IMMIGRATION AND PROTECTION TRIBUNAL NEW ZEALAND **[2014] NZIPT 800517-520**

AT AUCKLAND

Appellants:	**AC (Tuvalu)**
Before:	B L Burson (Member)
Counsel for the Appellants:	C Curtis and T Zohs
Counsel for the Respondent:	No Appearance
Date of Hearing:	3 April 2014
Date of Decision:	4 June 2014

DECISION

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INTRODUCTION

[1] These are appeals against decisions of a refugee and protection officer, declining to grant refugee status and/or protected person status to the appellants, citizens of Tuvalu.

[2] The appellant in NZIPT [2014] 800517 is the husband of the appellant in NZIPT [2014] 800518. They will be referred to as "the husband" and "the wife" respectively. They are the parents of the appellants in NZIPT [2014] 800519 and 800520 who will be referred to as "the children". The wife is the responsible adult for the children in terms of section 375(1) and (2) of the Immigration Act 2009 ("the Act").

[3] The appellants claim that there are substantial grounds for believing that they will be in danger of being arbitrarily deprived of their lives or in danger of being subjected to cruel treatment if returned to Tuvalu because of the effects of

climate change in Tuvalu. The central issue to be determined by the Tribunal is whether the Government of Tuvalu can be said to be failing to take steps within its power to protect the appellants' lives from the effects of climate change such that their lives can be said to be "in danger" and whether or not the harm they fear amounts to cruel treatment as that term is defined under the Act.

[4] Given that the appellants' claims derive to a significant extent from the general conditions in Tuvalu, it is appropriate to first set out some salient features, before turning to detail the experiences and concerns of the appellants.

TUVALU: RELEVANT FEATURES

Geo-physical characteristics

[5] The relevant geophysical characteristics are contained in the Government of Tuvalu's National Adaptation Programme of Action (May 2007) ("the 2007 NAPA") filed under the auspices of the United Nations Framework Convention on Climate Change. At p13, the 2007 NAPA describes Tuvalu as "an extremely small, isolated atoll island nation aligned in a northwest – southwest orientation; disbursed within the central Pacific Ocean". Tuvalu consists of five coralline atolls, three table reef islands and one composite island. Tuvalu's total land area is 25.9 square kilometres. The report continues:

> "The islands of Tuvalu are alike in physiographic development processes with low-lying land rarely exceeding three meters above mean sea level. The islands are generally coastal in nature that is, easily affected by coastal processes such as coastal erosion, sea sprays, etc. The coastal area especially, is the area mostly influenced by the sea. On the five atolls, there are two regions of coastal areas: coastal areas adjacent to the open ocean and coastal areas adjacent to the internal and central lagoon.
>
> There is no major variation in the land or soil types of the islands of Tuvalu. The soils of the islands of Tuvalu are generally none structured, coarse texture and porous. These are characteristics of an immature and infertile soil, unsuitable for subsistent agriculture.
>
> Since much of the soil is sandy and acidic; high annual rainfall in combination to soil porosity inhibits efforts to improve soil through the use of fertilizers, and therefore, agricultural production is limited. The main tree crops are coconuts, pandanus, breadfruit and bananas. Pulaka pits were also constructed to allow the cultivation of traditional root crops such as Pulaka (*Cytosperma chamissonis*). However, traditional subsistence agricultural activities and outputs are declining, as the economy becomes more monetarised."

Demographic features and trends

[6] According to the Secretariat of the Pacific Community ("SPC") *Pacific Island Populations – Estimates and Projections of Demographic Indicators for Selected* Years (2013) the population of Tuvalu is estimated to be just under 11,000 people. As to population projections, the population is estimated to reach 14,400 by 2030, and 19,600 by 2050. Population density is projected to increase from 420 persons per two square kilometres to 556 persons per two square kilometres.

[7] In the context of vulnerability to natural hazards and the adverse impacts of climate change, the spatial distribution of Tuvalu's population is important. In this regard, two points need emphasising. First, on each of the islands the entire population lives within the coastal areas. Second, the distribution of Tuvalu's population across each of the nine islands is highly variable, as the following table, appearing at p16 of the 2007 NAPA, illustrates:

Island	**Total Population**		**Total Population change**
	1991	**2002**	
1. Nanumea	824	664	-160
2. Nanumaga	644	589	-55
3. Niutao	749	663	-86
4. Nui	606	548	-58
5. Vaitupu	1,202	1,591	389
6. Nukufetau	751	586	-165
7. Nukulaelae	353	393	40
8. Niulakita	75	35	-40
9. Funafuti	**3,839**	**4,492**	**653**

[8] From this table, it can be clearly seen that the population of Tuvalu is largely concentrated on only two islands, Vaitupu and Funafuti. The 2007 NAPA notes that the positive change for Vaitupu is due to the increasing number of new intakes into the only government funded secondary school located on Vaitupu, while the positive population trend for Funafuti is due to internal migration in search of employment.

Land tenure in Tuvalu

[9] As much of the appellants' case revolved from their having a lack of access to land on which to build a house in Tuvalu, it is also necessary to say something about land tenure in Tuvalu.

[10] Rates of customary land tenure are highly variable across the Pacific. As regards Tuvalu specifically, between 95 per cent of the land is held in customary tenure, with only 5 per cent publicly owned. Less than 0.1 per cent is held in freehold title. All customary land has, however, been registered; see Australian Agency for International Development, *Making Land Work Volume One: Reconciling customary land and development in the Pacific* (Canberra, 2008), Table 2.1, at p4.

[11] As noted in the 2007 NAPA at p16, access to land, particularly in Funafuti for those from outlying islands is an important issue. To understand this importance, it is necessary to see the role of land and the place and significance of customary land tenure within the wider Pacific setting. The role of land in Pacific society generally is described in the report of South Pacific Forum Secretariat's Land Management and Conflict Minimisation Project *Guiding Principles and Implementation Framework for Improving Access to Customary Land and Maintaining Social Harmony in the Pacific* (Suva, 2008). As the title of the project suggests, in the Pacific region, land ownership and usage can be highly contested. The report, at pp20-24, details the importance of land in the Pacific and some of the issues arising. The report states:

> "Land is integral to the people of the Pacific, being a traditional source of sustenance, social and political relationships and identity. Traditional access to and use and management of land is closely tied to the social fabric of communities, and customary tenure defines not only the nature and scale of economic development but also social harmony. Land is a sensitive issue because it has a much broader meaning for indigenous Pacific people than just its value as an economic commodity. For the people of the Pacific, ties to land are central to identity and provide a sense of belonging. The importance to the people of the Pacific of acknowledging customary land tenure as the foundation of land management cannot be overemphasised. Sensitivities over land partly also arise because of tensions and conflicts that come to the surface during elections, when people's emotions are manipulated for political ends."

[12] As to customary land tenure the report notes:

> "Customary land is "owned" by groups with different rights held by individuals, defined by inheritance and social relationships. In traditional societies "ownership" of land relates to the notion of custodianship, where individuals and society jointly have a responsibility and duty of care towards current and future generations. Customary land is also a source of social insurance. For indigenous Pacific people, ties to land bring together ecological, geophysical, social, spiritual and

> economic dimensions, ... Decisions about the transfer of land (through gift or purchase) were usually made communally or, in chiefly societies, by chiefs or "big men". At the community level, individuals made decisions about land over which they had individual use rights. Conflicts were mediated by senior members of the community with expert knowledge of group genealogy and history and using sanctioned mediation processes."

[13] Land-related conflict is not uncommon. The report notes, at p22, that internal rural-to-urban migration and emigration has created additional problems:

> "Urbanisation and migration have raised the lack of clarity of the rights of members of landowning groups who are away from their land for extended periods of time, as well as the issue of access to customary land for settlement, while ensuring that landowners do not lose their superior rights. Not only do these challenges cause local-level anxiety and disagreement, they can lead to conflicts that are taken to courts. Such conflict resolution processes can be time consuming and affect economic growth."

Current and projected impacts in Tuvalu of environmental degradation linked to climate change

[14] The 2007 NAPA, at p13, notes both that, as a low-lying tropical island state, Tuvalu is no stranger to natural disasters and that "it is anticipated that Tuvalu will suffer the greatest from adverse impacts of climate change".

