IN THE COURT OF APPEAL OF NEW ZEALAND

CA50/2014
[2014] NZCA 173

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

Hearing:	1 May 2014
Court:	Stevens, Wild and Miller JJ
Counsel:	M J Kidd for Applicant R E Savage for Respondent
Judgment:	8 May 2014 at 2.30 pm

JUDGMENT OF THE COURT

A The application for an extension of time for the leave application is granted.

B The application for leave to appeal to the High Court is dismissed.

C The applicant is to pay the respondent's costs as for a standard application for leave to appeal under r 14 of the Court of Appeal (Civil) Rules 2005 on a band A basis with usual disbursements.

REASONS OF THE COURT

(Given by Wild J)

Two applications

[1] These are applications by Mr Teitiota for leave to appeal to the High Court on questions of law determined by the Immigration and Protection Tribunal, and for an extension of time for the leave application. The application was filed on 30 January this year, 10 working days outside the 20 working days application period which expired on 24 December 2013. Given this comparatively short delay over the Christmas vacation period and the fact that an application not in proper form was rejected by this Court in the interim, we grant the application for an extension of time for the filing of the leave application.

[2] The decision of the Tribunal Mr Teitiota asserts is erroneous in law was delivered on 25 June 2013.[1] Leave to appeal from that decision on points of law was refused by the High Court in a judgment delivered by Priestley J on 26 November 2013.[2]

[3] In that situation, s 245 of the Immigration Act 2009 permits Mr Teitiota to apply to this Court for leave. The relevant part of that section 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.
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> …
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> (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 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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> …

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1 *AF (Kiribati)* [2013] NZIPT 800413 [Tribunal decision].

2 *Teitiota v The Chief Executive of the Ministry of Business Innovation and Employment* [2013] NZHC 3125 [High Court judgment].

[4] Consistent with s 245(1), the focus of the present application is on the decision of the Tribunal, not on the judgment of the High Court declining leave.

Background

[5] Mr Teitiota is unlawfully in New Zealand. He and his wife came here from Kiribati in 2007 and remained after their permits expired, in Mr Teitiota's case on 7 October 2010. Although their three children were born in New Zealand none is entitled to New Zealand citizenship.[3]

[6] After being apprehended, Mr Teitiota applied for refugee status and/or protected person status.[4] That was declined in a decision of a Refugee and Protection Officer. Mr Teitiota then appealed to the Tribunal. Mr Teitiota applied only for himself. The Tribunal asked Mr Teitiota's counsel why the application had not extended to Mr Teitiota's wife and the three children. Mr Kidd's explanation was that "the health authorities and the kindergarten" had continued to care for the children, notwithstanding that applications for refugee status had not been filed on their behalf.[5]

[7] At the start of its admirably well structured, carefully reasoned and comprehensive decision the Tribunal summarised the basis for Mr Teitiota's application and the issue it needed to decide in this way:

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

The position in Kiribati

[8] The Tribunal had a substantial amount of information and evidence about the effects of climate change, particularly the rise in the level of the surrounding Pacific

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3 The applicable provision is s 6(1)(b) of the Citizenship Act 1977.
4 Under ss 129 and 131 of the Immigration Act 2009 respectively.
5 Transcript of hearing before the Immigration and Protection Tribunal, 21 March 2013 at 83–84 [Transcript].

Ocean, on the human and physical geography of Kiribati. This came from four sources:

(a) The 2007 National Adaption Programme of Action filed by Kiribati under the United Nations Framework Convention on Climate Change;

(b) Mr John Corcoran. Mr Corcoran is a Kiribati national now resident in New Zealand. For several years he was clerk to the Chief Justice in Tarawa. He is currently completing doctoral studies at the University of Waikato in the economic and cultural impacts of climate change on the population of Kiribati. The Tribunal accepted Mr Corcoran as an expert on those matters;

(c) Mr Teitiota; and

(d) Mr Teitiota's wife.

[9] The Tribunal accepted the evidence it heard. In particular, it accepted Mr Teitiota's evidence "in its entirety".[6] The Tribunal made these findings about the position in Kiribati and the situation of Mr Teitiota:

> [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

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6 At [38].

> sea-level-rise. The house they were living in on South Tarawa is no longer available to them on a long term basis. Although their families have land on other islands, these face similar environmental pressures and the land available is of limited size and has other family members living there.

The questions on which leave is sought

[10] Where leave to appeal on a question of law is sought under a provision such as s 245, the question should be stated as a question. It should end with a question mark. The six 'questions' on which Mr Teitiota seeks leave were framed as propositions, not as questions. We have re-framed them in the interrogative. At the start of the hearing we gained Mr Kidd's acceptance that our re-framing accurately states the questions on which leave to appeal is sought.

