

Appellant:	AW (Kiribati)
Before:	B L Burson (Member)
Counsel for the Appellant:	J Walker and S Fraser
Counsel for the Respondent:	No Appearance
Date of Hearing:	26 August 2022
Date of Decision:	31 October 2022

DECISION

INTRODUCTION

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

The Principal Issue on Appeal

[2] The appellant claims to have a well-founded fear of being persecuted or to be in danger of being subjected to another qualifying form of harm on a number of grounds. First, he claims to be at risk of being killed or seriously harmed in a revenge attack by the family of another citizen of Kiribati against whom he was convicted, in New Zealand in 2010, of committing serious offences. Second, he is at risk of suffering a level of socioeconomic deprivation amounting, he claims, to being persecuted or to degrading treatment. Third — and albeit overlapping with the second ground — he claims his safety and wellbeing will also be negatively impacted by climate change in ways amounting to being persecuted or to arbitrary deprivation of life or cruel treatment.

[3] The principal issues to be determined are whether the appellant's fear of a revenge attack is well-founded and, if so, whether effective protection will be available to him so as to reduce the risk of such an attack to below the real chance threshold; whether the appellant's anticipated socioeconomic predicament in Kiribati can amount to being persecuted or degrading treatment; and whether the risk to the appellant's safety and well-being due to the adverse impacts of climate change amounts, in law, to being persecuted, or to arbitrary deprivation of life or cruel treatment and if so, whether the risk of these harms arising reaches the requisite standard of risk.

[4] The Tribunal wishes to record at the outset the careful submissions of counsel which have been of great assistance in determining the issues raised.

The Appellant's Humanitarian Appeal Against Deportation Liability

[5] At the time that the appellant committed the above offences, he was the holder of a resident visa. As the offending had been committed no later than five years after his grant of residence, he became liable for deportation and, on 4 October 2013, he was served with a deportation liability notice. The appellant lodged an appeal against his deportation liability on humanitarian grounds. By decision dated 25 February 2016 the Tribunal (differently constituted) dismissed the appellant's appeal. The Tribunal found that the appellant had exceptional circumstances of a humanitarian nature, primarily because his deportation would result in his permanent separation from his wife and children. There would, the Tribunal found, be little prospect of the appellant being able to maintain any meaningful contact with his family from Kiribati where, the Tribunal accepted, he would need to lead a subsistence lifestyle.

[6] Nevertheless, the Tribunal concluded, weighing the appellant's offending (regarded as towards the upper end of the spectrum of seriousness) against the appellant's separation from his wife and children, it would not be unjust or unduly harsh for him to be deported from New Zealand: see *AM (Kiribati)* [2016] NZIPT 600102 (25 February 2016) at [49] and [61].

THE APPELLANT'S CASE

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

[8] The account which follows is a summary of that given by the appellant at the appeal hearing. It is assessed later.

Evidence of the Appellant

[9] The appellant was born in the late 1960s in a village on Kiritimati (Christmas) Island. He is one of number of children born to his parents, three of whom survive. His brother is a policeman but the appellant is not sure on which island in Kiribati he is posted. Of his two surviving sisters, the elder of the two is a teacher and is married. The appellant does not know where she now lives. His other sister is married to a policeman and lives in Y village on South Tarawa.

[10] At the time of the appellant's birth, his father, a marine engineer, had been posted to Kiritimati Island for employment purposes. The appellant and his parents remained living there until the appellant was approximately six years old at which point his family relocated to Z Island following his father's change of employment. The appellant completed his schooling there, finishing at the age of 16.

[11] After finishing high school, the appellant worked as a special constable assisting uniformed police on Z Island. In around 1991, he met and married his first wife. Together, they had three children born in 1990 (a son), 1996 (a son) and 1999 (a daughter). Following their marriage, the appellant and his family lived with his wife's family in Y village because his wife was culturally obliged to look after her elderly parents. The appellant supported his wife and her family initially through paid employment, repairing houses and working part-time as a stevedore on the local wharf. He managed to save sufficient funds to purchase an 18 foot boat powered by a 40 horsepower engine, which enabled him to give up this work and engage in small-scale commercial fishing. The appellant and some of his wife's relatives were now able to undertake open ocean, deep water fishing, keeping some of the daily catch for themselves and selling the remainder at market.

[12] In about 2003 or 2004, the appellant and his wife separated. Following the breakdown of his marriage, the appellant returned to live in X village on South Tarawa. Here he met his second wife. Two daughters were born to the couple in 2005 and 2007.

[13] With the money he had saved from his fishing operation, the appellant was able to construct a house for himself on land allocated to him under customary

land tenure arrangements. The land allocated to him was ocean facing and was the land situated most closely to the ocean. The appellant built a timber and concrete house topped with a corrugated iron roof, as was typical. Separate bedroom, kitchen, lounge and a utility area were created with partition walls and water was sourced by a rainwater harvesting system and water tank.

[14] In late 2007, the appellant's second wife arrived in New Zealand after her application for residence had been accepted under the Pacific Access category. The appellant and children followed in 2008. Subsequently, two further children were born to the couple in 2010 (a son) and 2011 (a daughter).

[15] Before leaving Kiribati, the appellant demolished the family house, selling as much of it as he could to neighbouring households to finance the family's move to New Zealand. He has not been back since.

[16] At the time he left Kiribati, the appellant's land was already being impacted by erosion as a result of king tides every March and April and storm surges which hit Kiribati through the cyclone season (Christmas time). While adjacent land owned by the Catholic Church has a seawall to protect it from erosion, his land did not. He does not know whether any coastal defences have been erected or other adaption measures taken in his absence, to protect the family land. The appellant is, however, doubtful whether he would now have sufficient land available to him.

[17] Even if it were, as he is aged in his mid-50s, the appellant believes he has no realistic way to earn a living and build even a modest house to live in. He has no funds to purchase a boat and earn a living as he had in the past. He has lost all connections with his family in the years since he has been in New Zealand, many of which have been spent in prison. He is doubtful that people would offer him employment and he is not aware of any unemployment benefit to which he is entitled. Although he is entitled to a pension, this will not be available to him until he is 60.

[18] Given this lack of income, the appellant does not think it is realistic for him to be able to find a place to live by leasing land and/or a dwelling from a customary landholder. Nor will the church be able to provide him with support. He has not heard of them providing support to people such as himself.

[19] The appellant does not believe his family would have any capacity to provide him with shelter and support. This was not so much to do with his

offending, he said, but due to overpopulation and the increasing demand on limited land resource. In Kiribati, land has been customarily divided over generations such that there are disputes between brothers, some of which turn violent, over entitlement and access to land under customary arrangements.

[20] The appellant also fears a revenge attack by the family of his victim. At the time of the offending, there were conversations where the victim made it clear that her family would look after her if anything happened. In the years before he left Kiribati, the appellant heard a number of stories of men who were in a similar situation to his having been found hacked to death or drowned in nets in remote spots. No specific threat of this kind has been issued against him, but he believes it will happen. He has heard that the victim's father lives close to X village. Even if he were to make a complaint, the police would, he believes, be powerless to stop it happening.

Material and Submissions Received

[21] The Tribunal and the appellant have before them copies of the files of the Refugee Status Unit which include all documents which were before that body at the time of its decision.

[22] In the course of the appeal, the Tribunal served on counsel the following:

- (a) Republic of Kiribati *National Adaptation Programme of Action* (January 2007).
- (b) Republic of Kiribati Island Report Series *South Tarawa* (2012) ("the 2012 South Tarawa report").
- (c) Human Rights Council *National Report Submitted in Accordance with Paragraph 5 of the Annex to Human Rights Council Resolution 16/21: Kiribati* A/HRC/WG.6/21/KIR/1 (11 November 2019) ("the 2019 UPR National Report").
- (d) Pacific Community *Island Diagnostic Analysis Report* for Kiribati (2022) ("the 2022 Island Diagnostic report").

[23] On 23 August 2022, the Tribunal received submissions of counsel, together with:

- (a) A statement (undated) from the appellant.

- (b) A letter (undated) from chaplain J Martin, confirming that the appellant has been a regular attendant of the church services at the prison. He describes the appellant as a “devoted Christian man who actively practises his faith”.
- (c) Committee on Economic, Social and Cultural Rights *General Comment No 6: the Economic, Social and Cultural Rights of Older Persons* E/1996/2022 (8 December 1995).
- (d) J P Cauchi and others “Climate Change, Food Security and Health in Kiribati: a Narrative Review of the Literature” (2019) 12(1) *Global Health Action*.
- (e) Australian Department of Foreign Affairs and Trade *2020-21 Kiribati Development Program Progress Report* (November 2021) (“the DFAT 2020-21 Development Progress report”).
- (f) Committee on Economic, Social and Cultural Rights *General Comment No 20 Non-discrimination in Economic, Social and Cultural Rights (art 2, para 2 of the International Covenant on Economic, Social and Cultural Rights)* E/C.12/GC/20 (2 July 2009) (“ICESCR GC20”).
- (g) The Borgen Project *Top 10 Facts about Living Conditions in Kiribati* (22 July 2019) at www.borgenproject.org.
- (h) International Labour Organization Regional *Kiribati Employment and Environmental Sustainability Fact Sheets 2019* at www.ilo.org.

