IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2013-404-3528
[2013] NZHC 3125

BETWEEN	IOANE TEITIOTA Applicant
AND	THE CHIEF EXECUTIVE OF THE MINISTRY OF BUSINESS INNOVATION AND EMPLOYMENT Respondent

Hearing: 16 October 2013

Appearances: M J Kidd for the Applicant
R E Savage for the Respondent

Judgment: 26 November 2013

RESERVED JUDGMENT OF PRIESTLEY J

This judgment was delivered by me on Tuesday 26 November 2013 at 2.30 pm pursuant to Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Date:……..

Counsel/Solicitors:
M J Kidd, Barrister and Solicitor, Henderson
R E Savage, Crown Solicitors, Auckland

Refugees

[1] The immediate aftermath of the Second World War presented the then international community with a number of challenges. One such challenge was to provide some mechanism for the protection of human beings who were the victims of persecution.

[2] The League of Nations, which some hoped would prevent or curtail warfare by collective security arrangements, had clearly failed. The Axis powers in Europe, spearheaded by Hitler's Third Reich, had systematically persecuted and killed millions of people, singling them out for concentration camps upon the grounds of their ethnicity, race, or religion.

[3] The defeat of Fascism in 1945 did not end persecution. Riding into central European countries behind the tanks of the Red Armies came communist regimes. These governments, nurtured by the Soviet Union (which had already tipped its hand with the execution of Polish middle class leaders and army officers in the forests at Katyn) set about imposing Marxist-Leninist regimes which were to blight the lives of millions of people for two generations. Class enemies were persecuted by imprisonment or execution. Additionally, the post-war adjustment of European borders resulted in populations being uprooted and minorities displaced.

[4] This judgment will not detail (fascinating though the story is) the negotiation and approval, under the auspices of the United Nations, of the 1951 Convention relating to the Status of Refugees (the Refugee Convention)[1] which was subsequently supplemented by the 1967 Protocol. The Refugee Convention is declaratory of international law. Nations have acceded to it. It has been incorporated into New Zealand domestic law by virtue of the Immigration Act 2009 (the Act).[2]

[5] Although, as initially negotiated by the international community between 1945 and 1950 and adopted by the United Nations (which set up the office of the

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1 Convention relating to the Status of Refugees 189 UNTS 137 (opened for signature 28 July 1951, entered into force 22 April 1954).

2 Under s129(1) of the Act, a person must be recognised as a refugee in accordance with the Act if he or she is a refugee within the meaning of the Refugee Convention.

High Commissioner for Refugees to cope with pressing refugee problems), the Refugee Convention extended only to pre-1951 refugees, the effect of the 1967 Protocol was to remove geographic and temporal limitations.[3]

[6] A refugee to whom the Refugee Convention and its Protocol applies (called for the purposes of this judgment a convention refugee) is a person who in terms of Article 1A(2):

> ... owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country....

[7] Thus, a person who finds him or herself in a country which has acceded to the Refugee Convention (New Zealand being one) and who has a well founded fear (being a fear which is objective and factually based) of being persecuted on one of the five stipulated convention grounds, is entitled to claim successfully refugee status and look to the protection, not of the country of the claimant's nationality, but instead of the country in which refugee status is being claimed.

[8] "Persecution" is not defined in the Refugee Convention but clearly encompasses well founded fears to life or freedom on a convention ground, some form of serious harm, or serious violations of civil or human rights.[4] New Zealand has adopted James Hathaway's "human rights" approach to the definition of persecution, which defines persecution as the sustained or systemic violation of basic human rights demonstrative of a failure of state protection. This definition of persecution is also applied in Canada and the United Kingdom.[5]

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3 See generally J C Hathaway *The Law of Refugee Status* (Butterworths, Ontario, 1991) at 1.3. See also Guy Goodwin-Gil and Jane McAdam *The Refugee in International Law* (3rd ed, Oxford University Press, New York, 2007) at 36.

4 These descriptions of the terms and ambit of the Refugee Convention and Article 1A(2) probably oversimplify what is an extremely complex and highly developed jurisprudence. Nonetheless, for the purposes of this judgment they will suffice.