Question One

[11] The question is:

> As the word "refugee" constitutes and incorporates those who are refugees by way of climate change and its effects, did the Tribunal err in law in using the term "sociological refugee" to distinguish what could amount to valid grounds for Mr Teitiota to seek refugee status?

[12] The starting point in answering this question is s 129(1) of the Immigration Act:

> 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 [United Nations Convention Relating to the Status of Refugees (the Convention)].[7]

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

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

[14] Adopting a decision of its predecessor, the Refugee Status Appeals Authority,

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[7] United Nations Convention Relating to the Status of Refugees, 189 UNTS 150 (opened for signature 28 July 1951, entered into force 22 April 1954).

the Tribunal set out this approach to considering art 1A(2):[8]

> (1) Objectively, is there a real chance of the refugee claimant being persecuted if returned to the country of nationality?
>
> (2) If the answer is yes, is there a Convention reason for that persecution?

[15] The Tribunal stated that New Zealand refugee law applies the Hathaway concept of "being persecuted" as the sustained or systemic violation of core human rights, demonstrative of a failure of state protection. The risk of being persecuted must be "well-founded", in the sense of there being a real, as opposed to a remote or speculative, chance of it occurring. The standard is entirely objective.[9]

[16] Question (1) appears to focus on [51] and [52] of the Tribunal's decision. In [51] the Tribunal recorded Mr Kidd's submission that "being persecuted" does not require human agency and the word "refugee" is capable of encompassing persons having to flee irrespective of the cause. In Mr Teitiota's case, it is the "act of fleeing climate change" because of the serious harm it will do to Mr Teitiota and his family coupled with the Kiribati Government's unwillingness or inability to deal with the factors "instituted by climate change" that constitute Mr Teitiota a refugee.

[17] The Tribunal responded:

> [52] This submission must be rejected. It draws on what has been described by Astri Suhkre in "Environmental Degradation and Population Flows" 47(2) *Journal of International Affairs* at p482 as a distinction between a 'sociological conception' of refugee-hood and a legal one. The fundamental difficulty Mr Kidd's submission faces is that the former is broader than the latter. The legal concept is governed by the refugee definition contained in Article 1A(2) of the Refugee Convention. Section 129 only permits recognition as a refugee if the requirements of the Convention are met. It is the legal conception which applies, not the sociological one relied on by Mr Kidd. The legal conception requires that the applicant establish that he is at risk of 'being persecuted', and that status be linked to one of the five Convention grounds.

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8 *Refugee Appeal No 70074/96 RSA Auckland*, 17 September 1996.

9 Tribunal decision, above n 1, at [53], citing *Refugee Appeal No 74665*, [2005] NZAR 60 (RSA); *BG (Fiji)* [2012] NZIPT 800091; *Chan v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379 and *Refugee Appeal No 76044* [2008] NZAR 719 (RSA).

[18] The Tribunal then elaborated. It stated that the legal concept of "being persecuted" rested on human agency, although it could encompass non-state actors. It accepted the requirement for some form of human agency did not mean climate change could never "create pathways into the Refugee Convention or protected person jurisdiction".[10] It expanded on this, citing legal decisions and texts and articles from around the world. It referred also to the interface between environmental degradation and international human rights law. It cautioned against generalised assumptions about environmental change and the applicability of the Convention, emphasising the care that must be taken to examine the particular facts of the case. Although accepting that environmental degradation could involve significant human rights issues, the Tribunal stressed the claimant still needed to establish he/she met the criteria set out in art 1A(2) of the Convention.

[19] Next, the Tribunal observed that the "complex interrelationship between environmental degradation … and international protection is reflected in New Zealand's refugee jurisprudence".[11] Amongst cases referred to by the Tribunal were a number, similar in nature to Mr Teitiota's claim, brought in 2000 by people from Tuvalu. The Tribunal noted "the claims were dismissed because the indiscriminate nature of these events and processes gave rise to no nexus to a Convention ground".[12]

[20] With all that in mind, the Tribunal then turned to the facts of Mr Teitiota's case asking itself whether, objectively, on the facts it had found, there is a real chance of Mr Teitiota being persecuted if returned to Kiribati. It held there was not for these reasons:

(a) there was no evidence Mr Teitiota faced a real chance of suffering serious physical harm from violence linked to housing, land and property disputes in Kiribati in the future;[13]

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10 At [55].
11 At [66].
12 At [67].
13 At [72].