[24] On 26 August 2022, counsel filed a copy of a statement (30 September 2015) which had been filed in relation to the appellant’s deportation liability appeal.

[25] At the conclusion of the hearing, counsel made closing oral submissions. These were supplemented by further written submissions received on 5 September 2022 and 3 October 2022. Attached to those submissions were copies of:

- (a) Australian Department of Foreign Affairs and Trade, *Pacific COVID-19 Response Package — Kiribati Annex* (May 2021).

- (b) S Behrman and A Kent “The Teitiota Case and the Limitations of the Human Rights Framework” (2020) *75 Questions of International Law* 25.
- (c) F Prance “Institutions and Values: Climate Change Adaptation Mainstreaming Implementation in Kiribati” (abstract only) *University of Adelaide* (August 2016).
- (d) CIVICUS *UN Rights Chief Calls on Kiribati to Establish a National Human Rights Institution* (16 February 2021).
- (e) United Nations Pacific *The Republic of Kiribati CCA* (5 January 2022) (“the 2022 UN Country Assessment”).

[26] The Tribunal acknowledges the considered submissions of counsel in relation to the difficult legal issues posed by cases grounded in the impact of climate change.

ASSESSMENT

[27] 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 the appellant as:

- (a) a refugee under the 1951 *Convention Relating to the Status of Refugees* (“the Refugee Convention” or “the 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).

[28] The appellant has been convicted of a serious non-political crime, albeit in New Zealand. While an exclusion issue potentially arises, having regard to the Tribunal’s finding as to a lack of a well-founded fear of being persecuted, it is not necessary to address this.

[29] 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

[30] The appellant presented as a credible witness. His account as to his background circumstances is accepted in its entirety. The Tribunal also accepts that the appellant genuinely holds subjective fears of retribution, impoverishment and risk to his safety and wellbeing due to the adverse impacts of climate change. The conclusions he has drawn as to these risks, however, are assessed below.

[31] Under section 231 of the Act, the Tribunal may rely on any finding of fact made by the Tribunal panel (differently constituted) which determined the appellant's deportation appeal. In that decision, the Tribunal recorded, at [6], that "[t]he victim is a citizen of Kiribati who, together with her brother, lived as boarders in the home of the appellant and his wife". The Tribunal made the following findings about the appellant's family:

[42] The appellant is a 48-year-old married citizen of Kiribati and the father of four children. His two eldest children, AA and BB, aged eight and 10 years, hold New Zealand residence status; the two youngest children, aged four and five, are New Zealand citizens by birth. CC, the appellant's wife of eight-and-a-half years, is also a citizen of Kiribati and a New Zealand resident since 17 May 2008. She is currently the sole caregiver of their four children and she has successfully raised her family on her own as the recipient of a sole-parent benefit for the last three years.

[43] The appellant and his wife both say that, if he is deported, CC and the children will remain in New Zealand where they are well-settled.

[32] With the exception of the appellant's age, these findings of fact are also accepted and relied on.

Summary of relevant facts as found

[33] The Tribunal summarises the facts relevant to its evaluation of the risk to the appellant in Kiribati and other relevant issues as set out below, as follows.

[34] The appellant is a married man aged in his mid-50s. He has three surviving siblings: a brother (a policeman) and two surviving sisters. The elder of his two sisters is a teacher and is married; the other is married to a policeman and lives in Y village on South Tarawa.

[35] The appellant met his first wife in the early 1990s. They had three children together of which two survive; his son lives in North America while his daughter is married and lives with her husband in Kiribati. He is estranged from both.

[36] In about 2003 or 2004, following the breakdown of his first marriage, the appellant returned to live in X village on South Tarawa. He met his second wife with whom he has four children. He supported his family through paid employment and then, using his own powered boat, by engaging in small scale commercial fishing. He built a family home on a portion of family land owned by him under customary land tenure arrangements.

[37] The appellant has been living in New Zealand since October 2008. His wife and four children are living in New Zealand as either citizens or residents. They will not join him in Kiribati. The appellant is liable to be deported as a result of his having been convicted in New Zealand of serious criminal offences. The victim is a citizen of Kiribati whose father lives nearby to the village where the appellant's family land is located.

[38] The house the appellant built is no longer available to him, nor is his boat. The former was demolished and the latter sold to finance the family's migration to New Zealand, his wife having obtained residence in New Zealand under the Pacific Access Quota scheme.

[39] The appellant's land is located on the ocean side of South Tarawa atoll and, as at the time he emigrated to New Zealand, was without any sea wall and was already being impacted by erosion.

THE REFUGEE CONVENTION

[40] 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.

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

[O]wing 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, is unable or, owing to such fear, is unwilling to return to it.

[42] This requires the Tribunal to evaluate the reason why the appellant is outside Kiribati and does not depend on his returnability there; see *GD (China)* [2020] NZIPT 801793–794.

[43] In terms of *Refugee Appeal No 70074* (17 September 1996), affirmed by the Tribunal in *DS (Iran)* [2016] NZIPT 800788 at [213] as “the essential distillation of the issues arising in the context of an inquiry into refugee status”, the principal issues are:

- (a) Objectively, on the facts as found, is there a real chance of the appellant being persecuted in the country of nationality?
- (b) If the answer is yes, is there a Convention reason for that persecution?

[44] 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].

[45] 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, 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 Appellant Being Persecuted in Kiribati?

The international human rights engaged

[46] In so far as the appellant’s claims to be at risk from the family of the victim, the appellant’s claim raises issues under Articles 6(1) and 7 of the ICCPR, which relevantly provide:

Article 6

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.

Article 7

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

[47] Specific issues have been raised in relation to the appellant's right to work on a non-discriminatory basis as guaranteed under Articles 2(2) and 6 of the 1966 *International Covenant on Economic Social and Cultural Rights* ("ICESCR"). These relevantly provide:

Article 2

1. ...
2. The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Article 6

1. The States Parties to the present Covenant recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right.
2. The steps to be taken by a State Party to the present Covenant to achieve the full realization of this right shall include technical and vocational guidance and training programmes, policies and techniques to achieve steady economic, social and cultural development and full and productive employment under conditions safeguarding fundamental political and economic freedoms to the individual.

[48] Counsel draw particular attention to the appellant's right to an adequate standard of living under Article 11 of the 1966 *International Covenant on Economic Social and Cultural Rights*, which provides:

Article 11

1. The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent.
2. The States Parties to the present Covenant, recognizing the fundamental right of everyone to be free from hunger, shall take, individually and through international co-operation, the measures, including specific programmes, which are needed:
 - (a) To improve methods of production, conservation and distribution of food by making full use of technical and scientific knowledge, by disseminating knowledge of the principles of nutrition and by developing or reforming agrarian systems in such a way as to achieve the most efficient development and utilization of natural resources;

(b) Taking into account the problems of both food-importing and food-exporting countries, to ensure an equitable distribution of world food supplies in relation to need.

[49] Insofar as the appellant's claim relates to risks to his life and wellbeing due to his exposure and vulnerability to the adverse impact of climate change, Counsel posits this element as also engaging these rights. Further, given the recent decision of the Human Rights Committee in *Billy et al v Australia*, CCPR/C/135/D/3624/2019 (22 September 2022) (hereinafter, "the *Torres Strait Islanders* decision"), the appellant's claim can also be fairly said to raise issues under Article 17 of the ICCPR, which relevantly provides:

1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.
2. Everyone has the right to the protection of the law against such interference or attacks.

Relevant country information

— Policing in Kiribati

[50] Although of itself not in issue, it is important to record that Kiribati has a functioning police force. Police are stationed on every island. There are four police stations on South Tarawa; see the 2019 UPR National Report at p7, para 50, and p23, footnote 65. The Kiribati Government Ministry of Finance and Economic Development *2021 Recurrent Budget* (December 2020) notes, at p25, in relation to the Kiribati Police Service:

Maintenance of Law and Order: The Kiribati Police Services has embarked on the development and implementation of the concept of community policing by placing a high focus on liaison and awareness programs and working with the community. Police stations provide front line law and order and public safety services and are responsible for first response to incidents reports made by the community. Incidents dealt with includes all reported criminal activities and disturbance of public order.

