

**AT AUCKLAND**

<b>Appellants:</b>	<b>AV (Nepal)</b>
<b>Before:</b>	A M Clayton (Member)
<b>Counsel for the Appellants:</b>	D Patchett
<b>Counsel for the Respondent:</b>	No Appearance
<b>Date of Hearing:</b>	21 August & 1 September 2017
<b>Date of Decision:</b>	22 September 2017

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**REFUGEE AND PROTECTION DECISION**

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[1] This is an appeal against a decision of a refugee and protection officer declining to grant refugee or protected person status to the appellants, a married couple who are citizens of Nepal.

**INTRODUCTION**

[2] The appellants fear returning to Nepal because they have been diagnosed with post-traumatic stress disorder (PTSD) since the April 2015 earthquake and because they do not have any children there to look after them.

[3] The Tribunal finds that the appellants' claims are credible but not well-founded in terms of international refugee or protection law.

**THE APPELLANTS' CASE**

[4] The accounts which follow are summaries only of the evidence given by the appellants and their two witnesses at the appeal hearing.

## **The Husband's Evidence**

[5] The husband is [...] years old and was born in eastern Nepal. He and his wife have two adult children both of whom are now married and have [...] children each. Their daughter, [...], studied in India and now lives in [...]. Their son, [...], has studied and worked in [...] for approximately 20 years.

[6] Prior to the April 2015 earthquake, the husband and wife were retired and living in their home in Kathmandu. They regularly visited temples and socialised with friends and former work colleagues and occasionally had contact with members of their extended families. With their savings and assistance from their son, they built a further one and a half storeys on their small home in Kathmandu, intending to remain there.

[7] The husband and wife were at home when the April 2015 earthquake struck. The wife injured her leg trying to get out of the house. The couple lived for three months in a tent. Eventually, they were able to have the ground floor of their home repaired sufficiently to be habitable and had the water and electricity reconnected. However, with continuing aftershocks, they often slept on the verandah.

[8] Following the earthquake, the husband and wife were constantly fearful and both thought it might be better to have died in the earthquake rather than suffer the aftershocks. The husband had ongoing pain in his foot which was not alleviated by an operation in Nepal.

[9] The danger of further earthquakes in Nepal has not passed. Further, if they go back, the husband and wife would not have their son and daughter there to support them emotionally.

[10] In contrast, in New Zealand, the husband and wife feel much more secure. Their son and daughter and their respective families have already visited them here. In 2013, their son and his family were granted residence status and their son purchased a home in a provincial city in New Zealand. The appellants are living in that home now and are waiting for their son and his wife and two children to leave [...] and join them here permanently. The son works in a specialised field and all that is holding up his move to New Zealand is obtaining a suitable employment position.

### **The Wife's Evidence**

[11] The wife is 55 years old. Her 99-year-old father and her siblings continue to live in Nepal. After the earthquake, the wife constantly felt like crying, she would forget things, be startled by small noises, and her heart would pound for no reason. On about 10 or 15 occasions she ran out of the house at night.

[12] As well as feeling continually frightened, tired and weak, the wife also felt responsible for everything, given that her husband suffered from constant pain and had to be taken to hospital regularly. She herself had injured her leg in the earthquake. Over time, she developed pain down her entire left side which could not be alleviated.

[13] Since they have been in New Zealand, the wife sleeps better and does not run out of the house anymore. She feels secure in their son's house which she trusts will not fall down and kill them. She still has flashbacks, although fewer, when she thinks of people, including a friend, dying in front of her. She has taken antidepressant medication over the last six months but this has not appeared to make any difference.

[14] If the appellants are permitted to stay in New Zealand, their daughter and her children are able to visit much more easily and often. Their son and his family will be joining them in New Zealand as soon as he is able.

### **Evidence of the Appellants' Son**

[15] The appellants' son lives in [...] with his wife and two children, aged [...]. They have held residence status in New Zealand since 2013 (and permanent residence status since 2016), but the son has been unable to find suitable employment in his field of work. He is also unable to obtain relevant work in Nepal.

[16] The son and his family saw his parents for four weeks last year in New Zealand and will rejoin them for another four weeks in January of this year.

### **Evidence of the Appellants' General Practitioner**

[17] The appellants' general practitioner in New Zealand, Dr AA, has not assessed the husband in regard to a diagnosis of PTSD made by his former doctor, because the husband's English is very limited.

[18] The husband recently had surgery for the removal of foreign material from his foot. Dr AA believes that this operation will cure the pain from which the husband has been suffering for a long time.