[15] Drawn from stakeholder consultations in all island communities, the 2007 NAPA, at p12, identified the most common vulnerabilities currently faced by Tuvaluans in the context of climate change. These were:

(a) <u>Coastal Erosion</u>

Loss of land due to coastal erosion was evident on all islands of Tuvalu. Sea-level rise, flooding, storm surges, tropical cyclones and major hurricanes were identified as the main contributing factors, although building aggregates excavation and coastal development activities had also contributed. Coastal erosion contributed to the destruction of coastal coconut tree plantations. Also, erosion due to heavy rainfall resulted in sedimentation in central and coastal areas, affecting coastal and lagoon fisheries.

(b) <u>Flooding and inundation</u>

February 2006 saw the worst ever flooding and inundation on Funafuti, resulting in the evacuation of some families. Other islands also experienced flooding and inundation into new areas. Climate-

related hazards such as tropical cyclones and storm surges were expected to exacerbate these problems.

(c) Water stress

Population growth had increased public demand for potable water, the main source of which came from rainwater. Vulnerability to water stress was caused by the lack of household water storage facilities and changes to rainfall patterns due to climate change and variability. Water shortages contributed to skin diseases and other health problems.

(d) Destruction to primary sources for subsistence

An increase in the occurrence of new crop diseases and pests, including fruit-fly infestation, was attributed by stake-holders to climate change and variability. Tropical cyclones, storm surges and coastal flooding had destroyed coastal coconut plantations. Coastal fisheries were also affected by sea-surface temperature changes and the increasing frequency of extreme events.

(e) Damage to individual and community assets

Coastal infrastructures such as harbours, church buildings, cooperative shopping centres, clinics and dispensaries, the tar sealed road in Funafuti and household properties were all exposed to the destructive forces of extreme events such as tropical cyclones, storm surges, droughts, and fires.

[16] As regards potential future vulnerabilities due to the impacts of climate change, the 2007 NAPA notes that these will depend on the frequency and intensity of climate-related hazards. Population growth is already placing pressure on sensitive environments and major sources of food security and livelihoods, and these effects can be exacerbated by the adverse effects of climate change. Drought is anticipated to increase in severity in the future. The low elevation and limited land area of Tuvalu meant that the most direct and severe anticipated effects of climate change will be an increasing risk of coastal erosion, flooding and inundation. Other anticipated direct effects were stated to include an increase in dengue fever risks and water borne diseases, an increase in human stress, and decreasing agricultural yields.

[17] Particular emphasis has been placed by counsel on the issue of access to safe water. In this regard, the 2007 NAPA recognises at p26 that :

> "One of the most critical national challenges with respect to impacts of climate change and sea level rise is the quality and availability of potable water for the people due to unpredictability of changes and variability in climate and weather patterns."

[18] It notes that low monthly rainfall frequently results in water shortages on Funafuti. While this usually occurs during the dry season (June-Sept), if it coincides with El Niño in the adjacent wet season (October-April), the resulting water shortage crisis will be prolonged. Increasing frequency of drought and longer periods of low rainfall causes increases in groundwater salinity, which adversely affects subsistence agriculture and increases skin diseases and eye infections. Groundwater was an alternative source of water in the past, which supplemented public water supply and is also the main source of water for agriculture, plants and crops. More than 60 per cent of pulaka pit plantations had been devastated by saltwater intrusion and, over time, saltwater intrusion is expected to impact other agricultural fruit trees such as coconut, breadfruit and pandanus.

[19] Having set out these general features pertaining to Tuvalu, it is now possible to turn to the evidence given by the husband and wife in support of the appeals.

THE APPELLANTS' CASE

[20] The account which follows is that given by the husband and wife at the appeal hearing. It is assessed later.

Evidence of the Husband

[21] The husband was born on X Island in the late 1970s and is the youngest of seven children. His father remarried following the death of his own mother and he has a half-brother. The family led a subsistence life. The husband's father encouraged him to become a teacher. He received a government scholarship to attend a training college in another Pacific island country, obtaining a teaching qualification. In the late 1990s, he returned to Tuvalu where he commenced teaching. He first taught for a year on X before moving to another island to teach for a year. In the early 2000s, he undertook an English language course in an

overseas university before returning to X to continue teaching. From 2005 until he departed for New Zealand at the end of in 2007, he was posted to other islands.

[22] In X, the husband lived with his family in the family home, a traditionally-built house of approximately 35 square metres in size made of a local hardwood with a thatched roof. Outside was a separate cooking block and a separate toilet facility was dug for elderly members of the family to use. The house was situated close to the community hall which served as a communal meeting point for the inhabitants of the two villages on the island. Beside the community hall there was a medical facility staffed by a nurse, a primary school, a government office and a church. There was also a general store where villagers could buy goods to supplement the food they grew on the land and the fish they harvested from the sea. A variety of fruits and vegetables were grown on the land.

[23] The appellant told the Tribunal that the family home in X was on land situated on the lagoon side of the island. It was not built on land owned by his family. The family land was situated on the seaward side of the island but there had been a dispute between his father and the husband's paternal grandfather which resulted in the husband's father leaving the house on the family land and, with the agreement of the landowners, he had built the dwelling on the lagoon side where the husband and his family were born and resided.

[24] In approximately 2005, the husband's father died. While the husband was teaching on another island, he came to know from a sister who was still living in the home on the lagoon side that it was in a bad state of repair. The husband instructed a builder to mend the corrugated iron roof which he would pay for with money he received from his teaching salary. However, the person who had given the husband's father permission had also died by this time, and her son sent him a message via the builder that he had no right to the house anymore and demanded building work cease. Not wishing confrontation the husband ceased work. Some four to six months later, the village council instructed the husband's sister who remained on the island that the house would have to be demolished and removed. As for the house on the seaward side, this had been occupied by his half-brother for many years by this point and the husband had never lived in it.

[25] The husband did not return to X but continued to stay on other islands where he taught. He lived in accommodation which he rented from the government. These were of a block construction with corrugated iron roofing. While they also had a separate cooking block, the government housing had modern toilet facilities connected to septic tanks.

[26] The husband told the Tribunal that, over time, he noticed significant changes in X and indeed the other islands due to climate change. While there had always been inundation of the land from the seaward side during the hurricane season, he noticed that over time land would be partially submerged from both the lagoon and the seaward side during monthly king-tides. Trees close to the shoreline began to die and it became more difficult to grow food compared to what he remembered as a small boy and from what he understood previous generations had grown from the oral stories that were told to him. The husband also noticed a problem of coastal erosion on X and the other islands where he lived.

[27] The only source of fresh water on the island was rain water, but the collection systems were somewhat haphazard and the water was often contaminated. It required boiling to be rendered safe and, even then, was of a marginal quality. While, as a boy, he had been used to that water, he nevertheless still suffered from sores and skin complaints which he attributed to the lack of decent water. Problems were exacerbated during times of drought. While teaching on another island, there was a severe drought and the government, at the island's request, shipped a tanker full of desalinated water. While the water tasted quite "rusty", nevertheless people drank it.

[28] The husband told the Tribunal that he fears for his own and particularly his wife and children's safety if returned. Although he is a teacher, he has heard that it is difficult to obtain teaching jobs in Tuvalu and that there are many teachers who are unemployed. He does not think he would be able to find work. While his sisters and their families are here in New Zealand they will not be in a financial position to provide him with ongoing support. Nor does he think he could get help from community or church-based organisations. He is particularly anxious about the effect on his children of having to drink contaminated and substandard water.

Evidence of the Wife

[29] The wife was born on Y Island in the early 1980s. She has three sisters and two brothers. Her father died when she was relatively young. When the wife was in her early teens, she was sent to boarding school. However, she became ill and her mother decided that she and the wife would go to Z Island where the health facilities were better. They lived there with one of the wife's aunts. The doctors at the hospital told her that her stomach complaints were attributable to the poor quality and insufficient food she was given at the boarding school.

