, as the only child of the family. The wife was born in Fiji and her family is of Tuvaluan ethnicity.

She is the only child of her parents but has two half-siblings. The husband completed his high schooling in Tuvalu, the wife in Fiji. The husband spent a year in school in Fiji in the late 1990s.

[16] In the early 2000s, the husband attended the Tuvalu Maritime School and attained a Certificate in Engineering. He then began working for the Tuvalu Marine Service as a merchant seaman. The couple were married in March 2012 in Fiji. The husband and wife arrived in New Zealand in August 2012. He came to New Zealand to help look after his father who was wheelchair bound and his mother was also in ill-health suffering from hypertension and diabetes.

[17] Although the husband's visitor visa expired in late 2012, he remained in New Zealand unlawfully as he was culturally obliged to look after his elderly and sick parents. Although he had extended family members present in New Zealand none were able to help. The husband and wife's eldest child was born in New Zealand in early 2013. Their second child was born in early 2015. Representations were made in 2015 by the electoral agent for the appellants' Member of Parliament seeking a Ministerial intervention under section 61 of the Act to regularise their status and the status of the husband's parents.

[18] By letter dated 13 October 2015, the Associate Minister of Immigration declined to intervene. The appellants lodged their claim for refugee status in August 2016.

[19] The family would have no home to live in if returned to Tuvalu. The husband's father had sold the family house prior to his coming to New Zealand. He has since died. The husband's extended family were mostly overseas and could not provide him with any assistance in Tuvalu. Both the husband and wife would struggle to find work. Their employment opportunities are constrained by the small size of Tuvalu's economy. Approximately 40 per cent of the Tuvaluan population is unemployed. Around 75 per cent of the labour force works in subsistence agriculture and fisheries. The remaining 25 per cent work for the government or are self-employed.

[20] While the husband has qualified as a seaman, he last found employment in 2011. He would find it difficult to find employment in Tuvalu which suffered from a high unemployment rate and because he had been out of work for a lengthy period of time. It could take many months for him to find work as there were many qualified seamen waiting for work.

[21] The appellants are also concerned about being able to maintain an adequate standard of health in Tuvalu. While the husband and wife are currently healthy, it would be difficult to access medical treatment in Tuvalu. The medical system was getting worse there. Both the appellant children are very young. The husband and wife are particularly concerned for the health and welfare of their son who has in the past been hospitalised with pneumonia and who remains under monitoring by the local district health board here in New Zealand.

[22] The family will be forced into a situation of extreme financial hardship. They will not have access to clean and sanitary drinking water and do not believe that the government of Tuvalu takes the responsibility seriously. The government has an "incompetent and relaxed" attitude.

[23] The appellants are also concerned about the adverse impact of climate change on their lives and livelihood. Tuvalu is a small island state and Funafuti atoll is small, comprising about 2.5 square kilometres. Exposure to the sea along the coastline makes land erosion a serious problem and the country suffers from rising sea levels, storms and king tides. They believe that life will no longer be sustainable on Tuvalu because of rising sea levels.

ASSESSMENT

[24] Under section 198 of the Act, on an appeal under section 194(1)(c) the Tribunal must determine (in this order) whether to recognise each of the appellants 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).

[25] 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 appellants' account.

Credibility

[26] Because the appellants have not been given the opportunity of an interview for the purposes of this decision, the Tribunal accepts their account as credible. In summary, the appellants are a married couple and two minor children. The husband and children are Tuvaluan citizens. The wife is a Fijian citizen. They have lived in New Zealand since 2012. The husband's father is deceased and his elderly mother is in New Zealand and is in ill-health. Previously, while living in Tuvalu, the husband has worked as a merchant seaman although has not worked in this capacity since 2011. The wife has not worked since completing high school. The wife's family members remain living in Fiji. Her mother lives with her brother. While in Tuvalu the husband lived in accommodation owned by his father which has since been sold.

The Refugee Convention

[27] 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."

[28] 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."

[29] 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

[30] For the purposes of refugee determination, "being persecuted" requires serious harm arising from the sustained or systemic violation of internationally

recognised human rights, demonstrative of a failure of state protection – see *DS (Iran)* [2016] NZIPT 800788 at [114]-[130] and [177]-[183].

[31] In determining what is meant by "well-founded" in Article 1A(2) of the Convention, the Tribunal adopts the approach in *Chan v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379 (HCA), 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].