[19] The husband is pre-diabetic, but controlled, and is taking common medications for hypertension and acid reflux.

[20] Dr AA readily agrees with the diagnosis of PTSD in the wife's case, given her level of anxiety, frequent flashbacks and waking from her sleep. She also suffers from chronic pain which he has diagnosed as fibromyalgia, one of the causes of which is a pre-existing depressive illness or anxiety disorder. Painkillers, anti-inflammatories and simple analgesics do not affect the pain felt by someone suffering from fibromyalgia. Dr AA has attempted to treat the wife with antidepressant medication but with no success to date. She will also have to take a common medication for her thyroid on a life-long basis.

#### **Material and Submissions Received**

[21] Counsel for the appellants lodged:

- (a) opening submissions (17 August 2017);
- (b) letters from the appellants' general practitioner Dr AA (both dated 10 August 2017) and from their former general practitioner (both dated 12 September 2016) in regard to the appellants' health;
- (c) a statement by the appellants' son (received 2 August 2017);
- (d) information on fibromyalgia; and
- (e) previous decisions of the Tribunal relevant to the appellants' humanitarian circumstances and to the connection between natural disasters, human rights, and international refugee law.

[22] The Tribunal obtained records of the movements and visas for the appellants and their two children from Immigration New Zealand. These show that the appellants arrived together on 26 April 2016. They also confirm that the appellants' son and his family were granted resident visas under the Skilled Migrant category in May 2013 and permanent resident visas in May 2016.

## **ASSESSMENT**

[23] Under section 198 of the Immigration Act 2009 (“the Act”), on an appeal under section 194(1)(c) the Tribunal must determine (in this order) whether to recognise each 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 (section 131).

### **Credibility**

[24] In determining whether an 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.

[25] The appellants’ evidence was consistent one with the other and with their son’s evidence. It was also consistent with country information.

### *Facts as found*

[26] The appellants’ claims for refugee and protection status will be assessed on the basis that they are nationals of Nepal, aged [...], both of whom have been diagnosed with PTSD. Their home in Kathmandu has been severely damaged by the April 2015 earthquake, but is habitable. Their adult children do not reside in Nepal and are highly unlikely to take up residence there.

### **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 Claims 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].

*Objectively, on the facts as found, is there a real chance of the appellants being persecuted if returned to Nepal?*

[32] The appellants fear returning to Nepal because they have been psychologically affected by the earthquake in April 2015 and because their adult children are unable to look after them there.

[33] The April 2015 Nepal earthquake killed nearly 9,000 people and injured nearly 22,000. It had a magnitude of 7.8 Mw (United States Geological Survey, 25 November 2015) and it was the worst natural disaster to strike Nepal since the 1934 Nepal-Bihar earthquake (“Nepal earthquake: Eerie reminder of 1934 tragedy” *The Economic Times* (25 April 2015)). In 2015, hundreds of thousands of people were made homeless across many districts of the country and centuries old UNESCO world heritage sites in the Kathmandu valley were destroyed. There

were continued aftershocks, including one on 12 May 2015 with a magnitude of 7.3 Mw, which killed more than 200 people and injured more than 2,500 (“Nepal earthquake: Dozens die in new tremor near Everest” *BBC* (12 May 2015)).

[34] It is recognised that natural disasters and their consequences can involve significant human rights issues. Nevertheless, any successful claimant must still establish that they meet the legal standards of the refugee definition contained in Article 1A(2) of the Refugee Convention. In *AF (Kiribati)* [2013] NZIPT 800413, the Tribunal noted:

[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.

[35] As to whether the appellants in the present case are refugees, the short answer is that they are not. It is acknowledged that the earthquake has had a deeply distressing effect on them. Indeed, it is accepted for the purposes of their appeals that they both suffer from PTSD. Because they are older individuals from Kathmandu, without adult children nearby to assist them, their predicament is even more difficult. The appellants acknowledge, however, that their fear is not of the Nepalese state but rather of returning to Nepal without the support of their children.

[36] The appellants have not presented any evidence to support the notion that, if they were returned to their home in Kathmandu, there is a real chance that they will suffer serious physical harm arising from the sustained or systemic violation of internationally recognised human rights, demonstrative of a failure of state protection (see [30] above). Whatever harm the appellants may face in Nepal does not arise from the legal concept of “being persecuted” which requires human agency or omission (subject to the points made in the careful discussion in *AF (Kiribati)* [2013] NZIPT 800413 at [55] *et seq*).