— Socio-economic conditions in Kiribati

[51] Kiribati is what is known as a Small Island Developing State and one of the poorest in the Pacific region. The country has a narrow economic base, with high dependence on access to markets and foreign exchange inflows. Poverty rates are estimated to be as high as 30 per cent; see the DFAT 2020-21 Development Progress Report. The 2022 UN Country Assessment, at p89, makes similar observations.

Poverty rates vary significantly across the different island groups, with the highest poverty rates found in the Southern Gilbert Islands (29% of population living in basic needs poverty, and 16% below the food poverty line), reflecting these islands' isolation, limited agricultural potential, and vulnerability to drought. South Tarawa has the second highest poverty rates, with an estimated 17% of households struggling to provide for themselves.

A large proportion of I-Kiribati are considered to be vulnerable to falling into poverty. UNDP's HDR Office and Oxford University publish their Multidimensional Poverty Index (MPI). For Kiribati (2018/2019) the MPI shows that 19.8% of the population are multidimensionally poor while an additional 30.2% percent are classified as vulnerable to multidimensional poverty.

[52] Nevertheless, the report also notes, at pp12-13, that Kiribati is making incremental human gains in terms of human development; for example, between 1990 and 2019 life expectancy at birth, and mean and expected years of schooling have both increased, as the per capita gross national income increased by nearly 80 per cent in this period. Despite these gains, the UN notes "21.9% of the population in Kiribati were poor in 2019/20 compared to national standards of living, ... and high shares of the population were deprived of non-monetary needs, such as access to clean water, sanitation, and electricity".

[53] The 2022 UN Country Assessment notes, at p14, that Kiribati's population is unevenly distributed with substantial overcrowding on South Tarawa:

The Gilbert Islands are home to 90% of the population and include both rural and densely populated urban territories. While the average population density for Kiribati is 152 inhabitants per square kilometre, this figure increases to 2,772 on South Tarawa island and further skyrockets to 10,377 on the heavily urbanized Betio islet, located to the extreme southwest of the capital atoll of South Tarawa. Owing to the high population density, land is scarce and expensive

[54] Population increases are expected to create further pressure on the carrying capacity of South Tarawa. The 2022 UN Country Assessment notes, at p19:

Significant population growth is projected in Kiribati, which could near 180,000 people in 2050, a growth of 60,000 or +50% from 2020. People in the outer islands who rely on subsistence livelihoods are likely to migrate to urban areas due to environmental pressures resulting in the population growth concentrating in South Tarawa, in turn highly unlikely to be able to sustain this influx due to resource constraints. Kiribati's population is young and brings along potential demographic dividends.

[55] The economy is heavily reliant on income from fisheries licencing. In terms of employment, the 2022 UN Country Assessment notes, at p18:

Other drivers of economic activity include the public sector (including state-owned enterprises [SOEs]), and a service economy underpinned by SOEs in the capital of South Tarawa. The Kiribati Government directly accounts for as much as 50% of GDP and some 80% of formal sector jobs. However, formal sector employment accounts for only 20 % of the labour force. Beyond fisheries and the

public sector, the private sector remains small, mostly consisting of SMEs in the wholesale, retail, and transport industries.

[56] Kiribati maintains a sovereign wealth fund — the Revenue Equalization Reserve Fund — valued at US\$950 million in July 2021 and which continues to grow despite the global economic downturn.

[57] There is evidence indicating that there have been advances in state social protection. There is some uncertainty in the country information as to the eligibility criteria. The 2022 Island Diagnostic Report notes, at p9:

An unemployment benefit of AUD50 per month per person for people from age 18 years to 59 years is now available and those aged 60 years old and above now receive a monthly payment of AUD200.00 per month.

[58] Citing the DFAT report *Pacific COVID-19 Response Package — Kiribati Annex*, counsel submit this benefit may be linked to temporary funding by the Australian government. This is not what the report says. Rather, it indicates (at p2) that Australia’s “investments under the Package will target women, girls and other vulnerable groups” and notes that “Kiribati’s proposed Unemployment Benefit Scheme extends to the informal sector and will contribute to protecting women and girls, the elderly, and people with disabilities from the effects of the crisis”. Counsel also refer to the 2022 UN Country Assessment at p60, which notes, in the context of discussing the human rights situation of women and girls:

In 2020, [the Ministry of Women, Youth, Sports and Social Affairs] introduced a new Social Welfare scheme to compensate for the impact of COVID-19. The new benefits scheme provides welfare payments for persons between the ages of 18 and 49 to address the high rates of unemployment and the lack of income in households. While the scheme offers many positive benefits and potential to reduce poverty, there have been anecdotal accounts of a correlation between GBV and payment dates, possibly induced by men’s abuse of alcohol.

[59] The reference to ‘persons’ and not ‘women’ also suggests that this is not gender specific support. However, contrary to the information contained in the 2022 Island Diagnostic Report, which indicates an unemployment benefit extending up to the age of pension eligibility at 60 years, this report suggests a significant gap into which the appellant would fall given he is aged in his mid-50s.

[60] Nevertheless, customary practices of social protection do exist, but are under pressure. Australian Agency for International Development (AusAID) *Kiribati Country Case Study — AusAID Pacific Social Protection Series: Poverty, Vulnerability and Social Protection in the Pacific* (March 2012) at pp7-8, documents how traditional social protection mechanisms, while still prevalent,

have been impacted by colonialism and the arrival of Christianity (citations omitted):

Kiribati's long tradition of providing informal social protection has evolved during the colonial period. Before Kiribati was colonised the basic unit of economic organisation was the *kainga*, a residential group of a small number of extended families. However, *kainga* broke down when Christianity and colonial rule were introduced, as people relocated from dispersed traditional lands to centralised villages. The immediate family (usually the household) became the most important economic unit. New institutions, in particular churches, began to replace the role wider kinship groups had had in giving people a sense of belonging.

Kiribati society has strong egalitarian values. Traditionally, affluence was discouraged and equality maintained through ostracism, shaming and sharing surplus wealth. While much sharing was voluntary, the *bubuti* system was key in maintaining equality, implicitly providing those in need with informal social protection. Those with a surplus were required to share it with extended family members in need. These members could make a 'non-refusable request' to another extended family member who had to comply. Non-compliant people were said to lack love and compassion and they were shamed and ostracised. *Bubuti* is prevalent today.

Older people, children and people with disability were traditionally cared for in the household and by extended family. Older people have always been respected and male elders remain the main decision makers in many rural communities. It is also common for children to be cared for by relatives other than parents.

[61] They note, however, at p31 (citations omitted):

Traditional care systems have been breaking down for some time in Kiribati. [It has been] argued that traditional values were weakening, social networks eroding and people prioritising their nuclear family, not their extended family. This has consequences, especially for single women, vulnerable children, the elderly and people with disability.

— *The Pacific hazard-scape*

[62] At the general level, the Tribunal recognises that the Pacific hazard-scape is characterised by both a variety of hazard types and, in the case of climate-related natural hazards, an increasing frequency and intensity. Different hazard types overlap, most obviously in recent years, COVID-19 — a biological hazard — with natural hazards.

[63] The Tribunal also recognises that the Pacific hazard-scape is also marked by the increasingly clear findings of the Intergovernmental Panel on Climate Change (IPCC). In its report *Climate Change 2021: The Physical Science Basis — Summary for Policymakers* (2021), the IPCC Working Group I sets out five illustrative emissions scenarios: under all of them, global surface temperature will continue to increase until at least the mid-21st century and warns that:

- (a) Without deep reductions in CO₂ and other greenhouse gas emissions in the coming decades, global warming of 1.5°C and 2°C — the target range of the Paris Agreement — will be exceeded during the 21st century (at para B.1).
- (b) Many changes due to past and future greenhouse gas emissions are irreversible for centuries to millennia, especially changes in the ocean, ice sheets and global sea level (at para B.5).
- (c) The existing changes in the climate system are therefore set to become larger, meaning increases in the frequency and intensity of hot extremes, marine heatwaves, heavy precipitation, agricultural and ecological droughts, in the proportion of intense tropical cyclones, as well as reductions in Arctic sea ice, snow cover and permafrost (at para B.2).

[64] Sudden and slow onset climate events and processes increasingly overlap. In the 2019 UPR National Report, Kiribati notes, at p23, footnote 29:

Lately, heavy rains and king tides coupled with sea level rise have become common disasters affecting the islands and the people for instance, in 2015 and 2018, Tamana and Arorae were the two most affected islands due to the passing of Tropical Cyclone Pam.