[30] In the early 2000s, the wife attended high school for a further two years in Z. At that time she left school and returned to Y with her mother. They could no longer stay with her sister because the house they were living in was overcrowded. The wife found employment as a pre-school teacher's aide but, after two years, the school closed due to a lack of funding. At this time, she met her husband who had come to Y as a teacher. They were married and thereafter she lived with her husband in accommodation they rented from the Ministry of Education. This accommodation was generally of better condition than the traditional houses.

[31] The husband and wife lost two babies in Tuvalu. One the first occasion, when she was approximately seven months pregnant, the wife was taken to Z as was normal. However, complications arose and the doctors were not qualified to undertake the necessary operation. Although an aircraft was organised from Fiji it could not land at night as there were no lights, and the baby died. The second baby died *in utero* at nearly nine months. No explanation was given for this.

[32] These experiences have made the wife anxious for her children's future in Tuvalu. The government does not have the medical facilities and the medicines are generally not available to keep children healthy. There is no immunisation programme such as there is in New Zealand. She is also anxious about their general livelihoods if returned to Tuvalu. They have nowhere to go. The husband has told her that the house where they lived in X is no longer available to them and that the land had been taken away from them. He has no family living in Tuvalu anymore and although family members are working in New Zealand they would not be able to provide them with money to help. Although the wife has some family members in Tuvalu they are not working and are not in a position to help her. She has lost contact with one of her brothers and another brother is here in New Zealand.

[33] The wife is also worried about the effects of sea-level rise. The land on Y is frequently inundated by the sea, making it difficult for plants to grow. During king tides the houses are often surrounded by water. She has no recourse to the land which belonged to her father.

Material and Submissions Received

[34] On 31 May 2013, the Tribunal received written submissions from counsel regarding the claims. Attached to those submissions were:

(a) Office of the High Commissioner for Human Rights *UN United to Make the Right to Water and Sanitation Legally Binding* (1 October 2010).

(b) Universal Periodic Review *National Report: Tuvalu* A/HRC/WG.6/3/TUV/1 (12 September 2008).

(c) Press statement by Special Rapporteur on the Human Rights of Safe Drinking Water and Sanitation (19 July 2012).

(d) United States Department of Labour Bureau of International Labour Affairs *Tuvalu Report* (2011).

(e) South Pacific Regional Environment Programme *Country Profile: Tuvalu*.

(f) United Nations Environment Programme and Pacific Islands Applied Geoscience Commission *Building Resilience in SIDS: Environmental Vulnerability Index*, p7.

(g) Pacific Islands Applied Geoscience Commission "Hot Spot Analysis in Selection for Focus on Demonstration Project for Tuvalu" (undated) p3.

(h) Jane McAdam "Climate Change Forced Migration, and International Law" (Oxford University Press, Oxford, 2012) pp60-73.

(i) Jane McAdam "Disappearing States, Statelessness and the Bounds of International Law" (SSRN.com) pp1-5.

(j) Jane McAdam "Climate Change Displacement International Law: Complementary Protection Standards" (UNHCR, Geneva) May 2011 pp52-54.

(k) Glazebrook J "Human Rights and the Environment" (2009) 40 *VUWLR*, pp293, 324.

(l) C Taylor "*This is What I Saw – Climate Change in the Pacific*" (19 April 2012).

[35] By letter dated 20 March 2004, the Tribunal served on counsel a bundle of documents comprising a copy of the decision of the Tribunal in *AF (Kiribati)* [2013] NZIPT 800413 together with:

(a) Tuvalu National Adaptation Programme of Action (NAPA), 2007, pp1-24;

(b) Tuvalu Millennium Development Goals Progress Report 2010/2011 (2011) pp15-32, 90-96;

(c) Tuvalu National Report to UN Working Group on the Universal Periodic Review (25 January 2013);

(d) Office of the High Commissioner for Human Rights *Compilation Report to UN Working Group on the Universal Periodic Review* (8 February 2013);

(e) Committee on the Rights of the Child *Consideration of States Party report: Tuvalu* (10 October 2012);

(f) Tuvalu Ministry of Health *Strategic Health Plan 2009-2018*;

(g) J Barnett and C Mortreaux (2009) “Climate Change, Migration and Adaptation in Funafuti, Tuvalu” 19 *Global Environmental Change* 105-112;

(h) F Gemenne and S Shen *Tuvalu and New Zealand*, EACH-FOR Case Study Report (United Nations University, Bonn 2009);

(i) Pacific Adaptation to Climate Change *Country Brief: Tuvalu* (2012);

(j) International Federation of the Red Cross “Red Cross responds to water crisis in drought-stricken Tuvalu” (16 October 2011); and

(k) Reliefweb *Tuvalu: Securing Tuvalu’s Water Supply* (6 December 2012).

[36] On 1 April 2014, the Tribunal received submissions from counsel in reply. Attached to those submissions was a further bundle of country information comprising:

(a) Human Rights Council, *OHCHR Compilation: Tuvalu* (February 2013).

(b) Committee on the Rights of the Child *Concluding Observations on Initial Report of Tuvalu* (4 October 2013).

(c) Asian Development Bank *Asian Water Development Outlook 2013* pp 6-5, 35, 54, 69, 71 and 92.

(d) Government of Tuvalu press release *UN Climate Change Adaptation Funds Not Reaching Pacific Island Nations, Tuvalu Minister Elisala Pita Says* (14 March 2014).

(e) Government of Tuvalu *Statement to First Preparatory Committee Meeting on the Third International Conference on Small Island Developing States* (February 24-26, 2014).

(f) Government of Tuvalu *National Report to Third International Conference on Small Island Developing States to be held in June 2014* pp 5, 7, 9, 14-17.

[37] Counsel made closing submissions at the end of the hearing.

ASSESSMENT

[38] Under section 198 of the Immigration Act 2009, on an appeal under section 194(1)(c) the Tribunal must determine (in this order) whether to recognise the appellants as:

(a) refugees under the 1951 Convention Relating to the Status of Refugees ("the Refugee Convention") (section 129); and

(b) protected persons under the 1984 Convention Against Torture (section 130); and

(c) protected persons under the 1966 International Covenant on Civil and Political Rights ("the ICCPR") (section 131).

[39] In determining whether the appellants are refugees or protected persons, it is necessary first to identify the facts against which the assessment is to be made. That requires consideration of the credibility of the appellants' account.

Credibility

[40] The Tribunal accepts the appellants as credible witnesses as to their background and experiences in Tuvalu.

[41] It is therefore accepted that the husband and wife come from different islands in Tuvalu. The husband is a qualified teacher who for a number of years prior to his departure for New Zealand worked as a teacher on various islands. The couple stayed in rented accommodation which was of a higher standard than that which they occupied when living on their respective home islands. They suffered the deaths of two children during the late stages of pregnancy. In 2007 they came to New Zealand. The Tribunal accepts that they are concerned about the effects of climate change and general conditions in Tuvalu for both themselves but particularly for their children. The Tribunal accepts the husband has no land available to him in X and that if they were to have to return to Tuvalu it would be to Z. Their claims will be assessed against this background.

The Refugee Convention

[42] 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."

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

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

[44] In terms of *Refugee Appeal No 70074* (17 September 1996), the principal issues are:

(a) Objectively, on the facts as found, is there a real chance of the appellant being persecuted if returned to the country of nationality?

(b) If the answer is yes, is there a Convention reason for that persecution?

[45] In the submissions of 30 May 2013, counsel submitted that the appellants are entitled to be recognised as refugees. However, in both a pre-hearing

conference and on the morning of the hearing it was accepted that, in light of the Tribunal's reasoning in *AF (Kiribati),* there was no basis upon which any of the appellants could be recognised as refugees. Whatever harm they faced in Tuvalu due to the anticipated adverse effects of climate change, it did not arise by reason of their race, religion, nationality, membership of any particular social group or political opinion. Their refugee claims were abandoned.

[46] The position taken by the Tribunal in *AF (Kiribati)* as regards the Refugee Convention in the context of natural disasters has been endorsed on appeal by both the High Court and, most recently, by the Court of Appeal; see, respectively: *Teitiota v Chief Executive of the Ministry of Business, Innovation and Employment* [2013] NZHC 3125 and *Teitiota v Chief Executive of the Ministry of Business, Innovation and Employment* [2014] NZCA 173.