5 *Canada (Attorney-General) v Ward* [1992] 2 SCR 689, 709 and *Horvath v Secretary of State for the Home Department* [2001] 1 AC 489 (HL).

[9] The word "refugee", of course, is not limited to the definition of a convention refugee. The New Shorter Oxford English Dictionary[6] defines "refuge" from the Latin *refugium*, as shelter from danger or trouble; protection; aid. "Refugee" has a related and primary meaning as "a person driven from his or her home to seek refuge, esp. in a foreign country, from war, religious persecution, political troubles, natural disaster etc.; a displaced person".

[10] A person may properly be described as a refugee for reasons other than a well-founded fear of persecution on one of the five convention grounds. Natural disasters such as earthquakes, volcanic eruptions, severe weather events, and tsunamis can turn people into refugees. So too can warfare.[7] And arguably, so too might climate change. Increased aridity of agricultural land on the fringe of deserts; the reduction or contamination of water tables; and the effect of rising sea levels and violent weather over decades on coastal lands and islands; all have the capacity to drive people from their traditional or historic homes.

[11] Such refugees of this non-convention variety at times are worthy objects of assistance and relief by the international community, the United Nations High Commissioner for Refugees, and non-government organisations. But it is abundantly clear that the displacement of such refugees has not been caused by persecution. Nor, importantly, have they become refugees because of persecution on one of the five stipulated Refugee Convention grounds. A person who becomes a refugee because of an earthquake or growing aridity of agricultural land cannot possibly argue, for that reason alone, that he or she is being persecuted for reasons of religion, nationality, political opinion, or membership of a particular social group.

Why does the applicant think he is a refugee?

[12] In the peculiar circumstances which surround his refugee claim the applicant does not seek name suppression. Normally a refugee claimant's name is not published. There are a number of reasons for this. The most important include the risk that a successful claimant who makes out a well founded fear of persecution

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6 Lesley Brown (ed) *The New Shorter Oxford English Dictionary* (5th ed, Clarendon, Oxford, 2002) at 2510.

7 The flight of hundreds of thousands of people in recent times from Syria, to Lebanon and Jordan is a contemporary example.

might expose his or her family, still living in the country where persecution is taking place, to some form of retaliation or reprisal. Secondly, even in situations where a refugee claim is unsuccessful, publication of a claimant's name might trigger adverse consequences on his or her return to the country of origin. The applicant is not a convention refugee in the normal sense. There is no risk to him or his relatives of adverse consequences of the type described. His counsel did not seek suppression of his name.

[13] The applicant is a citizen of Kiribati. He is in his mid 30s. Kiribati is an island group situated in the south-west Pacific Ocean. The islands straddle the Equator and spread over approximately 3.5 million square kilometres of ocean. There are some 32 atolls and one raised coral island (Banaba). The island group, named the Gilbert Islands after the British naval captain who was the first European to sight them, became a British protectorate along with the adjacent Ellice Islands in 1892 and were administered from Fiji. The Gilbert and Ellice Islands became a Crown colony in 1916. Most of the islands were occupied by the Japanese during the Second World War and Tarawa was the scene of an extremely bloody battle in November 1943, when the United States Marine Corps invaded the island to oust the Japanese. During the 1950s and early 1960s some of the islands were used by the United States and the United Kingdom to test hydrogen bombs. On independence in 1978 and 1979, the Gilbert group became known as Kiribati whilst the Ellice Islands became Tuvalu.

[14] Overcrowding is a problem which the Kiribati government has had to confront. A long term problem for the Kiribati government is steadily rising ocean levels attributable to climate change.

[15] There is the perception that the inhabitants of Kiribati will be obliged to leave their islands because of rising ocean levels and environmental degradation. This has led to the applicant's claim for refugee status.