[65] A similar observation is made in the 2022 UN Country Assessment at p44:

In 2015, Kiribati felt the impacts of Tropical Cyclone Pam and Tropical Storm Bavi. In these events, a total of 126 homes were affected with 65 of them completely destroyed on 3 southern islands: Onotoa, Tamana and Arorae. This resulted in temporary displacement of 65 households, as people moved inland and built temporary houses away from the coast. In 2019, tropical cyclone Sarai led to damage on 5 islands: Arorae, Tamana, Beru, Nikunau and Tab-North. Local Government buildings, health facilities, community halls, church buildings, seawalls, a causeway on Onotoa island and a total of 4 private homes were damaged.

[66] However, local variability in natural conditions shape risks associated with impacts of generally occurring climate hazards. This is true of sea-level rise, as noted in the *IPCC Special Report on the Ocean and Cryosphere in a Changing Climate — Summary for Policymakers* (2019) (“the 2019 Oceans and Cryosphere report”) (at para B3):

Extreme sea levels and coastal hazards will be exacerbated by projected increases in tropical cyclone intensity and precipitation (*high confidence*). Projected changes in waves and tides vary locally in whether they amplify or ameliorate these hazards.

[67] As far as South Tarawa is concerned, the 2012 South Tarawa report notes, at p10:

Estimates of the extent of sea level rise risk vary, and if the IPCC High Scenario 2070 risk levels are assumed it is suggested that Bikenibeu and the area immediately to the west of Bikenibeu, Eita and Antebuka and Antenon are most at risk (extreme risk) with Bangantebure and Temaiku having a high level of risk. Nowerewere, Tangintebu, Ambo and Teoraereke and Betio are classified as being at a medium risk level and Abarao, Taborio, Banraeaba, Nanikai and Bairiki are all classified as being at (relatively) low risk. With limited land availability and an increasing population, settlement densities in South Tarawa are increasing especially in the already densely populated areas of Betio, Bairiki, Nanikai and Bikenibeu. However the long term outlook for the whole of Kiribati looks uncertain as more recent scientific evidence suggests faster sea level rise than the IPCC Scenarios.

[68] The appellant's village is one assessed as being of 'medium' risk.

[69] In 2019, the 2019 Oceans and Cryosphere report cautioned that, under high emissions scenarios, adaptation limits will be reached leading to "[h]igh to very high risks... for vulnerable communities in coral reef environments, urban atoll islands and low-lying Arctic locations well before the end of this century". In particular, while habitability thresholds were difficult to assess, some island nations are likely to become uninhabitable due to climate-related changes in the ocean and cryosphere (at para B9.2).

— *Climate change impacts and adaptation measures in Kiribati*

[70] There is no question that Kiribati is impacted by the adverse effects of climate change which exacerbates pre-existing development-related risks to the population's well-being; see *AF (Kiribati)* [2013] NZIPT 800413, where the Tribunal found that:

[39] ... 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).

[71] Country information before the Tribunal in this appeal further underscores that, while not the main driver of poverty, climate change exacerbates pre-existing development-related drivers of poverty and contributes to poor general socio-economic conditions. As the 2012 South Tarawa report notes, at p10:

Climate change will make current development challenges worse throughout Kiribati, and this is especially true in South Tarawa. Climate change issues identified by the South Tarawa community are listed in Appendix 1, these include:

- Coastal erosion
- Depletion of marine resources
- Overcrowding
- Lack of water and poor water quality.

However, there is evidence that at present, climate change is not the main cause of coastal erosion, water shortages or overcrowding. Other issues, especially population growth and the move to Western lifestyles, are having a more immediate impact. But any future plans to tackle any of the above challenges need to provide for the growing contribution of climate change over time.

[72] That the erosion of land in South Tarawa is contributed to by both climate change and land use practices is referenced in the 2012 South Tarawa report, at p12, as are the nature-based adaptation measures being implemented to address the issue:

The Ministry of Environment, Lands and Agriculture Development (MELAD) is involved in the replanting of mangroves in selected sites to help against coastal erosion; however, a lot more is required to protect many of the sites already eroded away on South Tarawa including islets that once were protected with mangrove and iron-wood (tengea) trees. Extraction of aggregate in quantities from the foreshores and inland is one of the main causes of erosion on the foreshores in many places and a danger to underground water lenses especially the Bonriki water reserve.

[73] The main findings of the analysis in the 2022 Island Diagnostic report are set out at p28 and state:

1. The pressing issue that affects all islands in Kiribati is coastal erosion, which has resulted in the destruction of roads, homes and trees along the coastline. The cost of protecting the coast from further erosion is very expensive and beyond reach by Government.
2. The issue of the impact on drinking water supply is quite severe in urban areas of South Tarawa, which accommodates 52.9% of the total population of Kiribati. Government is now considering the installation of a 6.0 mega litre capacity desalination plant to make sure water supply is available at all times.

[74] Displacement remains a disaster risk, and can be expected to increase over the long term. The 2022 UN Country Assessment, at p44:

While climate change and disasters are expected to contribute to increased risk of displacement and inhabitability in Kiribati, the Government promotes in-situ adaptation and resilience through the investment in climate change and disaster resilience programs, including the formulation of sound legal and policy instruments that specifically address and support displaced communities, plan their relocation and protect those who choose to stay.

[75] Multi-causality also features prominently in the examination of recent literature on the impacts of climate change on food insecurity in Kiribati by Cauchi and others in “Climate Change, Food Security and Health in Kiribati: a Narrative

Review of the Literature” (2019) 12(1) *Global Health Action*. They note, at pp5-7, that the evidence overwhelmingly identifies lifestyle and development issues as the predominant driver of food insecurity in Kiribati, and in South Tarawa. Nevertheless, climate change-related hazards such as king tides and drought also severely impact the socio-economic and sociological environments.

[76] As the 2019 UPR National Report observes, at para 5, Kiribati faces constraints in adapting to climate change:

Kiribati continues to face challenges in implementing the recommendations on the various human rights commitments. Main challenges include slow incoming of data and updates, limited resources and skills to implement the recommendations, staff turnover and changes to the membership of the Kiribati National Human Rights Taskforce, and competing priorities. Kiribati continues to need support of donor partners for funding and for external technical expertise to fill in capacity gaps.

[77] Similar observations are made in the 2022 Island Diagnostic report which, at p29, also notes risk factors for the successful implementation of the International Waters Ridge-to-Reef project in Kiribati including:

Donors may not be interested in financing infrastructure type proposals such as coastal protection work due to the very high cost involved. The islands and atolls of Kiribati have relatively large coastlines already inundated and eroded, which may require millions of dollars to fund construction of preferred and recommended coastal protection designs.

[78] This does not mean, however, that no meaningful action to effectively address climate-change-related risks has occurred. Country information establishes that the successive governments of Kiribati are acutely aware of the risks and are taking a range of short, medium and long-term actions to ameliorate risks to the population through interventions at the legislative, policy and operational levels.

[79] The government of Kiribati continues to operate with a range of international institutions and mechanisms, and the 2019 UPR National Report notes:

17. The Government has successfully secured projects to support the climate change and mitigation plans. Through the Global Environment Fund small grants program, UNDP supported and continues to provide funding for communities to be more climate impact resilient through adaptation and mitigation project activities. (Annex 4 – list of projects)

18. Kiribati continues to use existing climate change frameworks, plans and implementation strategies to guide the current national climate change adaptation and disaster risk management initiatives implemented across sectors.

19. The Government is committed to manage disasters and disaster risk together. Significantly, where there is direct overlap between measures for

disaster risk reduction and climate change adaptation and in resolution, Cabinet instructed to repeal the 1993 Disaster Act

[80] As regards interstate cooperation and development assistance, the report notes:

47. The various regional and international platforms are essential, and Kiribati will continue its advocacy on the vulnerability of Kiribati in the face of Climate Change. An additional direction and focus by the current Government is to move towards more action on the ground in improving/strengthening resilience and adaptation of local population. The Talanoa Dialogue in 2018 discussed and agreed to ensure that measures laid out are implemented/achieved.

48. Key platforms for Climate Change advocacy of national and regional perspective provide avenues where Kiribati has taken a lead role in representing Micronesia on the Pacific Resilience Partnership Taskforce responsible for implementing the regional (Pacific) framework, the Framework for Resilient Development in the Pacific (FRDP).

49. Access to climate finance is a priority of Kiribati to help ensure the implementation of key frameworks, plans and strategies. Kiribati has taken key steps in engaging with key partners and climate financing institutions to ensure that capacity of internal financial management systems is able to access and manage climate finance. The CFD along with the Kiribati National Expert Group (KNEG) on Climate Change and Disaster Risk Management (CCDRM) are working together to engage with these financing institutions. Kiribati continues to work with bilateral and multilateral institutions to ensure coordination and direct access to climate financing.