(b) there was no evidence to support Mr Kidd's contention that Mr Teitiota was unable to grow food or obtain potable water. Mr Teitiota had not made those claims in his evidence;[14]

(c) there was no evidence establishing the environmental conditions Mr Teitiota faced or was likely to face on return to Kiribati were so parlous as to jeopardise his life or mean he and his family would be unable to resume their prior subsistence life with dignity;[15]

(d) in any event, Mr Teitiota's claim under the Convention must necessarily fail because, by Mr Teitiota's own admission, the effects of environmental degradation were faced by the population of Kiribati generally; and[16]

(e) there was no suggestion the Government of Kiribati had failed to take adequate steps to protect Mr Teitiota from such harm as it is able to for any Convention ground.[17]

[21] We cannot see any scope to argue that this reasoning is erroneous in law. As Ms Savage submitted, the Tribunal essentially applied well developed law, which it correctly understood, to the undisputed facts of Mr Teitiota's case. The short point is that the effects of climate change on Mr Teitiota, and indeed on the population of Kiribati generally, do not bring him within the Convention. That is the position even if the most sympathetic, ambulatory approach permissible to interpreting the Convention is taken. The Convention is quite simply not the solution to Kiribati's problem.

[22] There are, in the evidence the Tribunal heard, some striking endorsements of the misconceived nature of Mr Teitiota's claim for refugee status. First there is

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14 At [73].
15 At [74].
16 At [75].
17 At [75].

Mr Teitiota's explanation to the Tribunal of why he did not wish to return to Kiribati:[18]

> Q Is there anything you want to say, Mr Teitiota, that you haven't said, that you want me understand, in relation to your appeal?
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> A Yes, I want, there is something. My appeal, together with my family, I want, I don't want to go back, I want to stay here.
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> Q Why?
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> A There's nothing, there's no future for us when we go back to Kiribati, especially for my children, there's nothing for us there, and I also – because they are all born here, the children. In terms of education, they have better future here, and for us. That's all.

No suggestion there of persecution, let alone on any of the five grounds set out in art 1A(2) of the Convention.

[23] Secondly, there are these two confirmations that climate change is generally having the same affect on all the people of Kiribati. Firstly, in the evidence of Mr Corcoran:[19]

> Q … are these things [the combination of overpopulation and rising sea level and their consequences] generally experienced by all citizens to more or less the same level or is it only experienced by a certain part of the population?
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> A I think generally speaking, I think everybody's experiencing the same.

And then in the evidence of Mr Teitiota's wife:[20]

> Q The problem with sea level rise and overcrowding?
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> A Yeah it's affecting everyone, everybody …

[24] Thirdly, there is this clear statement by Mr Teitiota's wife that the family would not face persecution if it returned to Kiribati:[21]

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18 Transcript, above n 5, at 43.
19 At 75.
20 At 81.
21 At 82.

> Q All right and then you use this terminology at 4, "I do not fear persecution except for the persecution of mother nature". What do you mean by that, "The persecution of mother nature"?
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> A What I mean is that the problem with sea level rise they're real and it's affecting our – it's going to affect our children. For example the refugees they run away from persecution and comparing that to myself and my family, especially my children, going back to the Island I won't face persecution as such but I will face a lot of problems from the sea level rise and that problem includes flooding and us drowning.

[25] Although this is not an appeal from the High Court's refusal of leave, we note that Priestley J also saw no error of law in the Tribunal's reasoning. The Judge viewed Mr Teitiota as a "sociological" refugee who, on the facts of his claim, cannot bring himself within art 1A(2) of the Convention. Priestley J observed:[22]

> … 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.

We agree with all of that.

[26] Accordingly, Question One is not open to serious argument justifying leave to appeal to the High Court. Even if it were, we would not consider the question was of such general or public importance as to justify leave to appeal, nor can we see any other reason why leave to appeal should be granted.

Question Two

[27] The question is:

> Did the Tribunal err in law in holding that the fact that everyone in Kiribati suffered the same results of climate change disqualified Mr Teitiota from claiming refugee status?

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22 High Court judgment, above n 2, at [54].

[28] This second question focuses on the Tribunal's reason (d) set out in [20] above. We agree with Priestley J that this second question is a reformulation of the first.[23] What the Tribunal was stating in the impugned passage is that Mr Teitiota – admittedly unable to distinguish himself from the rest of the Kiribati population in terms of the effects of environmental degradation – was not "being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion …". As Priestley J observed "… even if there was persecution (which I do not accept), that persecution is indiscriminate rather than based on one of the five Convention grounds".[24]

[29] Thus, as we stated, in dealing with Question One, Mr Teitiota is unable to bring himself within the terms of art 1A(2) of the Convention. Question Two is equally inappropriate for leave to appeal.