[16] A refugee and protection officer declined to grant the applicant refugee status and/or protected person status. The applicant exercised his statutory right of appeal to the Immigration and Protection Tribunal (the Tribunal). In a lengthy and carefully

considered decision released on 25 June 2013 the Tribunal held that the applicant was neither a refugee nor a protected person.[8]

Before the IPT

[17] The applicant gave evidence before the Tribunal. His account was accepted in its entirety. He was found to be credible.[9]

[18] The Tribunal accepted in evidence the 2007 National Adaptation Programme of Action which had been filed by the Kiribati government under the United Nations Framework Convention on Climate Change (UNFCCC). It is not necessary to detail that evidence. Pertinent issues included storm surges, extreme high spring tides, flooding of residential areas, raised floors of residences, depletion of fishing stocks, diminution of arable land, contamination of drinking water by salt water, sewage contamination of water tables, and deterioration of the population's health.

[19] The applicant himself gave evidence about his personal history. Once the applicant completed his secondary schooling he went to live with relatives on Tarawa. In the mid-1990s he became unemployed. He married in 2002. He and his wife considered life on Tarawa was becoming progressively insecure as a result of ocean inundation. Because he and his wife wished to have children and saw little future in living on Tarawa they decided to emigrate to New Zealand. They came to New Zealand in 2007. On the expiration of their permits they continued to live here illegally. The couple have produced three children all of whom are New Zealand born but who in terms of the relevant legislation are not entitled to New Zealand citizenship.[10]

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8 *AF (Kiribati)* [2013] NZIPT 800413.

9 At [38].

10 Under the Citizenship Act 1977 an individual will only be a New Zealand citizen by birth if under s 6(1)(a) the person was born in New Zealand on or after 1 January 1949 and before 1 January 2006; or if under s 6(1)(b) the person was born in New Zealand on or after 1 January 2006 and at least one of the person's parents was a New Zealand citizen or entitled in terms of the Act to reside in New Zealand indefinitely. Neither section applies. The Citizenship Amendment Act 2005 changed s 6(1) of the Citizenship Act. Prior to this amendment all persons born in New Zealand on or after 1 January 1949 were New Zealand citizens.

Relevant portions of the IPT decision

[20] As already stated, the Tribunal accepted the evidence of the applicant and the detailed country information produced in support. The applicant and his wife gave evidence, as did a New Zealand resident, Mr Corcoran, who was a former clerk of the Chief Justice of Kiribati. The Tribunal regarded Mr Corcoran as an appropriately qualified expert on matters of urbanisation, climate change, and their impacts upon the population of Kiribati.[11]

[21] The relevant evidence of the applicant was accurately summarised by the Tribunal thus:

> [39] The Tribunal finds that the limited capacity of South Tarawa to carry its population is being significantly compromised by the effects of population growth, urbanisation, and limited infrastructure development, particularly in relation to sanitation. The negative impacts of these factors on the carrying capacity of the land on Tarawa atoll are being exacerbated by the effects of both sudden onset environmental events (storms) and slow-onset processes (sea-level-rise).
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> [40] As for the appellant, the Tribunal finds the appellant is from Kiribati and has been living with his wife's family in their village on South Tarawa. For a number of years prior to coming to New Zealand in 2007, he was unemployed, relying on subsistence agriculture and fishing, supplemented by support from his wife's brother who is in employment there. Concerned about the coastal erosion which he witnessed from 2000 onwards and the increasing intrusion of salt water onto the land during high tides, and aware of the debate around climate change, the appellant and his wife came to New Zealand in 2007. They have three children born here.
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> [41] The appellant does not wish to return to Kiribati because of the difficulties they faced due to the combined pressures of over-population and sea-level-rise. The house they were living in on South Tarawa is no longer available to them on a long term basis. Although their families have land on other islands, these face similar environmental pressures and the land available is of limited size and has other family members living there.

[22] The Tribunal then referred to s 129(1) of the Act which obliges New Zealand to recognise as a refugee a person who is a refugee within the meaning of the Refugee Convention, Article 1A(2) of which is set out above.[12]

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11 At [12].
12 Supra [6].