[81] As regards action at the national level to address vulnerability to climate impacts on a non-discriminatory basis, Kiribati reported:

66. Vulnerabilities during events are different for each island group (Gilbert Group, Line Group and Phoenix Groups); there are events where the severity of impacts noticed are more than others. Common effects of Climate Change felt and experienced are coastal inundation, loss of houses along coast leading to relocation of villages to safer inner areas of islands, aggravated soil infertility with sea water intrusion and hence food in-security (unsafe water, limited food crops).

67. In countering and mitigating the impacts, the Government has worked on several initiatives both in Urban and Rural areas. In South Tarawa, with more than 50% of the total population, major developments to ensure coastal livelihoods are supported and the impacts are mitigated. Currently Kiribati is implementing the whole island approach (WOIA) focusing also on all areas of Island vulnerabilities (Food, Water, Health, Coastal Protection, Education, Communication barriers) on eight islands.

68. The Kiribati Joint Implementation Plan for Climate Change Disaster Risk Management is designed to complement the National Disaster Risk Management Plan and the National Framework Climate Change and Climate Change Adaptation (CCA). The main rationale of KJIP is that a systematic and integrated plan, identifying tangible actions, will maximize the efficiency and effectiveness of existing capacities and resources and ensuring that new initiatives are well targeted and have maximum impact. In the context of human rights, the KJIP respects and promotes human rights by ensuring that all citizens have increased access to food security, safe water security and land security within the current and future threats of climate change and disasters such as droughts and storms.

[82] The ‘Whole of Island’, or ‘Ridge-to-Reef’ approach taken by Kiribati to address overlapping climate and development-related risks to the safety and wellbeing of the population in an integrated fashion is described in the 2022 Island Diagnostic report. By way of background, the report notes, at p2:

The International Waters (IW) ridge-to-reef (R2R) project in Kiribati aims to test the mainstreaming of climate resilient approaches to integrated land, water, forest and coastal management in the PICs through strategic planning, capacity building and piloted local actions to sustain livelihoods and preserve ecosystem services.

Kiribati’s IWR2R project focuses on strengthening local capacity in the area of waste management through effective community engagement, testing of sustainable dry-litter technology (DLT) for reduction of nutrient offload and contamination, and increased information management and community awareness in support of sustainable animal waste management. Community engagements include the participation of men, women, youths and all vulnerable members of communities.

The Kiribati IWR2R project demonstration site is South Tarawa, where a heavy population migration has led to increased pressures on drinking water as well as sustainable waste management. A larger desalination plant with the daily capacity of 6.0 MLD (Mega-litres per day) has been proposed and would be implemented as part of the on-going South Tarawa Water Supply Project to remedy the shortage of drinking water. The project would also include rehabilitation of water supply systems with new pipes and storage tank and extension to Buota and unserved area at Bonriki water reserve to enable an efficient and operational water supply system. The introduction of the compost toilets was not socially accepted, but it will be reintroduced at a much smaller scale with performance closely monitored to ensure that it works with home gardening before it is to be considered for large scale replication. Gender considerations, especially cultural restrictions on women using such toilets need to be reassessed to ensure introduced infrastructure is culturally and socially appropriate.

[83] The 2019 UPR National Report outlines specific actions at the national level to address the various elements comprising the right to an adequate standard of living. The purpose of the 2019 UPR National Report is recorded, at para 4, as being “the third submitted by Kiribati on the implementation of recommendations of the Human Rights Council arising from the second UPR and outstanding previous recommendations”. It notes:

N. Right to food

Recommendation 84.82

90. Government efforts to address adequate food and freedom from hunger are reflected through its development projects that empower the people in initial five islands. The rest of the islands will receive the same tools under these projects targeting farmers association on the islands. Youths are also target of the projects. ... In the capital, South Tarawa, 11 communities have been visited and trained on soil amendment, compost, marcotting, organic liquid fertilizer, seed sowing and transplanting. Over 10,000 in 2017 and over 40,000 in 2018 of seedlings (food crops) were distributed.

...

O. Human rights to drinking water and sanitation

Recommendations 84.83, 84.84, 84.86, 84.91

92. The main source of drinking water include ground water, sea water (desalinated) and rain water. The issue with ground water is the quality of safe drinking water and for most population in the urban area, accessibility. The water (and sanitation) needs of the urban population in Tarawa comprising more than 50% of total population (130,000) is provided by the Public Utilities Board (PUB) under the PUB Act 1999. Outer Islands water for drinking and sanitation needs are supported by the Government through the MISE implementing projects for access and quality.

93. Supported by donor partners and agencies, water, sanitation, hygiene practices are being addressed. ...

94. Public Utility Board (PUB) water pipes and sanitation pipes for South Tarawa have recently been restored to ensure clean and accessible drinking water and better sanitation for the population. The South Tarawa Improvement Program (STSISP) project has rehabilitated the sewerage and salt water systems and outfalls with funding by the World Bank, recently completed in 2018. Other activities of the project contributed to sustainability concerns. For better and ease of access to safe drinking water, the PUB has commenced piloting a 24-hour metered water service in 2 small village locations of Tebikenikoora and Nanikai before rolling out to other areas in South Tarawa.

95. For the urban population, the STWSP has installed a 4,000 m³/d capacity desalination plant. GHD Pty Ltd commissioned in Feb 2018 by the ADB to deliver the Project Preparatory Technical Assistance (PPTA) for the STWSP. Now the project design advance (PDA) phase of the project is being finalized. This project is committed to address human rights needs of access to quality water and mitigate impacts of climate change. To assist with sewerage improvement in South Tarawa, a new project, the New Sewerage System Extensions, is launched with assistance from the World Bank. Supporting these projects, MISE has a new GIS program for high quality areal imaging to achieve planned infrastructural developments.

[84] Not all climate change adaptation measures have been well-implemented. Prance, in “Institutions and Values: Climate Change Adaptation Mainstreaming Implementation in Kiribati” (abstract only) *University of Adelaide* (August 2016), notes that Kiribati’s implementation of climate change adaptation measures under its National Adaptation Programme of Action and Kiribati Action were negatively impacted by a range of political and social factors such as rival coalitions of agencies within government taking differing approaches, and a lack of community participation. Cauchi and others, in in “Climate Change, Food Security and Health in Kiribati: a Narrative Review of the Literature” (2019) 12(1) *Global Health Action*, indicate that many resilience-building measures have been ineffective, in significant part because of a lack of community participation and ownership, as well as western-centric interventions by international organisations adrift of the cultural context. They observe, however, at p5, that the Government of Kiribati “has included the need to value traditional knowledge both as a [food] security priority and as a key component of climate adaptation strategies”.

[85] Measures to improve food security at the community level continue to be undertaken, including on South Tarawa. The DFAT 2020-21 Development Progress report notes, at p3:

Australia's development cooperation also improved food security. Live and Learn and the Pacific Community (SPC), in partnership with the Australian Centre for International Agricultural Research (ACIAR), implemented the Kiribati Food Futures Initiative to address the food security challenges brought about by climate change, poor soil quality and lack of arable land available for cultivation. The program is delivering 90 Foodcube planter beds to boost plant growth at 11 community garden sites in South and North Tarawa, and Kiritimati and Abaiang islands. The Foodcubes were launched in May 2021 in South Tarawa.

Application to the facts

[86] Due to the appellant's incarceration, he has faced constraints on his ability to obtain up-to-date information on key matters, such as the physical condition of his land, or the willingness and ability of members of his extended family to provide him with support in Kiribati. These particular difficulties faced by the appellant are compounded by structural communication constraints. As noted in the 2022 UN Country Assessment at p31:

Kiribati remains one of the least connected countries in the world, where much of the population either has no access to Information and Communication Technologies (ICT) or, even if it lived within range of the existing, often unreliable networks, is unable to afford the service. Until recently, about 40% of the population relied entirely on public access (radio, satellite-based telecentres). In 2017, Internet users only represented 15% of the population. Rapid growth has situated household Internet access at 48% in 2018.

[87] While mindful of the appellant's overarching statutory responsibility to establish his claim, the Tribunal has, to the extent possible, made allowance for his inability to make relevant inquiries.

— As to risk of retribution by the victim's family

[88] Counsel submits that the risk of harm in the form of a revenge attack by the family of the victim is more than speculative and remote and refer to the appellant's evidence that such attacks have been known to occur. However, his evidence was that knowledge of these other events stemmed from information he was given while working as a special constable prior to his migrating to New Zealand, many years ago now. He has not been made aware of any specific threat to him from the family of the victim. Kiribati has a functioning police force. Notwithstanding gaps in human rights governance such as non-ratification of core international human rights treaties and the lack of a national human rights institution, there is no basis to conclude that, should the

appellant make any concerns known to the police in Kiribati, that protection would be denied to him or be ineffective such that the risk to him would be at the real chance level.