The Convention Against Torture

[47] 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."

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

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

[49] On the morning of the hearing, Ms Curtis indicated that the appellants were not making any allegation that they were at risk of being tortured as that phrase is defined under the Act. That claim was also abandoned.

[50] What remains in issue, however, is the claim to be recognised as protected persons on the basis of section 131 of the Act. It is to that issue the Tribunal turns.

The claims under Articles 6 and 7 of the ICCPR

[51] 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."

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

> "(a) treatment inherent in or incidental to lawful sanctions is not to be treated as arbitrary deprivation of life or cruel treatment, unless the sanctions are imposed in disregard of accepted international standards:
>
> (b) the impact on the person of the inability of a country to provide health or medical care, or health or medical care of a particular type or quality, is not to be treated as arbitrary deprivation of life or cruel treatment."

Submissions of Counsel

[53] Counsel submits that each of the appellants – but the appellant children in particular – are in danger of suffering the arbitrary deprivation of life or of being subjected to cruel, inhuman or degrading treatment in Tuvalu. Citing McAdam (*op cit, 2011*), in the memorandum dated 30 May 2013 at paragraphs 2.1.and 2.2 and 2.18, counsel submits that the proper focus of the inquiry under section 131 should be on the ability and willingness of the Government of Tuvalu to mitigate against the harm, and not the underlying cause of the harm – in this case climate change. Nor is the fact that the harm stems, in part, from slow-onset processes relevant. The relevant issue is on the severity of harm arising and not on the timing. The anticipated harm need not be "imminent or subject to any time test"; see memorandum at paragraph 2.11.

[54] Further, citing various decisions of the European Court of Human Rights ("ECtHR") in relation to the broadly analogous Article 3 of the European Convention on Human Rights, it is submitted that the harm the appellants face reaches "a minimum level of severity" to fall within the prohibition of cruel, inhuman or degrading treatment; *Soering v United Kingdom* (1989) 11 EHRR 439. Further, inhuman treatment did not have to be deliberate; see *Labita v Italy* (2008) 46 EHRR 1224 at [120]. Nor is it necessary that the Government of Tuvalu

intends to cause degrading treatment to the appellants; *Peers v Greece* (2001) 33 EHRR 51 at [74].

[55] Particular emphasis is placed by counsel on access to safe drinking water. It is submitted that the prohibition of inhuman treatment does not require that the Government of Tuvalu intends to deprive it citizens of drinking water. Having been provided with a copy of the Tribunal's decision in *AF (Kiribati),* at paragraphs 1.3–1.7 of the memorandum of 1 April 2014, counsel submits that, while recognising the issue, the Government of Tuvalu is not taking concrete steps to address the problem. In particular, it "is not taking active steps to materialise their recognition of the lack of water on Tuvalu and its impact on the health of children and women". It is, counsel submits, failing to take any steps at the regulatory level and relies on donor countries' "generosity and ability to provide assistance". This failure to take steps to secure access to safe drinking water in sufficient quantity could lead to death and amounted to a risk of arbitrary deprivation of life.

[56] It is further submitted that particular regard must be had to the specific vulnerabilities of the appellant children. Regard must be had to the best interests of the child principle; *EM (Lebanon) v Secretary of State for the Home Department* [2008] UKHL 64 at [28]; *HS v Secretary of State for the Home Department* [2010] CSIH 97 at [15].

[57] In broad terms, the Tribunal accepts that the submission that the nature of the underlying environmental factor is not determinative of the issues to be decided. However, the Tribunal rejects the submission that timing is irrelevant to the inquiry under Section 131. Section 131 mandates a forward looking assessment of risk and protects against qualifying harm which is "in danger" of occurring. This equates to something akin to the "real chance" test under the Refugee Convention; that is to say, the evidence must establish that a future risk amounting to more than mere conjecture or surmise, but need not be established as being 'more probable than not' or 'likely to occur'; see *AF (Kiribati)* at [98]–[90] and *AI (South Africa)* [2011] NZIPT 800050 at [80]–[85].

[58] This forward looking assessment of risk means that the slow-onset nature of some of the impacts of climate change such as sea-level-rise will need to be factored into the inquiry as to whether such 'danger' exists at the time the determination has to be made. As to whether anticipated harm arising in the context of slow-onset process may reach the threshold of the claimant being 'in danger', much will depend on the nature of the process in question, the extent to which the negative impacts of that process are already manifesting, and the

anticipated consequences for the individual claimant. This assessment is necessarily context-dependent.

[59] The Tribunal does accept that, within this context, the focus of the inquiry under section 131 is on state protection from any qualifying harm – arbitrary deprivation of life or cruel, inhuman or degrading treatment or punishment – and whether the protection that is available reduces the risk of that harm to below the "in danger" threshold. In the context of natural disasters, Walter Kälin and Nina Schrepfer *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 p64, note:

> "In the case of disasters, the assumption should be that these authorities continue to be willing to provide protection and necessary assistance, but in many cases it will be clear that the ability to do so is at least temporarily limited or even non-existent. From a protection perspective, the needs of affected people combined with the inability to obtain necessary protection and assistance from the country of origin must be the primary consideration."

[60] However, just as the fact that the harm arises in the context of a natural disaster or exposure to the negative effects of climate change does not exclude it from the scope of section 131, nevertheless, as will be seen, the context in which it arises is not wholly irrelevant to the inquiry. This context will shape the specific content of the state's duty to protect and thus inform the answer to the question of whether any risk to life can be said to be an 'arbitrary deprivation' or any action or failure to act by the state amounts a 'treatment' or 'punishment'.

[61] It is also important to recall that the references to a protection perspective in the literature must, in the context of New Zealand's domestic arrangements, be tempered by the fact that the inquiry under section 131 involves a relatively narrow band of qualifying harm. The Tribunal rejects the submission that section 131 should be interpreted so as to offer protection from all anticipated harm of sufficient severity that is in danger of occurring. Section 131 is clear. It is self-evidently intended to protect only against arbitrary deprivation of life or against cruel, inhuman or degrading treatment or punishment. While these harms are undoubtedly of a serious and severe kind, this is not to say that all severe harm which may result from removal will necessarily amount to the arbitrary deprivation of life or cruel, inhuman or degrading treatment or punishment. As will be discussed below, the 2009 Act expressly preserves a humanitarian jurisdiction in which harm falling outside the scope of the protected person jurisdiction can be considered.

[62] Counsel's submissions refer to the reliance by the Government of Tuvalu on assistance from overseas partner governments, United Nations agencies and international non-governmental organisations. As will also be discussed below, the Tribunal does not accept the submission that this provides any basis for finding that the appellants are in danger of suffering 'arbitrary' deprivation of life as the result of the state failing to take steps to protect their lives from known environmental hazards, nor that such measures constitute cruel treatment under the Act.

[63] In order to understand why this is so, it is necessary to say something about the role that human rights play in the context of natural disasters.

Natural Disasters and the Protection of Human Rights

Some general observations

[64] In a recent article, 'The Human Rights Dimension of Natural or Human-Made Disasters' (2012) 55 *German Yearbook of International Law* 119–147. Professor Walter Kälin, the former United Nations Special Rapporteur for Internally Displaced Persons, charts the growing recognition of the relationship between international human rights law and natural disasters. At pp125-127, he contrasts the lack of explicit mention of disasters in multi-lateral human rights treaties such as the ICCPR and the International Covenant on Economic Social and Cultural Rights which entered into force in the mid-1960s, and the more recent 2006 Convention on the Rights of Persons with Disabilities. The latter, at Article 11, obliges States Parties to take "all necessary measures to ensure the protection and safety of persons with disabilities in situations of risk, including... the occurrence of natural disasters".

[65] Kälin, at p121, describes the relationship as "multi-dimensional", comprising:

(a) a *factual dimension*, in that disasters may seriously affect the enjoyment of rights;

(b) a *legal dimension*, in that human rights may entitle an individual to be protected against certain hazards and their effect on the enjoyment of rights; and

(c) an *operational dimension*, in that human rights may help shape disaster management and suggest a rights-based approach to disaster relief.