[23] The Tribunal went on to assess[13] the applicant's submission that he was an internally displaced person who, as such, had the right to claim refugee status in New Zealand. Counsel had cited Principle 15 of the Guiding Principles on Internal Displacement (the Guiding Principles). The Tribunal accepted the Guiding Principles were a relevant international human rights instrument but saw them as a "soft law instrument" dealing with situations very different from the Refugee Convention. An internally displaced person, as the name suggests, is a person displaced inside his or her country. As soon as such a person leaves his or her country of origin, the Guiding Principles are no longer applicable. Such a person then becomes either a refugee or a migrant.

[24] I am satisfied the Tribunal was correct in its decision that an internally displaced person cannot meet the requirements of the Refugee Convention, quite simply because such a person, in terms of Article 1A(2), is not "outside their country of nationality".

[25] The Tribunal then summarised, correctly in my judgment, the general principles of New Zealand's refugee law as they were originally developed by the former Refugee Status Appeals Authority, many of the decisions of which have been scrutinised and upheld by the High Court and the Court of Appeal.

> [53] New Zealand refugee law has for some time adopted and applied the Hathaway concept of "being persecuted" as the sustained or systemic violation of core human rights, demonstrative of a failure of state protection. For a full account of the human rights approach, see *Refugee Appeal No 74665* (7 July 2004), at [36]-[90]. The application of this approach in the context of economic social and cultural rights emphasised by counsel in his submissions, is fully explored in *BG (Fiji)* [2012] NZIPT 800035, at [85]-[133]. The risk of being persecuted must be "well-founded" under Article 1A(2) of the Convention. In determining what is meant by "well-founded", the Tribunal, like the Refugee Status Appeals Authority (RSAA) before it, has adopted the approach in *Chan v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379, where it was held that a fear of being persecuted is established as well-founded when there is a real, as opposed to a remote or speculative, chance of it occurring. The standard is entirely objective – see *Refugee Appeal No 76044* (11 September 2008), at [57].
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> [54] The legal concept of 'being persecuted' rests on human agency. Although, historically, there has been variation in state practice on the issue, international refugee law has, in recent years, coalesced around the notion

[13] At [45]-[49].

> that it can emanate from the conduct of either state or non-state actors. In the former case, the failure of state protection derives from the inability of the state or lack of will to control its own agents who commit human rights violations, or its failure to take steps it is obliged to take under international human rights law. In the latter case, it derives from the failure of the state, via its human agents tasked with the requisite legal or regulatory authority, to take steps within their power to reduce the risk of harm being perpetrated by non-state actors.
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> [55] But this requirement of some form of human agency does not mean that environmental degradation, whether associated with climate change or not, can never create pathways into the Refugee Convention or protected person jurisdiction.

[26] The Tribunal next considered overseas authorities which set out the obvious proposition that people fleeing natural disaster cannot, for that reason alone, obtain protection outside their country under the Refugee Convention.

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

[27] But, as the Tribunal correctly recognised, there is a complex inter-relationship between natural disasters, environmental degradation and human vulnerability.[14] Sometimes a tenable pathway to international protection under the Refugee Convention can result. Environmental issues sometimes lead to armed conflict. There may be ensuing violence towards or direct repression of an entire section of a population. Humanitarian relief can become politicised, particularly in situations where some group inside a disadvantaged country is the target of direct discrimination.[15]

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14 At [57].
15 At [58]-[59].

[28] The Tribunal went on to review a number of refugee appeals relating to claimants from Tuvalu, who had similarly argued that environmental factors such as inundation, coastal erosion, or water contamination might lead to refugee status. These claims had all been dismissed because the indiscriminate nature of these environmental events did not point to any nexus with a convention ground.[16]

[29] The Tribunal then turned to examine the central issue of whether the applicant faced a real chance of being persecuted if he returned to Kiribati. The Tribunal saw no such evidence.

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

[30] The Tribunal additionally considered that the refugee claim must fail because the effects of environmental degradation on Kiribati and on the applicant's standard of living were faced by the population generally. The photographic evidence and the evidence of Mr Corcoran:

> ... graphically demonstrate that the underlying environmental events and processes favour no civil or political status. Nor has it been suggested that the government of Kiribati has in some way failed to take adequate steps to protect [the applicant] from such harm as it is able to for any applicable Convention ground.