— *As to the risk of impoverishment*

[89] In *BG (Fiji)* [2012] NZIPT 800091, at [88]–[89], the Tribunal distinguished between economic hardship (poverty) and being persecuted. In short, some people may be reduced to poverty in ways amounting to being persecuted, but not all persons experiencing, or at risk of experiencing, poverty were, by that reason alone, being persecuted for the purposes of the Refugee Convention. Structural inequality at the global level is deeply entrenched with massive disparities in wealth and wellbeing. The Refugee Convention is simply not designed to deal with every ill that plagues the world. Nevertheless, breaches of ICESCR rights are capable of founding valid claims for refugee status, with assessment driven by consideration as to whether the claimant would be denied the core minimum content of the relevant socio-economic rights engaged by the claim on a discriminatory basis. This basic jurisprudential approach is recognised in counsels' submissions.

[90] Counsel submits, however, that the appellant's socio-economic predicament here meets the requirements to be characterised as 'being persecuted'. In particular, it is submitted, the compulsory retirement age of 55 amounts to unlawful discrimination. Deprived by law of the ability to work, and with no family support available to him and no access to a social security safety net in Kiribati, the appellant will be without any means to maintain even a subsistence lifestyle. He will not be able to access adequate food or potable water nor have a roof over his head. He will thus be denied the core minimum content of a range of socio-economic rights. Further, given that the appellant will soon be of compulsory retirement age, he will become, by law, highly dependent on the state. This amounts to a qualifying 'treatment' of him to bring him within the ambit of Article 7 of the ICCPR and his impoverished condition will reach the requisite level of seriousness to amount to a breach of this absolute right.

[91] As to this, the risk that the appellant will become destitute, let alone in a manner amounting to persecution, is speculative. Country information indicates that an unemployment benefit has been established, albeit that the eligibility criteria are unclear in terms of the upper age limit. If the indication in the 2022 Island Diagnostic Report is correct, the appellant will be entitled to AU\$50 per

month, until he is aged 59 and thereafter to AU\$200 per month. The appellant was candid that he had not heard of this but conceded that it “sounds good”. He would then be eligible to the pension. If the 2022 UN Country Assessment is correct, however, the appellant will not be entitled to the unemployment benefit as the upper age limit for entitlement is 49. He will face a five-year gap until he is entitled to draw a pension.

[92] Even assuming the latter is correct, this does not imply a breach of ICESCR rights to social security or to an adequate standard of living, which are subject to progressive realisation. Kiribati is taking steps to progressively realise these rights, including through international cooperation, consistent with its status as a Small Island Developing Country. Moreover, it is clear that Kiribati is taking steps to ensure basic levels of enjoyment of the right to adequate food and water at the community level. Further, although to some extent breaking down, traditional support mechanisms do exist to supplement state social support programmes. The Tribunal accepts that the appellant has been absent from Kiribati for many years now and is estranged from extended family. It accepts his evidence that he does not believe that it will be forthcoming. But this has not been established. While it may be that members of the appellant’s extended family will not look favourably on him, and their ability to provide support may well itself be limited, there is no evidence before the Tribunal to establish that he will not be able to count on it, to the extent that he needs it, if the alternative would be to leave him in a state of destitution. No criticism of counsel is intended here; as noted, the appellant is in detention and getting information from the Pacific can be challenging. That said, it cannot be assumed that the appellant will be shut out of traditional social protection mechanisms.

[93] That state and customary social protection mechanisms provide for the core minimum content of the right to adequate food is reflected in the 2022 UN Country Assessment which, at p90, notes that hunger is not prevalent in Kiribati. Rather, the main issue is of nutrition which in adults mainly manifests in obesity, something the appellant does not suffer from. While climate change creates risks to Kiribati’s underground freshwater lens, measures taken by the Government have ensured that the appellant will have access to a basic water supply. The 2022 UN Country Assessment, at p99, notes that, on South Tarawa, 95 per cent of the population have access to a basic water supply.

[94] Nor can it be said that the imposition of a compulsory retirement age at 55 is discriminatory. The differentiation would appear to be based on reasonable

and objective grounds and thus is a permissible differential in treatment; see here ICESCR GC20 at para13. Kiribati has both a narrow economic base and a youthful population. The 2022 UN Country Assessment notes, at p39:

The Pacific region is young, with almost a fifth of its population between 15 and 24 years of age (18.2%). Its youngest country is Kiribati. According to the 2015 census, 20.7% of the population is aged 15 - 24 years and 41% of the population is under 17 years - a largely youthful population structure coupled with a high dependency ratio of 94.8%. This offers a demographic window of opportunity that is critical for a new development narrative of Kiribati.

[95] Ensuring a retirement age allows entry into the public and other sectors of the workforce by younger generations, in a country where education opportunities are scarce and where the service sector and the public service is a significant national employer. Nor is it the case that the appellant is prohibited from working at all, given that formal employment comprises only 20 per cent of employment in Kiribati.

[96] Moreover, this is an example of a general socio-economic policy which was never intended by the framers of the ICCPR to constitute a qualifying 'treatment' for the purposes of Article 7. The jurisprudence cited in *BG (Fiji)* at [149]–[159], upon which this argument is founded, are of a different type. They refer to persons who were incarcerated or otherwise under the control of the state or who were, in some way, members of a specific group purposefully subjected by the state to a special regime (such as asylum seekers). The compulsory age of retirement is not a special regime but rather a generally applicable and non-discriminatory socioeconomic policy of a type which was never intended to be regarded as cruel, inhuman or degrading treatment, whether this be as an element of 'being persecuted' or as a stand-alone aspect under the Tribunal's protected person jurisdiction.

— *As to the risk posed by climate change*

[97] Before addressing the particulars of this case, it is necessary for the Tribunal to address debates which have arisen in the wake of its decision in *AF (Kiribati)* relating to the assessment of risk in cases of this kind generally, namely the standard of risk and the question of time: just how far is a decision-maker acting at the coalface of the international protection regime required to peer into the future?

[98] As to the first issue (the standard of risk) the Tribunal notes that concerns expressed by one of the dissenting opinions in the decision of Human Rights

Committee in *Teitiota v New Zealand* CCPR/C/127/D/2728/2016 (7 January 2020) (the majority having found no error leading New Zealand to be in breach of its obligations towards the complainant under Article 6) mischaracterises the Tribunal’s approach to cases of this kind. Colourful criticism was made by member, Duncan Laki Muhumuza, (Annex 2, at para 6) that:

The fact that this is a reality for many others in the country, does not make it any more dignified for the persons living in such conditions. New Zealand’s action is more like forcing a drowning person back into a sinking vessel, with the ‘justification’ that after all there are other voyagers on board.

[99] This misplaced concern is echoed by Behrman and Kent in “The Teitiota Case and the Limitations of the Human Rights Framework” (2020) *75 Questions of International Law* (“the Behrman and Kent article”), at p35. To be clear (again), as noted in *AF (Kiribati)* at [65], no special rules apply to cases of this kind; it is the ordinary standard of risk which applies. Claimants do not need to establish any ‘super-heated’ risk over and above that of the general population nor that their predicament is in some way worse. That the claimant’s predicament may be shared by many other people is irrelevant. What is critical is whether the predicament is one to which the Refugee Convention can, on the application of ordinary principles, respond to.

[100] In the Behrman and Kent article, they argue, at p35, that “[i]t is difficult to imagine a case where an individual or defined group within a geographic area will experience the effects of climate change in ways that go beyond general conditions”. In fact, this is precisely what occurs. Differences, both between communities and among individual members of a single community around gender, disability status, and social-economic status shape the experience of climate change in material ways, notwithstanding the exposure of sometimes large populations to the same general climate hazard. These differentials often increase risk; see the detailed examination by M Scott *Climate Change, Disasters, and the Refugee Convention* (Cambridge University Press, 2020). This is a well-understood element of disaster risk, whether related to climate change or not.

The question of time

[101] Having exhausted his domestic remedies before the New Zealand courts, Mr Teitiota (the previously unnamed appellant in *AF (Kiribati)*), lodged a complaint with the Human Rights Committee, albeit on more narrow grounds

limited to an alleged breach of his rights under Article 6 of the ICCPR; see *Teitiota v New Zealand* CCPR/C/127/D/2728/2016 (7 January 2020).

[102] Regrettably, one further consequence of the decision in *AF (Kiribati)*, and its international analogue in the decision of the Human Rights Committee, has been to excite much interest in the concept of imminence as the appropriate yardstick of time within which qualifying harm must arise; see the Behrman and Kent article, at p36, which seems to assume that what is required is to establish “an imminent threat to life”. Building on earlier work in this area by the Kaldor Centre for International Refugee Law, A Anderson and others “Imminence in Refugee and Human Rights Law: A Misplaced Notion for International Protection” (2019) 68(1) *International & Comparative Law Quarterly* (ICLQ) 111, and M Foster and J McAdam “Analysis of ‘Imminence’ in International Protection Claims: *Teitiota v New Zealand* and Beyond” (2022) 71(4) ICLQ 975 detail the problems with this unwelcome development.