[66] Elements of all three dimensions identified by Kälin, are relevant to the inquiry mandated by the protected person protection jurisdiction under the Act. As noted in *AF (Kiribati)* at [62]:

> "As is reflected in the 2005 Hyogo Declaration and the 2005-1015 Hyogo Framework for Disaster Reduction, in respect of which over 160 states were present for its adoption, it is now generally accepted that states have a primary responsibility to protect persons and property on their territory from the impact of disasters and to undertake disaster risk reduction measures. Consistent with this understanding, the European Court of Human Rights (ECtHR) has examined the duty to protect the right to life in the context of natural disasters. In *Oneryaldiz v Turkey,* [2004] ECHR 657 at para 89 and *Budayeva & Ors v Russia* Application No 15339/02 (20 March 2008), the ECtHR found a violation of the right to life of those killed because the authorities in each case had not discharged positive obligations to protect life against risks from known and imminent environmental hazards".

[67] The existence of an obligation on states to protect rights in the context of natural disasters is increasingly recognised in the work of treaty monitoring bodies, particularly the Committee on Economic Social and Cultural Rights and the Committee on the Rights of the Child. Kälin notes, at p127, that the latter, in particular, has mentioned disaster-related issues in over 20 of its concluding observations on States Parties' reports. He continues:

> "Human rights provisions in general not only entail negative duties to respect relevant guarantees and refrain from violating them, but also to impose positive obligations to become active and take measures to protect rights holders against infringement of their rights by third parties, or as a result of particularly dangerous situations, or to provide them with the means necessary for the enjoyment of rights. The duties to protect and fulfil are obviously relevant to disaster responders, for instance when evacuating people form danger zones or providing humanitarian assistance."

[68] While the protected person jurisdiction under section 131 is a narrow one, embracing only Articles 6 and 7 of the ICCPR, the growing recognition of the existence of positive duties on states under international human rights law in the context of natural disasters is significant. It provides a protection-oriented contour law around which claims for recognition as a protected person under section 131 of the Act may in principle wrap, both in the context of claims based on a danger of being subjected to arbitrary deprivation of life, and of suffering cruel, inhuman or degrading treatment. But complicated issues arise for consideration. In particular, whether the risk of such future harm transcends mere conjecture or surmise and,

whether the harm feared is of sufficient seriousness or severity to fall within the scope of Article 7 of the ICCPR will need to be carefully considered.

[69] Just as in the refugee context past persecution can be a powerful indicator of the risk of future persecution, so too can the existence of a historical failure to discharge positive duties to protect against known environmental hazards be a similar indicator in the protected person jurisdiction. Nevertheless, 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.

[70] While these issues may give rise to significant evidential and legal challenges, it cannot be maintained that natural disasters (or man-made disasters for that matter) – and whether not caused or exacerbated by climate change – may not, at least in general terms, provide a context in which a claim for recognition as a protected person under the Act may be properly grounded.

[71] Having set out these general observations, it is now possible to chart more fully the analysis in each type of protected person claim.

Natural Disasters, Climate Change and Protection from the Arbitrary Deprivation of Life

[72] Article 4(2) of the ICCPR provides that the right to life under Article 6 ICCPR is non-derogable, even in the event of a "public emergency threatening the life of a nation" – which has been recognised to include a "natural catastrophe"; see Human Rights Committee *General Comment No 29 States of Emergency (Article 4)* CCPR/C/21/Rev.1/Add.11 (31 August 2001) at paragraph [5]. In other words, the prohibition on arbitrary deprivation of life which is domesticated under section 131 is not suspended simply because the state concerned is threatened by, or is experiencing, a natural disaster.

[73] In *AF (Kiribati),* the Tribunal examined the scope of the right not to be arbitrarily deprived of life within the context of natural disasters as a component of the protected person jurisdiction under section 131 of the Act. It noted, at [83], that not all risks to life fall within the ambit of section 131, just those risks to life which arise by means of "arbitrary deprivation". Citing the decisions of the ECtHR in *Budayeva* and *others v Russia* Application No 15339/02 (20 March 2008) and *Őneryiliz v Turkey* [2004] ECHR 657, and international instruments such as the

Hyogo Framework for Action 2005–2015, the Tribunal held that that prohibition on arbitrary deprivation of life must take into account the positive obligation on the state to protect the right to life from risks arising from known environmental hazards, an obligation which applied to both man-made and natural disasters. Therefore, failure to do so may, in principle, constitute an omission for the purposes of the prohibition on the arbitrary deprivation of life; see discussion at paragraphs [84]-[87].

[74] There is one further aspect of the *Budayeva* decision relating to the scope of state obligations in such cases which needs emphasising. After noting its decision in *Őneryiliz*, the ECtHR drew a distinction between the circumstances of the two cases. Whereas in *Őneryiliz* the underlying hazard was man-made (the presence and explosive potential of methane gas in a dump site) and in the nature of a "dangerous activity", the circumstances in *Budayeva* involved an underlying hazard of natural origin (mudslides), but where human vulnerability to that hazard had arisen because of the construction of the town where the applicants lived in the hazard-prone area as part of a large-scale industrial project in the 1950s. The Court stated (citations omitted):

> "135. In this respect an impossible or disproportionate burden must not be imposed on the authorities without consideration being given, in particular, to the operational choices which they must make in terms of priorities and resources...; this results from the wide margin of appreciation States enjoy, as the Court has previously held, in difficult social and technical spheres... This consideration must be afforded even greater weight in the sphere of emergency relief in relation to a meteorological event, which is as such beyond human control, than in the sphere of dangerous activities of a man-made nature.
>
> 136. In assessing whether the respondent State had complied with the positive obligation, the Court must consider the particular circumstances of the case, regard being had, among other elements, to the domestic legality of the authorities' acts or omissions..., the domestic decision-making process, including the appropriate investigations and studies, and the complexity of the issue, especially where conflicting Convention interests are involved...
>
> 137. In the sphere of emergency relief, where the State is directly involved in the protection of human lives through the mitigation of natural hazards, these considerations should apply in so far as the circumstances of a particular case point to the imminence of a natural hazard that had been clearly identifiable, and especially where it concerned a recurring calamity affecting a distinct area developed for human habitation or use... The scope of the positive obligations imputable to the State in the particular circumstances would depend on the origin of the threat and the extent to which one or the other risk is susceptible to mitigation."

[75] The Tribunal agrees. Translating these statements into the context of the present appeals, this is not a case of a dangerous activity amenable to domestic regulation causing an environmental hazard due to poor regulation. The disasters that occur in Tuvalu derive from vulnerability to natural hazards such as droughts

and hurricanes, and inundation due to sea-level rise and storm surges. The content of Tuvalu's positive obligations to take steps to protect the life of persons within its jurisdiction from such hazards must necessarily be shaped by this reality. While the Government of Tuvalu certainly has both obligations and capacity to take steps to reduce the risks from known environmental hazards, for example by undertaking *ex-ante* disaster risk reduction measures or though *ex-post* operational responses, it is simply not within the power of the Government of Tuvalu to mitigate the underlying environmental drivers of these hazards. To equate such inability with a failure of state protection goes too far. It places an impossible burden on a state.

Natural Disasters, Climate Change and the Prohibition on Cruel, Inhuman or Degrading Treatment

The scope of the prohibition under the Immigration Act 2009

[76] The nature and scope of this aspect of the protected person jurisdiction was examined in detail in *BG (Fiji)* [2012] NZIPT 800091. The Tribunal considered the scope of the prohibition on cruel, inhuman or degrading treatment or punishment under Article 7 of the ICCPR, which had been domesticated under this limb of section 131 of the Act. It noted that it was never intended by the drafters of the ICCPR that general socio-economic conditions should constitute 'treatment' for the purposes of Article 7 of the ICCPR but that, in certain circumstances, state acts or omissions which resulted in socio-economic harm could constitute a treatment. Examples included:

(a) the deliberate infliction of socio-economic harm by state agents or a failure to intervene while non-state agents did the same;

(b) the adoption of a particular legislative, regulatory or policy regime in relation of a section of the population to whom the individual belongs (such as asylum seekers); and

(c) the failure to discharge positive obligations towards persons wholly dependent on the state for their socio-economic well-being (such as detainees).