[32] To qualify for refugee status, the appellants' predicament must be grounded in one of the five Convention grounds of race, religion, nationality, membership of a particular social group or political opinion. The nexus to the relevant Convention ground may be provided by either the serious harm or failure of state protection elements to the definition of being persecuted; see discussion in James C Hathaway and Michelle Foster *The Law of Refugee Status* (2nd ed, Cambridge University Press, Cambridge, 2014) at pp373-376 and cases cited therein. As to the relevant standard, *Refugee Appeal No 72635* (6 September 2002) held, at [173]:

> "...it is sufficient for the refugee claimant to establish that the Convention ground is a ***contributing*** cause to the risk of "being persecuted". It is not necessary for that cause to be the sole cause, main cause, direct cause, indirect cause or "but for" cause. It is enough that a Convention ground can be identified as being relevant to the cause of the risk of being persecuted. However, if the Convention ground is remote to the point of irrelevance, causation has not been established."

[33] At the core of the appellants' claims lie the inter-related concerns of the adverse effects of climate change and their socioeconomic condition in Tuvalu. The Tribunal accepts that returning to Tuvalu will pose challenges for the appellants both socioeconomically and in terms of the negative environmental impacts of climate change.

[34] As far as the appellants' fears relating to the adverse impacts of climate change are concerned, in *AF (Kiribati)* [2013] NZIPT 800413, the Tribunal noted that in the context of natural disasters and climate change, claims based on the generalised consequences of climate change cannot, without more, give rise to recognition of refugee status due to the lack of nexus to a Convention ground. This reasoning has been endorsed on appeal by the High Court, Court of Appeal and Supreme Court; see, respectively, *Teitiota v Chief Executive of the Ministry of Business, Innovation and Employment* [2013] NZHC 3125, *Teitiota v Chief Executive of the Ministry of Business, Innovation and Employment* [2014] NZCA

173 and *Teitiota v Chief Executive of the Ministry of Business, Innovation and Employment* [2015] NZSC 107.

[35] The difficulty in this case is that, having regard to the information provided by the appellants in support of their claim and on appeal, there is no basis for finding that any harm they do face as a result of the adverse impacts of climate change has any nexus whatsoever to any one of the five Convention grounds.

[36] The same principles apply in relation to any harm any of the appellants face by reason of the socioeconomic difficulties they would encounter on return. See here discussion in *BG (Fiji)* [2012] NZIPT 800091, where the Tribunal observed:

> [119] Socio-economic policy varies across all societies. Most countries face hard choices about the allocation of scarce public resources, levels of which are highly variable internationally. Where the socio-economic condition of the claimant arises as a result of general policy choices, it may be difficult to establish that their civil and political status as specified in the enumerated Convention grounds is anything other than a remote cause for their predicament. The well-founded element cannot be founded on mere conjecture or surmise: see *Refugee Appeal No 72668: Ruling on Legal Issues* (5 April 2002) at [131]; Minister *for Immigration and Ethnic Affairs v Guo* (1997) 191 CLR 559, 572. The same applies to the nexus requirement. Cogent evidence must be presented to establish the causal nexus to the required degree.

[37] The representative refers in his submissions to economic data and reports such as the 2014 *Tuvalu Economic and Development Handbook* (Volume 1) and a 1994 *Household Income and Expenditure Economic Survey* which demonstrate that a significant proportion of the population live in poverty, with some sectors of society more affected than others, including those without access to a regular source of income, without access to land and those with large families. This can all be accepted. However, as with the claim in relation to climate change, there is no evidence to establish that such socioeconomic harm as the appellants may encounter would be *by reason of* any one of the nominated Convention grounds. Similarly, to the extent that it could be argued that the Tuvaluan state was somehow failing to protect its citizens from socioeconomic deprivation (about which there is no evidence), there is in any event no evidence before the Tribunal to establish that such failure of state protection would arise because of the civil or political status of these appellants.

[38] Similar observations arise in relation to the wife as regards return to Fiji. She says that her brother, who is looking after her mother, would be unable to support her. Whether or not this is the case, it could not sensibly be said that her predicament had any nexus to her civil or political status as expressed through one of the Convention grounds.

[39] For these reasons alone, the appellants' refugee claims must fail.

Conclusion on Claim to Refugee Status

[40] None of the appellants are entitled to be recognised as refugees under section 129 of the Act.

The Convention Against Torture

[41] 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."

[42] Section 130(5) of the Act provides that torture has the same meaning as in the Convention Against Torture, Article 1(1) of which states that torture is:

> "… any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions."

[43] The appellants have not advanced any allegation that they are at risk of being tortured as that phrase is defined under the Act. None of the appellants are in danger of being tortured if returned to Tuvalu or Fiji.

Conclusion on Claim under Convention Against Torture

[44] None of the appellants are entitled to be recognised as protected persons under section 130 of the Act.

The ICCPR

[45] 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."