[37] In this instance, there is no evidence, however much time the recovery effort is taking, that the Nepalese government has failed to take adequate steps to protect the appellants from such harm as it is able. They were provided with basic

shelter and food immediately after the earthquake, their home was eventually made habitable, and they were able to live in it prior to coming to New Zealand a year ago. There is no basis for considering that it would be any different in the future.

[38] Finally, the harm faced as the result of the 2015 earthquake, its shocks and any future seismic activity is faced by the population of Kathmandu and/or Nepal generally. Any potential danger does not arise by reason of the appellants' race, religion, nationality, membership of any particular social group or political opinion. Therefore, not only is there an absence of persecution, but also an absence of a Refugee Convention reason.

#### *Conclusion on claims to refugee status*

[39] For these reasons, the appellants are not recognised as refugees within the meaning of the Refugee Convention.

#### **Assessment of the Claims under the Convention Against Torture**

[40] 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.

[41] Section 130(5) of the Act provides that torture has the same meaning as it does in Article 1(1) of the Convention Against Torture, 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.

[42] The appellants rely on the same evidence and submissions here as they rely on in terms of their refugee claims. However, for the same reasons, there are no substantial grounds for considering the appellants would be in danger of being subjected to torture if they were deported from New Zealand. Neither of them is entitled to recognition as a protected person under section 130 of the Act.



## Assessment of the Claims under the International Covenant on Civil and Political Rights

[43] 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.

[44] By virtue of section 131(5):

- (a) treatment inherent in or incidental to lawful sanctions is not to be treated as arbitrary deprivation of life or cruel treatment, unless the sanctions are imposed in disregard of accepted international standards:
- (b) 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.

[45] In regard to their claims under section 131 of the Act, the appellants rely again on the same evidence as that given in relation to the refugee claims. That evidence does not give rise to substantial grounds for considering that, in Nepal, they are in danger of being arbitrarily deprived of life.

[46] In *AF (Kiribati)*, cited above, the Tribunal examined the scope of the right not to be arbitrarily deprived of life within the context of natural disasters and noted, at [83], that not all risks to life fall within the ambit of section 131, only those which arise by means of “arbitrary deprivation”. It determined that the prohibition on arbitrary deprivation of life must take into account the positive obligation on a state to protect the right to life from risks arising from known environmental hazards. Failure to do so might, in principle, constitute an omission for the purposes of the prohibition on the arbitrary deprivation of life. As already noted, the appellants have not presented any evidence that the Nepalese government, with the assistance which it accepted from the international (state and non-state) community, has failed to take steps to positively protect its population, including the appellants, as best it could from the consequences of the earthquake. There is no basis for finding that the position would be any different in the future such that the appellants “would be in danger” of being arbitrarily deprived of their lives.

[47] As to the nature and scope of the prohibition on cruel, inhuman or degrading treatment, this was examined in detail in *BG (Fiji)* [2012] NZIPT 800091. The Tribunal determined that this prohibition was not intended to allow general socioeconomic conditions to constitute “treatment” unless there was: a deliberate infliction of socioeconomic harm by state agents or a failure to intervene while non-state agents did the same; the adoption of the particular legislative, regulatory or policy regime in relation to a section of the population; or the failure to discharge positive obligations towards individuals wholly dependent on the state for their socioeconomic well-being.

[48] In *AC (Tuvalu)* [2014] 800517-520, this reasoning was applied in the context of natural disasters. The Tribunal stated at [84]:

Just as it was not intended that consequences of general socio-economic policy should constitute a treatment under Article 7 of the ICCPR, nor does the mere fact that a state lacks the capacity to adequately respond to a naturally occurring event mean that such inability should, of itself, constitute a ‘treatment’ of the affected population. However, the existence of positive state duties in disaster settings means that, in some circumstances, it may be possible for a failure to discharge such duties to constitute a treatment. Specific examples will be the discriminatory denial of available humanitarian relief and the arbitrary withholding of consent for necessary foreign humanitarian assistance. ...

[49] None of those examples or any other act or omission which could constitute state treatment is present in the appellants’ case.

[50] For those reasons, there are no substantial grounds for considering that the appellants are in danger of being arbitrarily deprived of life or suffering cruel treatment as that term is defined in the Act, if they must return to Nepal. Neither appellant is entitled to recognition as a protection person under section 131 of the Act.

## **CONCLUSION**

[51] 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 persons within the meaning of the Convention Against Torture;
- (c) are not protected persons within the meaning of the Covenant on Civil and Political Rights.

[52] The appeals are dismissed.

**Order as to Depersonalised Research Copy**

[53] 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 their identification.

"A M Clayton"  
A M Clayton  
Member

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A M Clayton  
Member