[103] While an imminent risk of persecutory harm will certainly meet the real chance standard, this is not to say that it is *only* imminent risk which does so. This is the fundamental point that the Tribunal was making in *AF (Kiribati)* at [90]. As the Tribunal noted at [89], imminence, conceptually, is linked to the threshold admissibility status of victimhood, but that is all. Once that threshold is crossed, it is the ordinary standard of risk (in New Zealand, a ‘real chance’/being ‘in danger’) which is operative.

[104] Beyond this, however, the question of time becomes less strait forward. Certainly, the forward-looking nature of status determination (whether refugee or protected person status) as a core element of international protection law, fundamentally, requires an examination of the relationship between risk and time. It rests on an *evidentially established minimum degree of predictive certainty as to the appellant’s future (time)*. The more unsettled issue is whether it is possible to prescribe a one size fits all standard of time for the purposes of status determination. In a recent article, A Anderson and others “A Well-founded Fear of Being Persecuted ... But When?” (2020) *Sydney Law Review* 42(2) 155, examine this topic in some detail. They extensively chart Australian jurisprudence, which appears to have settled on a “reasonably foreseeable future” standard.

[105] Insofar as this is an exhortation to decision-makers that not only the immediate future may be relevant, it is unobjectionable. Beyond that, using ‘reasonably foreseeable’ as the measure of the relevant future time does not take

matters very far from a practical decision-making perspective. The Tribunal is not certain that it is in fact possible to elucidate a standard. Instead, the relevant time is entirely contextual; a function of the relationship between the appellant's individual characteristic or attributes and the asserted drivers of risk which lie behind the claim. The force exerted by time on the assessment of whether the threshold of risk is reached will thus vary according to the nature of the claim. In some instances, the decision-maker may not have to peer very far into the future to be satisfied that the requisite risk exists (such as in an archetypal 'political refugee' claim, based on extensive anti-regime activity in a country with an entrenched repressive political environment in which surveillance, the arbitrary detention and serious ill-treatment of detainees is pervasive. The relevant point in future time at which the decision-maker will need to project in order to be satisfied that the low degree of predictive certainty is met is comparatively near, relative to the date of determination.

[106] In cases grounded in more generalised conditions such climate change-related hazards, however, depending on the nature of the hazard and its existing and anticipated future frequency and/or intensity, time may weigh more heavily in terms of when the requisite degree/threshold of risk is reached. This is because the further in time the decision-maker projects, the greater the opportunity for risk-reducing factors to intrude. There is a corresponding need to account for any measures which may reduce otherwise generally 'foreseeable' risks of harm over time.

[107] At the current time at least, the general Pacific hazard-scape may mean the risk to life and wellbeing is, in broad terms, 'foreseeable' or even 'reasonably foreseeable' over an extended timeframe in the context of climate change. Yet, this degree of foreseeability is, in context, a poor measure of risk sufficient to warrant engagement of hard-edged international protection obligations grounded in the *non-refoulement* principle.

[108] Claims situating climate change as the driver of risk require decision-makers to take note of risk-reducing measures in the form of climate change adaptation or disaster risk reduction projects and programming, as well as those undertaken to promote sustainable development, and weigh their intrusion into the trajectory of risk faced by the claimant given his/her characteristics; see *AC (Tuvalu)* [2014] 800517 at [69]:

.... given the forward looking nature of the inquiry, the nature of the hazard, including its intensity and frequency, as well as any positive changes in disaster

risk reduction and operational responses in the country of origin, or improvements in its adaptive capacity, will need to be accounted for.

[109] Counsel cite the observations in both the *Teitiota* decision (and the more recent *Torres Strait Islanders* decision, albeit reading a different geography) regarding a time frame of 10-15 years before habitability thresholds are reached. The evidential basis for this timeframe was not before the Tribunal in *AF (Kiribati)* nor is it in this appeal. It does not appear that this assertion was grounded in scientific evidence and/or customary or indigenous knowledge, but was merely asserted by the author of the complaint, Mr Teitiota; see para 7.2. Certainly, the acceptance by the Committee at para 9.12 of “the author’s claim that sea-level rise is likely to render the Republic of Kiribati uninhabitable” within this time frame sits uneasily against the assessment of the IPCC in the 2019 Oceans and Cryosphere report set out at [66] above, which makes no such claim and points to a potentially far longer timeframe for habitability thresholds to be reached.

[110] Regardless, the need to account for improvements in adaptive capacity through climate change adaptation measures in the assessment of risk has been echoed by the Human Rights Committee in the *Teitiota* decision and the more recent *Torres Strait Islanders* decision. The Committee, in *Teitiota* at para 9.12, recognised the impossibility of ignoring the potential for climate change adaptation and/or disaster risk reduction measures to reduce risks to below the real chance threshold, noting:

... that the timeframe of 10-15 years, as suggested by the author, could allow for intervening acts by the Republic of Kiribati, with the assistance of the international community, to take affirmative measures to protect and, where necessary, relocate its population.

[111] A similar position was adopted by the Committee in the *Torres Strait Islanders* decision at para 8.7. The Committee noted:

.... that the time frame of 10 to 15 years, as suggested by the authors, could allow for intervening acts by the State party to take affirmative measures to protect and, where necessary, relocate the alleged victims. The Committee considers that the information provided by the State party indicates that it is taking adaptive measures to reduce existing vulnerabilities and build resilience to climate change-related harms in the Islands. Based on the information made available to it, the Committee is not in a position to conclude that the adaptation measures taken by the State party would be insufficient so as to represent a direct threat to the authors’ right to life with dignity.

[112] The assertion that as-yet-unrealised and inherently complex planned relocation can be factored into existing risk assessments in relation to Kiribati is questionable given projected population increases, limited land availability, land tenure arrangements and anticipated degradation of available land over time.

Nevertheless, the broad point regarding the need to account for adaptation measures in the assessment of risk (in the context of the claimant's right to life under article 6 of the ICCPR), again emphasised by the Committee, is undoubtedly correct.

[113] Perhaps the most significant difference between the majority and the dissenting opinion of Duncan Laki Muhumuza in the *Teitiota* case concerned the impact of adaptation measures, not their inherent relevance. Having taken the contrary view that the risk to Mr Teitiota's life met the Committee's standard of a "real, personal and reasonably foreseeable" risk was met, adaptation measures, while "laudable", changed little in that Mr Teitiota's right life 'with dignity' was considered by Mr Muhumuza to be already undermined (see Annex 2, paras 5-6).

[114] To be clear, this is not to say that adaptation measures will always operate to reduce risks from climate-related hazards to below the relevant standard of risk. Climate change adaptation measures face both hard (eg, physical ecosystem) and soft (eg, financing) limits; see IPCC Working Group II report *Climate Change 2022: Impacts, Adaptation and Vulnerability — Summary for Policymakers* (2022), at p27. As those limits are approached in relation to the relevant hazard(s) and geography at the heart of the claim (in this instance, South Tarawa) their risk-reducing weight are likely to lessen.

[115] It may therefore be that, in some contexts, at some point in time, a risk to life which evidences a state's failure to protect under Article 6 of the ICCPR (or other human rights breaches) may reach the requisite real chance (risk) threshold. Indeed, counsel argue this is already the case with Kiribati in that "the pace of climate change threatens to outperform the capacity of Government to preempt and respond". If so, the salient issue in terms of entitlement to refugee status may be less about risk, but whether there is a sufficient nexus to a Convention ground. That is a matter to which the Tribunal will turn later.

— *The predicament of the appellant*

[116] That the appellant will in Kiribati be exposed to the adverse impacts of climate change is accepted.

[117] Counsel submits that the appellant's situation is far removed from that of the appellant in *AF (Kiribati)*, in that the appellant has no access to land on which to find shelter, nor means of financial support from family, and would be unable to

provide for even a basic standard of living. The Tribunal accepts that the appellant will be vulnerable to the impacts of climate change, the trajectory of which, in the general sense, is clearly upwards in terms of adverse impacts on Kiribati in general and South Tarawa in particular. It accepts that he has no home on his land and will need to construct on that land or find shelter through family or by entering into a lease arrangement, whether formal or customary. However, counsel's submissions that the appellant "has no land to return to" is not accepted. While the Tribunal accepts the appellant's evidence that, at the time he left Kiribati in 2008, his land was already suffering from erosion and he genuinely fears that he will now be unable to use it to sustain himself, there is no direct evidence to establish that his land has been eroded to a point of no utility. While it is accepted that his land will not have been immune from erosion in the intervening 14 or so years, there is no sufficient evidential basis for the Tribunal to infer that, even if land physically remains, it has passed the point of habitability or is nearing that threshold.