[31] The Tribunal also examined s 131 of the Act which provides that a person must be recognised as a protected person in New Zealand (a different status from refugee status) under the International Covenant on Civil and Political Rights (ICCPR) if there were substantial grounds for believing that person would be in danger of being subjected to arbitrary deprivation of life or cruel treatment if deported from New Zealand.

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16 At [67].

[32] Article 6 of the ICCPR states every human being has an inherent right to life which must be protected and that no one should be arbitrarily deprived of life. There is no evidence that any act or omission of the Kiribati government pointed to any risk that the applicant would be arbitrarily deprived of his life under Article 6.[17] There were thus no "substantial grounds" for believing the applicant or his family would be in danger of being subjected to arbitrary deprivation of life.[18]

[33] Other arguments were briefly raised before the Tribunal based on other international covenants. It is not necessary to detail these since they were not pursued in this Court.

Grounds for relief of the High Court

[34] There is no automatic right of appeal to this Court from the Tribunal. Like many other countries, in the interests of finality and avoiding protraction (tactical or otherwise), New Zealand's Parliament has placed limits on appeal rights. Points of law must be involved.

[35] Section 245 of the Act provides:

> **245 Appeal to High Court on point of law by leave**
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> (1) Where any party to an appeal to, or matter before, the Tribunal (being either the person who appealed or applied to the Tribunal, an affected person, or the Minister, chief executive, or other person) is dissatisfied with any determination of the Tribunal in the proceedings as being erroneous in point of law, that party may, with the leave of the High Court (or, if the High Court refuses leave, with the leave of the Court of Appeal), appeal to the High Court on that question of law.
>
> (2) Every appeal under this section must be brought—
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> (a) not later than 28 days after the date on which the decision of the Tribunal to which the appeal relates was notified to the party appealing; or
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> (b) within such further time as the High Court may allow on application made before the expiry of that 28-day period.
>
> (3) In determining whether to grant leave to appeal under this section, the court to which the application for leave is made must have regard to

[17] At [88] and [91].
[18] At [92].

> whether the question of law involved in the appeal is one that by reason of its general or public importance or for any other reason ought to be submitted to the High Court for its decision.
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> (4) On the appeal, the High Court must determine the question or questions of law arising in the proceedings, and may then—
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> (a) confirm the decision in respect of which the appeal has been brought; or
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> (b) remit the matter to the Tribunal with the opinion of the High Court, together with any directions as to how the matter should be dealt with; or
>
> (c) make such other orders in relation to the matter as it thinks fit.
>
> (5) Subject to subsection (2), every appeal under this section must be dealt with in accordance with the rules of the court, with any modifications necessary to reflect the provisions of this Act, including any ancillary general practices and procedures developed under section 260.

[36] An applicant must point to an error of law. As was observed by Kos J in *Taafi v Minister of Immigration*,[19] there are prerequisites to engaging s 245. A simple factual error alone will not suffice. The first is that an applicant must show a seriously arguable case that the Tribunal's factual findings are incorrect. Given that there was no challenge to the appellant's evidence before the Tribunal, it would be difficult to engage that requirement.

[37] Secondly an applicant must show that the factual errors, in combination with the Tribunal's decision, are sufficiently grave to constitute an error of law. Thirdly, and relevantly here, there must be a question of law which is one of general public importance (a reference to s 245(3)).

[38] In short there must be an error of law discernible from the Tribunal's decision which is of sufficient general or public importance for this Court to consider on appeal.[20]

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19 *Taafi v Minister of Immigration* [2013] NZAR 1037 (HC).

20 See also *Nabou v Minister of Immigration* [2012] NZHC 3365, [2013] NZAR 155 and *X v Chief Executive of the Ministry of Business Innovation and Employment* [2013] NZHC 642, [2013] NZAR 513. Heath J correctly pointed out that value judgments made by the Tribunal in balancing and weighing competing factors will seldom amount to an error of law.