[77] As for the focus of section 131, at [172]–[185], the Tribunal examined the development of the implied *non-refoulement* obligation under Article 7 of ICCPR. It noted what it described as the orthodox approach, in which it must be

established that there is some qualifying harm – the arbitrary deprivation of life or cruel treatment as defined under the Act – in the receiving state. It further noted the development of what it described as a 'modified approach' by the ECtHR in relation to Article 3 of the European Convention on Human Rights, the regional analogue to Article 7 of the ICCPR, which the Court held extended to situations where proscribed harm arose not because of any "treatment" in the receiving state – the orthodox position – but where a sufficient level of suffering was a readily foreseeable consequence of the treatment of the host state in expelling or otherwise removing the person from its territory.

[78] As to this modified approach, the Tribunal noted that this had yet to be adopted at the international level and by other regional human rights bodies. It held that, until such time as a clear consensus had emerged that the prohibition on cruel, inhuman or degrading treatment could extend this far, section 131 of the Act was to be interpreted in line with the more orthodox position; see [186]–[196].

[79] Although the approach taken in New Zealand in *BG (Fiji)* was not cited, in a case involving an applicant from New Zealand, the Federal Court of Australia has also found that those aspects of Australia's domestic complementary protection jurisdiction which also protects against cruel, inhuman or degrading treatment did not extend to cover the act of expulsion from Australia which would have the consequence of separating the appellant from his children. Mansfield J endorsed the reasoning of the lower court that "the obligation is therefore clearly an obligation to protect non-citizens from harm faced in the receiving country. Being removed from one's children cannot be characterised as harm faced in the receiving country"; see *SZRSN v Minster of Immigration and Citizenship* [2013] FCA 751 at [48]–[49].

[80] The position appears also to be the same under the Council of Europe *Directive 2004/83/EC on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted* (29 April 2004) and the *Recast Directive 2011/95/EU* of the European Parliament and of the Council (13 December 2011). Article 15(b) of each Directive requires that to qualify for 'subsidiary' protection, serious harm in the form of torture or inhuman or degrading treatment or punishment must arise "in the country of origin" of an applicant. Those persons whose predicament falls within the bounds of the parallel complementary protection jurisdiction derived from the modified approach of the ECtHR therefore fall outside the scope of these Directives. In the United

Kingdom, according to the relevant Asylum Policy Instructions, such persons are eligible for a discretionary grant of 'humanitarian' protection; see here M Symes and P Jorro *Asylum Law and Practice* (2nd Ed, Haywards Heath, Bloomsbury Professional, 2010) at p527.

[81] Whatever the merits of the modified approach taken in the European context, where the ECtHR has developed a sophisticated jurisprudence to ensure that all those in the territory of the many different member states of the Council of Europe enjoy a wide variety of rights, to parachute this approach into New Zealand's legislative setting in the form of the Immigration Act 2009 runs the risk of precipitously enlarging the protected person jurisdiction to a degree which captures matters which may more properly fall within the humanitarian jurisdiction under the Act. As noted by the Tribunal in *BG (Fiji)* at [199], the imperatives driving the ECtHR to adopt the modified approach, namely the need to maintain flexibility for intervention in exceptional circumstances where the humanitarian concerns weighing against removal are overwhelming, are substantially replicated in section 207 of the Act.

[82] It must be remembered that an identical humanitarian jurisdiction existed in respect of removal from New Zealand under section 47(3) of Immigration Act 1987, which had no protected person jurisdiction. The deliberate retention by Parliament of this free-standing humanitarian jurisdiction when domesticating the implied *non-refoulement* obligations under Article 7 of the ICCPR under section 131 of the Immigration Act 2009, signals a clear parliamentary intention that the ECtHR's modified approach is not to apply. This intention is further signalled by the express terms of section 131(5)(b) which provides that the inability of the receiving country to provide health or medical care of a particular kind or quality - the issues which drove the development of the modified approach by the ECtHR - is not to be regarded as cruel treatment.

'Treatment' in the context of natural disasters

[83] But this rejection for the modified approach should not be understood as meaning that cruel treatment for the purposes of section 131 of the Act could never arise in the context of natural disasters. As recognised in *AF (Kiribati)* at [57], the relationship between natural disasters, environmental degradation, and human vulnerability to those disasters is complex and, within this complexity, pathways into the protection regimes in the 2009 Act can, in some circumstances, exist. The Tribunal, at [58], acknowledged that "the reality is that natural disasters

do not always occur in democratic states which respect the human rights of the affected population". Examples include where:

(a) due to political weighting, state response to natural disasters fails to meet the recovery needs of marginalised groups;

(b) the provision of post-disaster humanitarian relief may become politicised; and

(c) the increased vulnerability of persons displaced in the wake of natural disasters increases the risk of them being subjected to cruel treatment (for example, being trafficked) by non-state actors against whom the state is unwilling or unable to provide effective protection.

[84] Just as it was not intended that consequences of general socio-economic policy should constitute a treatment under Article 7 of the ICCPR, nor does the mere fact that a state lacks the capacity to adequately respond to a naturally occurring event mean that such inability should, of itself, constitute a 'treatment' of the affected population. However, the existence of positive state duties in disaster settings means that, in some circumstances, it may be possible for a failure to discharge such duties to constitute a treatment. Specific examples will be the discriminatory denial of available humanitarian relief and the arbitrary withholding of consent for necessary foreign humanitarian assistance. These two forms of 'treatment' form aspects of what Kälin and Schrepfer (*op cit*) at p65, describe as the "criterion of permissibility" in relation to the 'returnability' of persons to countries affected by natural disasters. They argue:

> "There are certain cases where human rights law, by analogy to the refugee law principle of non-refoulement, prohibits return of certain persons. Such prohibition exists where there are substantial grounds to believe that an individual would face a real risk of torture or cruel, inhuman or degrading treatment or punishment, or arbitrary deprivation of life if sent back to a particular country. Arguably, this prohibition could apply in cases where a rejection at the border or return would expose an individual to an imminent danger for life and limb related to the disaster causing their displacement, or to the absence of adequate provision of protection and assistance by their home country."

[85] It is necessary to say something further about each.

Discriminatory distribution of available relief

[86] As remarked in *AF (Kiribati),* the denial of available domestically situated humanitarian assistance such as essential food aid or shelter may create a risk of the arbitrary deprivation of life. Under the interpretive approach adopted by the

Tribunal in *BG (Fiji)* in relation to the concept of 'treatment', which includes policy measures directed at a particular segment of the population (see [76(b)] above), it can also be seen that a policy which omits a particular section of a disaster-affected population from the provision of available post-disaster relief may constitute a 'treatment' of individuals within that population for the purposes of section 131 of the Act.

Arbitrary denial of foreign humanitarian assistance

[87] In certain circumstances, the denial of foreign humanitarian assistance may also constitute a 'treatment'. This aspect derives from the duty to co-operate as a core norm of international law. Article 1(3) of the United Nations Charter proclaims one of the purposes of the United Nations to be:

> "To achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion;"

[88] The duty to co-operate to promote the enjoyment of rights is given further emphasis in Articles 55 and 56 of the Charter. Article 56 obliges states to act "jointly and separately" for the realisation of human rights as well as economic and social progress and development. The duty on states to co-operate to promote and protect human rights is given emphasis in Article 2(1) of the International Covenant on Economic Social and Cultural Rights and in the work of its treaty monitoring body, the Committee on Economic Social and Cultural Rights; see *General Comment No 3: the Nature of States Parties Obligations under the Covenant,* HRI/GEN/1/Rev 7 (2004) at paragraph [14]; *General Comment No 12: The Right to Adequate Food, E/C 12/1999/5* (1999) at paragraph [36]; *General Comment No 4: The Right to Adequate Housing* at paragraph [19] and *General Comment No 14: The Right to the Highest Attainable Standard of Health* E/C.12/2000/4 (2000) at paragraph [45]. The committee has explicitly addressed natural disasters, asserting its understanding that states have a joint and individual responsibility "to cooperate in providing disaster relief and humanitarian assistance in the times of emergency, including assistance to refugees and internally displaced persons"; see *General Comment No 12* (*op cit*) at paragraph [38].