[118] As for shelter, citing the 2012 South Tarawa report in particular, counsel submits that the appellant will struggle to be able to purchase a home elsewhere or afford to lease a house. However, even assuming that he will not be entitled to any social security support, as noted already, it has not been established that the appellant will not be able to rely on customary practices to secure adequate shelter.

[119] Living a subsistence life, reliant at least in the short term on traditional social support mechanisms in terms of shelter and support can be expected to increase the appellant's vulnerability to those hazards.

[120] However, as the country information addressed above establishes, this exposure and vulnerability is counterbalanced by the fact that, in Kiribati, multiple climate change adaption and disaster risk reduction projects and programmes have been, and are being, developed and implemented, and this can be expected to continue into the future. It is accepted that there have been implementation problems. Yet, on the whole, the country information paints a picture of lessons being learned, for example, in relation to the critical importance of community participation in the design of adaptation measures and the centrality of valuing traditional knowledge and nature-based adaption measures to ensuring effective and sustainable adaptation to climate change. The Tribunal does not accept the submission that the situation in Kiribati has reached the point in time where the impacts of climate change have 'outperformed' the capacity of

the government to respond by adaptation and disaster risk reduction measures sufficient to reduce risk of serious harm to below the real chance threshold.

[121] Similarly, it cannot be argued that Kiribati is not taking adequate steps to address the impacts of climate change in relation to the appellant's rights under Article 17 of the ICCPR. The situation is far removed from that considered by the Human Rights Committee in the *Torres Strait Islanders* decision where, at para 8.12, Australia was found to have breached the victims' Article 17 rights because of historical failures to take adequate adaptation measures, despite repeated requests to do so.

[122] Moreover, it cannot be argued that the government of Kiribati is not taking steps to progressively realise the appellants socio-economic rights, consistent with the ICESCR, to ensure at least a basic level of enjoyment by the appellant of the right to work, and to the constituent elements comprising an adequate standard of living. While there will undoubtedly be substantial diminution in the levels of enjoyment of socio-economic rights to that which would exist if the appellant were to remain in New Zealand, the appellant simply cannot point to any breach of his socio-economic rights upon which a finding of being persecuted can rest.

[123] Nor is there any basis to conclude that the government of Kiribati will fail to take steps consistent with its positive obligations to protect the appellant's right to life under Article 6 of the ICCPR, nor that those steps which are being taken are ineffective in terms of reducing risk to below the real chance threshold.

[124] The Tribunal notes the confirmation by the Human Rights Committee in both *Teitiota* (at paras 9.4, 9.8 and 9.9) and the *Torres Strait Islander* decision (at paras 8.4–8.6) that the right to life under Article 6 of the ICCPR includes a right to life 'with dignity'. It is not necessary to address this extension in detail; suffice it to say that, insofar as the threshold requirements for dignified life are grounded in socio-economic entitlements for which the relevant human right is subject to progressive realisation or rights more generally which may be permissibly limited or derogated from, an extension of Article 6 to being one of an absolute nature risks rendering the right otiose. It is no doubt these concerns which have underpinned the very high threshold requirements in both *Teitiota* (at para 9.8) and *the Torres Strait Islander* decision (at para 8.6) as to when a right to life 'with dignity' is breached.

[125] To the extent to which this proposed extension of Article 6 reflects a desire to respond to the undoubted humanitarian concerns raised by climate change impacts on vulnerable communities, in the New Zealand context there is a separate humanitarian jurisdiction in which these impacts (and those of other hazards such as COVID-19) can, and increasingly are, addressed; see *MS (India)* [2022] NZIPT 802082.

[126] As regards the appellant's reliance on Article 7 of the ICCPR, in *AC (Tuvalu)* [2014] NZIPT 800517-520, at [84], the Tribunal recognised that a qualifying 'treatment' of a disaster-affected population may arise:

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.

[127] There is no suggestion that either arises on the facts of this case.

[128] While giving full weight to the expected upward trajectory of adverse climate change impacts on Kiribati in the coming years, there is no sufficiently compelling evidence before the Tribunal to establish that existing and future climate change adaptation and disaster risk reduction measures by the successive governments in Kiribati, acting in cooperation with the international community, international organisations and civil society and alongside ongoing sustainable development projects and programming, will not reduce the risk that the appellant's international human rights will be breached (whether including a right to life with dignity or not), to below the real chance standard.

[129] The appellant's predicament does not amount to 'being persecuted' as set out in *DS (Iran)*.

[130] For these reasons, the appellant does not have a well-founded fear of being persecuted in Kiribati.

Is there a Convention Reason for the Persecution?

[131] In light of the Tribunal's finding that the appellant does not have a well-founded fear of being persecuted in Kiribati, it is not necessary to address this issue.

Exclusion

[132] As noted above, the findings in relation to the application of Article 1A(2) of the Convention make it unnecessary to determine at this time whether or not the appellant would be subject to the exclusion provisions of Article 1F.

THE CONVENTION AGAINST TORTURE

[133] 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.

[134] 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:

[A]ny 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.

[135] The appellant relies upon the same evidence for this part of his appeal as he does for his claim to refugee status. The same findings of credibility and fact apply. For the reasons given above, he is not at risk of being subjected to severe mental or physical pain or suffering for any of the prescribed purposes with any of the prescribed involvement of a public official. Accordingly, the appellant is not recognised as a protected person in New Zealand under the *Convention Against Torture*.

THE ICCPR

[136] Counsel submits that the appellant “faces an extremely perilous future if returned to Kiribati. He faces a real chance of irreparable harm”. It is important to be clear that the irreparable harm standard is not the applicable standard under New Zealand law. It is a test drawn by the Human Rights Committee jurisprudence; see *Teitiota* at para 9.3. In New Zealand, the relevant tests are those set out in sections 130 and 131 of the Act. So, too, the statement by the

Human Rights Committee in both *Teitiota* (at paras 9.4, 9.8 and 9.9) and the *Torres Strait Islander* decision (at paras 8.4–8.6) that the right to life under Article 6 of the ICCPR includes a right to life ‘with dignity’. Protection from harm under this limb of New Zealand law is limited, under section 131, to the ‘arbitrary’ deprivation of life.

[137] 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

[138] The appellant relies upon the same evidence for this part of the appeal as for the claim to refugee status. The same findings of credibility and fact apply.

As to the danger of being subjected to arbitrary deprivation of life

[139] While it is accepted that challenges do exist, in light of the information as a whole, the Tribunal finds that it has not been established that Kiribati has failed, or will fail, to take steps to protect the lives of its citizens from known environmental hazards such that the appellant would be in danger of being arbitrarily deprived of his life.

As to the danger of being subjected to cruel treatment

[140] There is no evidence before the Tribunal to establish that the appellant belongs to a section of the Kiribati population in respect of which the Government of Kiribati has implemented policy measures or failed to discharge positive obligations in response to past natural disasters amounting to cruel treatment. There is no evidential basis upon which to find such a risk would arise in the future.

[141] Nor is it permissible in the context of New Zealand’s statutory scheme to effectively regard the act of deportation as the relevant ‘treatment’ as appears to

be the case in the jurisprudence of the European Court of Human Rights: see *BG (Fiji)* at [172]–[196].

[142] For the reasons given above, the appellant is not in danger of being arbitrarily deprived of life or subjected to cruel treatment. Accordingly, the appellant is not recognised as a protected person in New Zealand under the *International Convention on Civil and Political Rights*.

Exclusion

[143] There is nothing in the evidence before the Tribunal which raises any issue under section 198(1)(c) of the Act which statutorily imports 'exclusion' provisions analogous to Article 1F of the Refugee Convention into the protected person jurisdiction.

Conclusion on Claim under ICCPR

[144] For the above reasons already given, the appellant is not a protected person within the meaning of section 131(1) of the Act.

CONCLUSION

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

- (a) is not a refugee within the meaning of the Refugee Convention and therefore is not a refugee under section 129 of the Act;
- (b) is not a protected person within the meaning of Article 1(1) of the *Convention Against Torture* and, therefore, is not a protected person under section 130 of the Act;
- (c) is not a protected person within the meaning of the relevant elements of Articles 6 and 7 of the 1966 *International Covenant on Civil and Political Rights* and, therefore, is not a protected person under section 131 of the Act.

[146] The appeal is dismissed.

Order as to Depersonalised Research Copy

[147] The Tribunal is satisfied that publication of this decision beyond the parties (and those to whom disclosure is permitted by section 151(2)(a), (b) or (c)) would tend to identify the appellant and/or be likely to endanger the safety of the appellant or others.

[148] 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 appellant's name and any particulars likely to lead to the identification of the appellant.

"B L Burson"
B L Burson
Member

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