[39] The central thrust of the Tribunal's decision was clearly its rejection of the applicant's claim that climate change driven problems faced by the inhabitants of Kiribati fell inside Article 1A(2) of the Refugee Convention.

What are the applicant's questions of law?

[40] Mr Kidd advanced six questions of law which were, with respect, somewhat imprecise. They were:

(a) The word "refugee" extends to people who are refugees from climate change and its effects and that by referring to such people as "sociological refugees" the Tribunal had erred.

(b) The Tribunal erred in finding that because all people in Kiribati suffer from the same results of "global warming" this disqualifies the applicant from claiming refugee status.

(c) Green house gases are responsible for rising sea levels and changes of weather patterns (inherent in climate change) and, as such, constitute an indirect but worldwide "human agency".

(d) The Tribunal had failed to consider Articles 2, 3(a) and 24(1) of the ICCPR as they might relate to the three children of the applicant and had further failed to consider Articles 24(1) and 2(a)-(c) of the United Nations Convention on the Rights of the Child (UNCROC).

(e) The Tribunal erred in law in not considering the situation of the applicant's children separately, particularly as regards the effect on them of water and food deprivation as New Zealand born children who, if returned to Kiribati where they had never lived, would suffer serious harm.

(f) The factual finding of the Tribunal that the applicant's food and water supply were adequate was a "misdirection" because of the evidence of

the effects severe overcrowding and future climate change would have on the applicant and his children.

Analysis

[41] I am of the clear view that this application for leave to appeal is misguided.

[42] The plight of the inhabitants of Kiribati, of which the Kiribati government is itself aware, raises, assuming environmental degradation continues, medium-term humanitarian concerns. The predicament of the applicant himself and more importantly his three New Zealand-born children also raises humanitarian considerations.

[43] Unfortunately for the applicant, because he has chosen to remain illegally in New Zealand, he is, under current law, precluded from applying for an immigration permit on humanitarian grounds. Changes to New Zealand citizenship law in 2005 prevent his three children from claiming New Zealand citizenship.[21]

[44] Humanitarian concerns and the issues of economic and environmental migrants or refugees are topics which individual states in the international community generally have to consider. But the Refugee Convention is not an available avenue for such migrants and refugees. Certainly it is not available to this applicant and his family.

[45] Mr Kidd made a number of submissions to the contrary. He candidly submitted, however, that he had been unable to find any New Zealand, Australian, Canadian, United Kingdom, United States, or European authority which had extended the protection of the Refugee Convention to a person adversely affected by climate change. To the contrary, there are many decisions rejecting claims by people from Kiribati, Tuvalu, Tonga, Bangladesh, and Fiji on the grounds that the harm feared (environmental problems in low-lying countries attributable to climate

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[21] See above n 10. Undoubtedly this legislative policy reflects a concern of governments in many developed states that illegal migrants, by overstaying their permits and avoiding detection and removal, might be able to strengthen their positions by procreation. The innocent victims of this policy are the children.

change) does not amount to persecution and there were no differential impacts on the applicants.[22]

[46] Counsel's primary submission was that a person who established his way of life is seriously impaired by warfare or climate change should be entitled to the protection of the Refugee Convention. Such a person has been harmed indirectly by human agency (climate change being caused by two centuries of carbon emissions). An additional indirect human agency was overpopulation.

[47] The Tribunal, submitted Mr Kidd, had erred when it held there was no evidence the applicant or his family would die if they were to return to Kiribati. The central Refugee Convention requirement of "persecution" equated to serious harm, not to death alone.

[48] Turning to the applicant's children, the Tribunal had failed to consider the obligations of the Care of Children Act 2004 and the various international law obligations which New Zealand had accepted by ratifying the United Nations Convention on the Rights of the Child (UNCROC).

[49] With reference to the Supreme Court authority of *Ye v Minister of Immigration*,[23] although accepting that the circumstances were different, Mr Kidd referred to the dictum that a child's interests were always important and were to be assessed against all other relevant circumstances.[24] Counsel referred to the Kiribati Adaptation Programme[25] and repeated the various environmental and resource threats faced by Kiribati which had been placed before the Tribunal.