[89] The 1989 United Nations Convention on the Rights of the Child, at Article 4, similarly provides that States Parties have an obligation to secure economic, social and cultural rights of children "within the framework of international cooperation". The Committee on the Rights of the Child has also emphasised the duty on states

to seek international assistance; see *General Comment No 5: General Measures of Implementation* CRC/GC/2003/5 (2003) at paragraph [60].

[90] The existence of a duty to accept assistance as an aspect of the wider international law norm of co-operation between states is further supported by General Assembly Resolutions 45/100 (1990) A/RES/45/100 and 46/182 (1991) A/RES/46/182. The latter, in particular, deals with the content of this duty. While it affirms the right of the sovereign state to decide whether or not to accept offers of assistance, this is qualified by the statement that those states with populations in need of humanitarian assistance "are called upon" to facilitate the work of humanitarian organisations from outside its borders to deliver essential aid including food, shelter and medical and health care"; see paragraphs [5] and [6].

[91] In 2006, the United Nations International Law Commission identified the topic "Protection of persons in the event of disasters" for inclusion in its long-term programme of work. A number of reports based on relevant aspects of existing public international law such as the duty to co-operate, and on existing international legal instruments and texts relating to various aspects of disaster prevention and relief assistance, have been prepared by the Special Rapporteur on the Protection of Persons in the Event of Disasters, Mr Eduardo Valencia-Ospina. Draft articles setting out the relevant principles that have been prepared and adopted by the Commission. A summary of those accepted together with commentary thereon can be found in: International Law Commission Report of the 63rd Session (2011) A/66/10 at Chapter IX, *Draft Articles on the Protection of Persons in the Event of Disasters*. Draft Articles 5, 9, 10 and 11(2), are particularly relevant. Draft Article 5 deals with the duty to co-operate. Draft Article 9 deals with the role of the affected State which, "by virtue of its sovereignty, has the duty to ensure the protection of persons and provision of disaster relief and assistance on its territory" and "has the primary role in the direction, control, coordination and supervision of such relief and assistance".

[92] Draft Article 10 deals with the duty of the affected State to seek assistance and provides:

> "The affected State has the duty to seek assistance, as appropriate, from among third States, the United Nations, other competent intergovernmental organizations and relevant nongovernmental organizations if the disaster exceeds its national response capacity."

[93] By way of commentary, the Commission's report notes that concerns were expressed by some states as regards couching the article in language which

implies a legal 'duty' to seek assistance. In response, the Commission observed, at p264:

> "The Commission considers that the duty to seek assistance in draft article 10 derives from an affected State's obligations under international human rights instruments and customary international law. Recourse to international support may be a necessary element in the fulfilment of a State's international obligations towards individuals where an affected State considers its own resources are inadequate to meet protection needs."

[94] Draft Article 11 deals with the duty of the affected State not to arbitrarily withhold its consent and provides:

> "1. Consent to external assistance shall not be withheld arbitrarily if the affected State is unable or unwilling to provide the assistance required.
>
> 2. When an offer of assistance is extended pursuant to draft article 12 of the present draft articles, the affected State shall, without delay, notify all concerned of its decision regarding such an offer."

[95] As regards the international law foundations for draft Article 11 relating to the prohibition on the arbitrary withholding of consent, the Commission's report, at p270, states:

> "The term "arbitrary" directs attention to the basis of an affected State's decision to withhold consent. The determination of whether the withholding of consent is arbitrary must be determined on a case-by-case basis, although as a general rule several principles can be adduced. First, the Commission considers that withholding consent to external assistance is not arbitrary where a State is capable of providing, and willing to provide, an adequate and effective response to a disaster on the basis of its own resources. Second, withholding consent to assistance from one external source is not arbitrary if an affected State has accepted appropriate and sufficient assistance from elsewhere. Third, the withholding of consent is not arbitrary if the relevant offer is not extended in accordance with the present draft articles. In particular, draft article 6 establishes that humanitarian assistance must take place in accordance with principles of humanity, neutrality and impartiality, and on the basis of non-discrimination. Conversely, where an offer of assistance is made in accordance with the draft articles and no alternate sources of assistance are available, there would be a strong inference that a decision to withhold consent is arbitrary."

[96] It is, however, important not to overstate matters. These are draft Articles and not part of a binding international law treaty on the protection of persons in situation of natural disasters. Further, while Article 56 of the United Nations Charter has proven particularly influential in the development of norms relating to the protection of human rights, the scope of the duty to co-operate under international law is uncertain; T Stoll "Article 56" in B Simma, D-E Khan, G Nolte and A Paulus (eds) *The Charter of the United Nations: A Commentary* (3rd ed) (Oxford University Press, Oxford, 2012). While these points are acknowledged, the existence of some form of positive duty to seek foreign assistance where necessary and not to arbitrarily withhold consent for such assistance is, as

observed by the International Law Commission, grounded firmly in general principles of international human rights law. Such a duty also coheres with the widespread state consensus around the existence of state obligations of protection generally in disaster settings as reflected in the Hyogo Framework for Action.

[97] In light of the above matters, and taking the interpretive approach to 'treatment' set out in *BG (Fiji)*, the Tribunal finds where a state is not in a position to provide humanitarian assistance to persons within its jurisdiction affected by natural disasters, the arbitrary withholding of consent for foreign humanitarian assistance to be deployed is a measure which can be properly regarded as 'treatment' for the purposes of section 131 of the Act.

[98] Two final points need emphasising, however. First, as noted by the International Law Commission, not all refusals of consent will be arbitrary and thus provide a factual foundation for finding a treatment exists. As Kälin (*op cit*) at p146 notes, whether or not refusal to allow humanitarian assistance is 'arbitrary' requires case-by-case determination. Second, as already noted in the context of section 131 generally, it must be shown that there is a prospective risk of such treatment occurring to such a degree that extends beyond mere speculation or surmise. It must be borne in mind that, as in any other case, the appellant must produce sufficient and compelling information and evidence to establish that a danger of such treatment exists at the time of determination.

Application to the Facts

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

[99] It is accepted that the husband has experienced some low-level tension and conflict over land in the past. However, it has not been suggested by him or counsel that this gives rise to a risk that his life is in danger.

[100] It is accepted that life for the appellants in Tuvalu will, in many ways, be more challenging than here in New Zealand. While the appellants' lives can be expected to be more challenging from an economic perspective, there is no evidence before the Tribunal to establish that, if returned to Tuvalu, the appellants' lives would be so precarious as a result of any act or omission by the state that they are in danger of being arbitrarily deprived of their lives. Although much was made of the fact that the husband could not find employment this, at the end of the day, is mere speculation. He is not shut out of the labour market in Tuvalu, nor has he encountered any discrimination in finding employment in the past. He has

managed to find employment in the past and, while he may not necessarily be able to find employment as a teacher, he has a range of skills and experience gained in both New Zealand and Tuvalu which he can utilise to seek employment outside this sector as needs be.

[101] As regards the socio-economic aspect of the right to life, country information does not establish that the husband would be seeking to find employment in a labour market where failure to do so for a period of time would result in a level of socio-economic deprivation to an extent which results in the appellants' lives being 'in danger' of being arbitrarily deprived. In closing arguments, counsel drew attention to the statement in the Millennium Development Goal Progress Report prepared by Tuvalu which states that it was unlikely to meet Millennium Development Goal 1A which relates to halving, between 1990 and 2015, the proportion of people whose income is less than $1 per day. Insofar as it is suggested that this is evidence of an omission for which the state can be held accountable, the Tribunal notes the reason given by Tuvalu for it being unlikely to meet this target was due to surges in the prices of food and fuel in 2008 and the economic crisis in 2009 "that negated some of the achievements made in previous years". To the extent that this goal was under threat, it does not appear to be the result of any act or omission on the part of the state. Furthermore, the report notes that Millennium Development Goal 1C, which relates to halving the number of people who suffered from hunger, had been achieved. This further evidences that, while poverty-related challenges remain, there is no basis for finding that the state is failing to take steps to address issues such that the lives of any of the appellants are "in danger" on this basis.