Question Three

[30] This is:

> Given that "human agency" includes general worldwide human agency in producing greenhouse gases that promote the rising sea levels and changing weather patterns inherent in climate change, did the Tribunal fail to consider indirect human agency?

[31] As Priestley J pointed out, this question is repetitive of Questions One and Two.[25] As is clear from our summary of the Tribunal's decision, particularly in [18] above, the Tribunal did consider the contribution of humans in bringing about rising sea levels and climate change generally. Like the previous two, this question is not open for serious argument.

Questions Four and Five

[32] As both relate to Mr Teitiota's children, we deal with them together. The questions are:

> Did the Tribunal fail to consider arts 2(3)(a) and 24.1 of the International Convention on Civil and Political Rights in respect of its finding that there

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23 At [56].
24 At [55].
25 At [58].

> would be no serious harm (to the named children of the applicant); and further arts 24(1) and 2(a), (b) and (c) and art 27 of the United Nations Convention on the Rights of the Child in respect of certain minimum standards relating to the welfare of the children?

And:

> Did the Tribunal err in law in not considering the children of the applicant separately in respect of the effects of deprivation of food and water on the applicant, and in not taking into account that the children were born in New Zealand and have never experienced the conditions in Kiribati and therefore would suffer serious harm if returned?

[33] Dealing particularly with Question Five, Mr Kidd drew our attention to s 135(2) of the Immigration Act. That subsection imposes on a claimant for recognition as a refugee a duty to ensure, before the officer determines the claim:

> (2) … all information, evidence, and submissions—
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> (a) that the claimant wishes to have considered in support of the claim are provided to the refugee and protection officer; and
>
> (b) that the claimant would wish to have considered in support of any other potential claim under section 129, 130, or 131 are provided to the refugee and protection officer.

[34] Mr Kidd submitted there was evidence before the Tribunal of the dependence on Mr Teitiota of his children, and that the family would stay together wherever they lived. Mr Kidd submitted that the Teitiota children "are protected children".

[35] Because we endorse entirely Priestley J's view about Questions Four and Five we simply set them out:

> [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 apparently from the notes of evidence before the Tribunal[26] 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.[27] Section 133 requires each person and every family member who seeks

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[26] See page 83 lines 4–8 and 12–26.

[27] Notes of evidence at 2/4–17.

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

Question Six

[36] This question is:

> Did the Tribunal err in law in its findings of fact (at [73]) that the applicant's supplies of food and water were adequate, in that there was evidence to support that the applicant and his children born in New Zealand would face severe difficulties in view of overcrowding and future effects of climate change leading to further deterioration?

[37] As Ms Savage submitted, the Tribunal's findings of fact could only be erroneous in law if there was no evidence to support them. Mr Kidd urged us to read the transcript of the hearing before the Tribunal – all 86 pages of it. We have done this. Certainly, there was evidence from each of Mr Teitiota, Mr Corcoran and Mr Teitiota's wife, that the rise in the level of the Pacific Ocean is adversely affecting homes, crops, coconut palms and fresh water supplies in Kiribati. At high tides and king tides, seawater sometimes comes into coastal homes. Salt water has killed some coconut palms and crops. It has contaminated drinking water drawn from wells. But the Tribunal was right to find that the supplies of food and water for Mr Teitiota and his family would be adequate if they were required to return to Kiribati. The Tribunal readily accepted that the standard of living of the Teitiota family back in Kiribati would compare unfavourably to that it enjoyed in New Zealand. But the Tribunal was, on the evidence it heard, entitled to find that Mr Teitiota and his family on return to Kiribati could "resume their prior subsistence life with dignity".[28]

[38] So this last question is also not open for serious argument on appeal.

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[28] Tribunal decision, above n 1, at [74].

Summary

[39] For the reasons we have given, it is not appropriate to grant leave to appeal to the High Court on any of the proposed six questions of law.

[40] Although the Court has every sympathy with the people of Kiribati, Mr Teitiota's claim for recognition as a refugee is fundamentally misconceived. It attempts to stand the Convention on its head. Priestley J succinctly explained why:

> [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. …

[41] No-one should read this judgment as downplaying the importance of climate change. It is a major and growing concern for the international community. The point this judgment makes is that climate change and its effect on countries like Kiribati is not appropriately addressed under the Refugee Convention.

Result

[42] The application for leave to appeal to the High Court is dismissed.

[43] The applicant is to pay the costs of the respondent as for a standard application for leave to appeal under r 14 of the Court of Appeal (Civil) Rules 2005 on a band A basis with usual disbursements.

Solicitors:
Meredith Connell, Auckland for Respondent