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22 See for instance Refugee Appeal No 72719/2001, RSAA (17 September 2001) (Tuvalu); *Mohammed Matahir Ali v Minister of Immigration* [1994] FCA 887; 0907346 [2009] RRTA 1168 (10 December 2009) (Kiribati); 1004726 [2010] RRTA 845 (30 September 2010) (Tonga); Refugee Appeal No 70965/98, RSAA (27 August 1998) (Fiji).

23 *Ye v Minister of Immigration* [2009] NZSC 76, [2010] 1 NZLR 104.

24 At [25].

25 Supra [18].

[50] Lying at the core of the Refugee Convention, submitted Mr Kidd, was the need to establish a well-founded fear of persecution coupled with the absence of state protection.[26] Such a fear of persecution was present here. Persecution of inhabitants of Kiribati was actually occurring. It was not remote or speculative.

[51] Novel and optimistic though these submissions are, they are unconvincing and must fail. On a broad level, were they to succeed and be adopted in other jurisdictions, at a stroke, millions of people who are facing medium-term economic deprivation, or the immediate consequences of natural disasters or warfare, or indeed presumptive hardships caused by climate change, would be entitled to protection under the Refugee Convention or under the ICCPR. It is not for the High Court of New Zealand to alter the scope of the Refugee Convention in that regard. Rather that is the task, if they so choose, of the legislatures of sovereign states. States, particularly those in the Pacific region, have not been oblivious to the adverse effects of climate change. The 1992 UNFCCC; the Kyoto Protocol (inspired by the UNFCCC); the 2010 Ambo Declaration involving 12 countries (including New Zealand, Australia, China, Japan, and Brazil), which was a precursor to the 2010 Cancun Adaptation Framework; and indeed the Niue Declaration flowing from the 2008 Pacific Islands Forum, are but a few examples of international and First World focus on the plight of such states as Kiribati.

[52] The history of the last 3,000 years of human kind records huge movements of people, driven in some cases by overpopulation or scarce resources.[27] But the globe is currently divided between independent sovereign states which would certainly resist unimpeded migration across state boundaries.

[53] But it is unnecessary to decide this application on some "thin end of the wedge" basis. The six propositions of law advanced by the applicant are untenable.

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[26] Reference was made to *Chan v Minister for Immigration and Multicultural Affairs* (1989) 169 CLR 379 (HCA), Refugee Appeal No 71427/99, RSAA, 16 August 2000 at [67].

[27] The westward movement of tribes out of Central Asia into Europe during the latter years of the Roman Empire; the oceanic movements of Vikings in the Northern Hemisphere and Polynesians, Melanesians, and Micronesians over the Pacific; and movements in and out of Africa and into India over the last 1,000 years are but some examples.

[54] For the reasons apparent in previous sections of this judgment, a "sociological" refugee or person seeking to better his or her life by escaping the perceived results of climate change is not a person to whom Article 1A(2) of the Refugee Convention applies. The economic environment of Kiribati might certainly not be as attractive to the applicant and his fellow nationals as the economic environment and prospects of Australia and New Zealand. But he would not, if he returns, be subjected to individual persecution. By returning to Kiribati, he would not suffer a sustained and systemic violation of his basic human rights such as the right to life under Article 6 of the ICCPR or the right to adequate food, clothing and housing under Article 11 of ICESCR. His position does not appear to be different from that of any other Kiribati national. And certainly there is no persecution or serious harm which will be visited on him for any of the five stipulated convention grounds.

[55] The appellant raised an argument that the international community itself was tantamount to the "persecutor" for the purposes of the Refugee Convention. This completely reverses the traditional refugee paradigm. Traditionally a refugee is fleeing his own government or a non-state actor from whom the government is unwilling or unable to protect him. Thus the claimant is seeking refuge within the very countries that are allegedly "persecuting" him. The Australia Refugee Review Tribunal has stated:[28]

> In this case the Tribunal does not believe that the element of an attitude or motivation can be identified, such that the conduct feared can be properly considered persecution for reasons of a Convention characteristic as required... There is simply no basis for concluding that countries which can be said to have been historically high emitters of carbon dioxide or other greenhouse gases, have any element of motivation to have any impact on residents of low lying countries such as Kiribati, either for their race, religion, nationality, membership of a particular social group or political opinion.