[102] Nor is there any evidence before the Tribunal that the state is failing to take steps within its power to protect the lives of its citizens from known environmental hazards – including those associated with the effects of climate change – such that any of the appellants' lives can be said to be "in danger". The report submitted by Tuvalu in January 2013 in respect of its Universal Periodic Review before the Human Rights Council, ("the UPR national report") details the various steps taken by Tuvalu to address the impacts of climate change on its territory and population. It notes that, with assistance from the Global Environment Fund, the Government established a National Adaptation Programme of Action Project ("the NAPA project") which has targeted three areas of implementation, namely: coastal areas including food security and home-gardening on all islands, agriculture and water. The report states, at paragraph 75:

> "The three focal areas address the deficiency issues of food security, accessibility to fresh and safe water, to better the agricultural standards on some of the islands and managing fishing grounds to provide the community with adequate food source."

[103] The UPR National Report notes, at paragraph 77 that the NAPA project has provided households on Nanumea with 60 water storage tanks for agricultural purposes and that the European Development Fund and Save the Children have assisted Tuvaluan households by providing plastic water tanks for safe water catchment and storage. The NAPA project also assisted in building water systems on Nanumea to address water shortage issues.

[104] On the issue of water stress and resilience, counsel drew heavily on the Asian Development Bank report *Asian Water Development Outlook 2013.* It was argued that the lack of data which precluded Tuvalu being included in a graph which indexed resilience to water-related disaster was symptomatic of a failure of Tuvalu to take steps. However, even assuming that the lack of data explained Tuvalu's exclusion from this list, the evidence as a whole does not support such a conclusion. Indeed, Appendix 1 to this report includes an entry for Tuvalu which, while giving it an overall index rating of 2 (presumably with 1 the lowest and 5 the highest), the household water security is given a rating of 3 out of 5.

[105] That steps are being taken in relation to access to safe water to ensure that the lives of citizens are not "in danger" is reflected in the press release which accompanied the Report of the United Nations Special Rapporteur ("UNSR") on the Human Right to Safe Drinking Water and Sanitation (19 July 2012) produced on appeal. The UNSR notes that, as of 2010, 98 per cent of the population had access to improved sources of water and some 85 per cent of the population had improved sanitation facilities. Nevertheless, challenges remained. The UNSR noted that water could not be drunk directly from storage tanks but had to be boiled. Gutters and collection mechanisms were not maintained and septic tanks were leaking into the ground water supply. Also, there was a lack of clear legal and institutional frameworks to deal with some of these challenges. Nevertheless, the UNSR understood that it rains enough in Tuvalu to accommodate people's needs generally, though the water harvesting system was not utilised to its maximum potential.

[106] In relation to climate change more broadly, the UPR National Report, at paragraphs [78]–[80], details the various awareness-raising programmes that have been conducted on each island including the training of teachers on Funafuti and outer islands in order to streamline climate change into the educational curriculum.

In 2010, the Government's NAPA project hosted an outer island consultation to identify priorities and plan the implementation of these priorities. Targeted participants included community leaders and members, women and youth.

[107] That challenges remain in this area is also acknowledged in the UPR National Report which, at paragraph [81], notes the NAPA project and other climate change adaptation measures face challenges and constraints. These include the accessibility and availability of funds to procure materials for project development, complex United Nations funding processes, the unavailability of materials to progress projects, poor internal management systems and slow staff recruitment processes.

[108] While it is accepted that challenges do exist, particularly in relation to food and water security in Tuvalu, in light of the information as a whole, the Tribunal finds that it has not been established that Tuvalu, as a state, has failed or is failing to take steps to protect the lives of its citizens from known environmental hazards such that any of the appellants would be in danger of being arbitrarily deprived of their lives.

As to the danger of being subjected to cruel treatment

[109] There is no evidence before the Tribunal to establish that the husband and wide belong to a section of the Tuvaluan population in respect of which the Government of Tuvalu 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. On the contrary, the country information cited above establishes that the Government of Tuvalu is taking steps but relies heavily on donor governments and agencies to provide assistance to meet the challenges faced by its citizens from natural disasters and the adverse impacts of climate change. However, far from amounting to cruel treatment under the Act, this activity is entirely in keeping with the duty to co-operate under international law and the duty to seek assistance where domestic capacity is lacking as outlined above.

[110] A recent example occurred in 2011, when Tuvalu experienced an extreme shortage of water forcing the government to declare a state of emergency. In conjunction with international partners such as Australia and New Zealand and the International Federation of the Red Cross and Red Crescent ("IFRC"), Tuvalu acted quickly. Red Cross volunteers delivered tarpaulin packs, water containers and 10,000 litres of water to the communal water tank on Nukulaelae Island during

its first assessment trip. The New Zealand Red Cross assisted with two emergency desalination units which were operating with full capacity within three hours of arrival and were producing 4,000 litres of clean water per day; see Reeni Amin Chua *"*Red Cross Response to Water Crisis in Drought-stricken Tuvalu*"* (16 October 2011).

[111] In addition to these temporary measures, more long-term solutions were secured with the assistance of international aid from Australia and New Zealand. The report "Tuvalu: Securing Tuvalu's Water Supply" (6 December 2012) <www.reliefweb.int> notes that the Australian Government provided AUS$1.4 million to support Tuvalu's long-term water security. Working with New Zealand, the Australian Government delivered one million litres of clean drinking water. The Australian Agency for International Development ("AusAID") also funded 607 water tanks for residents on Funafuti with a further 150 water tanks for schools on outer islands. AusAID also financed three further solar powered desalination units which were hoped to "significantly improve supply of fresh water across the country and lessen the risk of another disaster".

[112] More broadly, the UPR national report notes that the Government of Tuvalu has been active in the international arena in lobbying support for a second commitment period to the Kyoto protocol and ongoing negotiations for an international convention on loss and damage.

[113] It is clear, then, that the Government of Tuvalu is actively engaged in seeking to reduce the impacts of climate change on its territory and population. However, it faces significant financial and other capacity constraints. To this end, it is clear that Tuvalu needs support from the international community and that some level of support has been requested and provided. This conduct is consistent with an emerging recognition of the existence of a duty on states to not arbitrarily refuse permission for foreign humanitarian assistance to be utilised in the wake of natural disasters where domestic capacity to secure the continued enjoyment of rights is lacking.

[114] On the evidence before the Tribunal, there is no basis for finding that there is a danger of the appellants being subjected to cruel treatment by the state failing to discharge its obligations to protect its population and territory from the adverse impacts of natural disasters and climate change.

As to the specific situation of the appellant children

[115] Counsel rightly draws attention to the particular predicament of the appellant children. The best interest of the child principle requires that the tribunal turn its mind to their specific vulnerabilities as children.

[116] Referring to the report of the Committee on the Rights of the Child (October 2013), counsel cites the statement by the committee that it was "deeply concerned" at the adverse impact of climate change and natural disasters on the rights of the child. Yet, this general expression of deep concern is a long way from establishing that the appellant children are in danger of being arbitrarily deprived of their life or suffering cruel treatment.

[117] Counsel also refers to the compilation report prepared by the Office of the High Commissioner for Human Rights for Tuvalu's Universal Periodic Review in 2013. This report, however, does not support the submission that the Government of Tuvalu is failing to take into account the specific vulnerabilities of children in its operational responses to natural disasters. At paragraph 47, the report cites a UNICEF report dealing with the state of emergency declared in 2011 regarding water supply. The report states:

> "While quick action by governments and partners ensured that children's health and safety were protected, each natural disaster was a step back to achieve the millennium development goals."

[118] Similarly, the article by Reeni Amin Chua *"*Red Cross Response to Water Crisis in Drought-stricken Tuvalu*"* (16 October 2011) notes that, during the 2011 state of emergency, water was rationed to 40 litres per family per day which, given the typical family size in Tuvalu was below the international standard of 15 litres per person per day. However, exceptions were given to large families and those with babies.

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

CONCLUSION

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

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

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

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

[121] The appeals are dismissed.

"B L Burson"

B L Burson
Member

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