[46] As regards the arbitrary deprivation of life, this was considered by the Tribunal in *AF (Kiribati)* at [83] and in *AC (Tuvalu)* [2014] NZIPT 800517. The Tribunal noted that not every risk to life falls within the scope of this aspect of the Tribunal's protected person jurisdiction. Rather, to be an "arbitrary" deprivation of life there must be some act or omission by the government of Tuvalu which it is accountable. Although the appellants' claim that the government of Tuvalu is incompetent or inept, in both *AC (Tuvalu)* and *AF (Tuvalu)* [2015] NZIPT 800859 the Tribunal found that it had not been established that the government of Tuvalu had failed, or was failing to take steps to protect the lives of its citizens from known environmental hazards such that the appellants would be in danger of being arbitrarily deprived of their life. In *AC (Tuvalu)*, the Tribunal noted:

> "[107] That challenges remain in this area is also acknowledged in the UPR National Report which, at paragraph [81], notes the NAPA project and other climate change adaptation measures face challenges and constraints. These include the accessibility and availability of funds to procure materials for project development, complex United Nations funding processes, the unavailability of materials to progress projects, poor internal management systems and slow staff recruitment processes.
>
> [108] While it is accepted that challenges do exist, particularly in relation to food and water security in Tuvalu, in light of the information as a whole, the Tribunal finds that it has not been established that Tuvalu, as a state, has failed or is failing to take steps to protect the lives of its citizens from known environmental hazards such that any of the appellants would be in danger of being arbitrarily deprived of their lives. "

[47] No evidence has been provided which causes the Tribunal to depart from these conclusions.

[48] Specifically, in relation to the claim that the appellants will be arbitrarily deprived of their life due to a lack of access to clean drinking water and sanitation, the Tribunal noted in *AF (Tuvalu)*:

> "The question is what is at the core of the right to safe drinking water. This does not require that safe drinking water comes necessarily from the tap. What is required is that the person is able to access, after whatever process is necessary, water that they are able to drink. According to Ms Albuquerque, at p7 of her report, this is possible in Tuvalu. There has been substantial international assistance with provision of rainwater tanks."

[49] There is no evidence before the Tribunal to establish that the appellants will not be able to access clean drinking water provided for by the government of Tuvalu such that any of their lives will be in danger should they be returned there.

[50] As regards the claims that the appellants will not be able to access employment, and will generally face economic hardship there, as set out in *BG (Fiji)*, generally, socioeconomic deprivation arising from general policy and conditions in the receiving country will not constitute cruel, inhuman or degrading treatment, because there is no relevant treatment to which the state can be held accountable – see [149] and [197]. Nothing in the appellants' claim indicates that there will be any relevant 'treatment' by the Tuvaluan government.

[51] Finally, as regards the claim that the appellant children are particularly vulnerable to the adverse impacts of climate change due to their young age and, in relation to the son, ill-health, even accepting this, this does not bring them within the scope of the protected person jurisdiction. In *AC (Tuvalu)* the Tribunal noted:

> "[119] In summary, the Tribunal accepts and acknowledges that, by reason of their young age, the appellant children are inherently more vulnerable to the adverse impacts of natural disasters and climate change than their adult parents. Nevertheless, the evidence before the Tribunal establishes that the Government of Tuvalu is sensitised to the specific vulnerabilities of children such that the appellant children in this case are not in danger of being arbitrarily deprived of their young lives if returned to Tuvalu, and they are not, as children, in danger of being subjected to cruel, inhuman or degrading treatment."

[52] Nothing the appellants have produced in support of their refugee claim provides any basis for departing from this finding. Moreover, in relation to the particular health concerns relating to the son, section 131(5)(b) provides:

> "the impact on the person of the inability of a country to provide health or medical care, or health or medical care of a particular type or quality, is not to be treated as arbitrary deprivation of life or cruel treatment."

[53] In relation to Fiji, the wife's claim must also fail. Nothing she has provided establishes that she is in any danger there of being arbitrarily deprived of her life, or subjected to torture or cruel treatment as that is defined under the Act.

[54] For these reasons, none of the appellants are entitled to be recognised as protected persons under the Act.

Conclusion on Claim under ICCPR

[55] None of the appellants are entitled to be recognised as protected persons under section 131 of the Act.

CONCLUSION

[56] There facts of the case clearly raise matters of broad humanitarian concern. However, there is no humanitarian appeal before the Tribunal. It is unable to consider any wider humanitarian circumstances arising from the facts.

[57] For the foregoing reasons, the Tribunal finds that the appellants:

(a) are not refugees within the meaning of the Refugee Convention;

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

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

[58] The appeals are dismissed.

Order as to Depersonalised Research Copy

[59] Pursuant to clause 19 of Schedule 2 of the Immigration Act 2009, the Tribunal orders that, until further order, the research copy of this decision is to be depersonalised by removal of the appellants' names and any particulars likely to lead to the identification of the appellants.

"B L Burson"
B L Burson
Member

Certified to be the Research Copy released for publication.

B L Burson
Member