Furthermore, even if there was persecution (which I do not accept), that persecution is indiscriminate rather than based on one of the five Convention grounds.

[56] On the second question of law, that the Tribunal erred in finding that because all people on Kiribati suffer the same results of global warming this disqualifies the

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[28] 0907346 [2009] RRTA 1168, 10 December 2009 at [51].

applicant from claiming refugee status, the Tribunal did not reach its decision on that ground alone, nor did it make a precise finding to that effect. It instead concluded that whilst the applicant's standard of living, if he returned to Kiribati, would be less than what he enjoyed in New Zealand, this did not constitute serious harm for Refugee Convention purposes. Nor was the serious harm which the applicant alleged attributable to a Refugee Convention reason.[29] The second question of law is no more than a reformulation of the first.

[57] The third question of law is the Tribunal failed to consider an indirect human agency given that "general worldwide human agency" produced green house gases which promoted rising sea levels and changing weather patterns inherent in climate change.

[58] Again this alleged question of law is repetitive. Quite simply the Tribunal did consider the position and the phenomenon of climate change and its causes generally.[30]

[59] The fourth and fifth questions of law relate to the applicant's three children and the Tribunal's alleged failure to consider the relevant domestic law and the effects of UNCROC and the ICCPR. These matters are not questions of law. The Tribunal had before it an appeal solely from the applicant. It is apparent from the notes of evidence before the Tribunal[31] that it was not considering an appeal in respect of the applicant's children or his wife. The Tribunal specifically raised with the applicant and his counsel why refugee claims were not filed for the applicant's children. Counsel confirmed that no such claims had been filed and gave reasons for this. Similarly, at the outset of the hearing, the Tribunal clarified that the applicant's wife was not a claimant but was merely appearing as a witness.[32] Section 133 requires each person and every family member who seeks recognition as a refugee or protected person to make an individual claim. This was not done. Rather the position of the applicant's wife and his children is covered by the provision of

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29 At [74]-[76].
30 At [54]-[55]. See also supra [55].
31 See page 83 lines 4-8 and 12-26.
32 Notes of evidence page 2 lines 4-17.

humanitarian appeals under ss 206 and 207. The considerations are different, as is the Tribunal's jurisdiction.

[60] Sympathetic though one might be to the position of the applicant's family, there is no identifiable error of law. Certainly the fourth and fifth questions of law do not raise matters of general public importance.

[61] The sixth question challenges the Tribunal's factual finding[33] that supplies of food and water for the applicant and his family would be adequate were he to return to Kiribati. In submissions this was expanded to include the difficulties which would be caused to the applicant's New Zealand born children because of their susceptibility to disease, overcrowding on Kiribati, and the future effects of climate change.

[62] This question is essentially a question of fact not of law, and even if it were a question of law would be no more than a supplement to the applicant's first two questions. In any event the factual finding of the Tribunal in that regard was clearly open to it on the evidence before it.

Result

[63] For the reasons which are apparent in the previous sections of this judgment and particularly the "Analysis" section, leave to appeal under s 245 from the 25 June 2013 decision of the Immigration and Protection Tribunal on the grounds that the decision was erroneous on points of law is refused. The attempt to expand dramatically the scope of the Refugee Convention and particularly Article 1A(2) is impermissible. The optimism and novelty of the applicant's claim does not, in the context of well settled law and the current concerns of the international community, convert the unhappy position of the applicant and other inhabitants of Kiribati into points of law.

[64] The decision of the Tribunal is confirmed.

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[33] At [73].

Costs

[65] Since the respondent has been successful it is entitled to costs on the 2B scale. I did not understand Mr Kidd to argue to the contrary.

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Priestley J