

**‘CLIMATE CHANGE REFUGEES’: THE EXTENT NEW  
ZEALAND LAW PROTECTS MIGRANTS DISPLACED BY  
CLIMATE CHANGE**

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## INTRODUCTION

Increasingly, climate change is adversely affecting the world's natural environment and is creating challenges that we have not faced previously. In light of the Climate Change Conference held in Paris in 2015, climate change is at the forefront of political discussion. At this conference, the Paris Agreement<sup>1</sup> was drafted; an agreement within the United Nations Framework Convention on Climate Change<sup>2</sup> (UNFCCC), aimed at mitigating greenhouse gas emissions to reduce global warming.<sup>3</sup> While France's foreign minister Laurent Fabius stated that this agreement was a "historic turning point" in mitigating global warming,<sup>4</sup> the agreement failed to address what would happen if mitigation efforts were unsuccessful.

There is evidence that climate change is already making certain areas of the Earth less habitable. It is suggested that low-lying Pacific countries such as Kiribati and Tuvalu will one day "disappear" because rising sea levels associated with climate change will inundate these atolls.<sup>5</sup> Inhabitants of these atoll nations will be forced to migrate to other countries. Despite this prospect, there is very little international guidance on how states should protect people internationally displaced for environmental reasons.<sup>6</sup> Currently, New Zealand law does not provide for people to immigrate to New Zealand on the basis that they are displaced by climate change. Looking forward, possible protection is an issue worthy of discussion, as the United Nations High Commissioner for Refugees has forecast that climate change will become the biggest driver of population displacement in the not so distant future.<sup>7</sup> As low-lying Pacific countries are most vulnerable to displacement, it is particularly important for New Zealand and Australia to lead the discussion. As well as being geographically proximate to vulnerable Pacific countries, New Zealand retains a special relationship

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<sup>1</sup> Paris Agreement under the United Nations Framework Convention on Climate Change (opened for signature 22 April 2016, not yet in force).

<sup>2</sup> United Nations Framework Convention on Climate Change 1771 UNTS 107 (opened for signature 4 June 1992, entered into force 21 March 1994).

<sup>3</sup> Paris Agreement, above n1, at 2.

<sup>4</sup> Alister Doyle and Barbara Lewis "With landmark climate accord, world marks turn from fossil fuels" (12 December 2015) Reuters<<http://www.reuters.com/article/us-climatechange-summit/idUSKBN0TV04L20151212#gVKudBATCD0EGdxL.97>>.

<sup>5</sup> Sara C. Aminzadeh "Moral Imperative: The Human Rights Implications of Climate Change" (2006) 30 *Hastings Int'l & Comp. L. Rev.* 231 at 258.

<sup>6</sup> Jennifer Skinner "The State Responsibility in the Face of Environmentally Displaced Persons" (2014) 4 *Wake Forest J. L. & Pol'y* 417 at 418.

<sup>7</sup> Alice Edwards "Climate change and international refugee law" in Rosemary Rayfuse and Shirley V. Scott *International Law in the Era of Climate Change* (Edward Elgar Publishing Limited, Cheltenham, 2012) at 58.

with its former colonies.<sup>8</sup> New Zealand and Australia also have obligations to their Pacific neighbours under the Pacific Islands Forum;<sup>9</sup> an inter-government organization that aims to enhance cooperation and deepen integration between independent Pacific countries. In anticipation of the 2016 Forum meeting, New Zealand Minister of Foreign Affairs, Murray McCully, commented that it would be an important opportunity to discuss climate change.<sup>10</sup>

New Zealand Minister of Immigration, Michael Woodhouse has stated that at present, the New Zealand Government's focus is on climate mitigation rather than "building an ambulance at the bottom of the cliff".<sup>11</sup> While Woodhouse has stated that the Government does not have specific climate related immigration policies, he has acknowledged that an appropriate response would need to be developed "if in the future it is untenable for some [people] to live in their home countries".<sup>12</sup> In spite of this, over the last five years, at least 11 applications made by immigrants to remain in New Zealand included climate change as part of the basis for the application.<sup>13</sup> While New Zealand has been receiving these types of claims since the early 2000s, the recent case *AF (Kiribati)*,<sup>14</sup> known on appeal as *Ioane Teitiota v The Chief Executive of the Ministry of Business Innovation and Employment*<sup>15</sup> (*Teitiota*), is considered the leading case on this issue. The Immigration and Protection Tribunal (Tribunal) provided unprecedented depth of reasoning for its decision, and the case was the first of its kind to go beyond the Tribunal to be heard at High Court level.

In light of this, this dissertation aims to explore the extent that New Zealand law allows migrants displaced by climate change to immigrate to New Zealand. It is to be noted that migrants who are displaced for climate change reasons will be referred to as 'Climate Change Refugees'. While there are ways for migrants to remain in New

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<sup>8</sup> Jon Fraenkel "Pacific Islands and New Zealand – New Zealand and the Pacific" (20 June 2012) Te Ara – the Encyclopedia of New Zealand <<http://www.teara.govt.nz/en/pacific-islands-and-new-zealand/page-1>> at 1.

<sup>9</sup> Agreement Establishing the Pacific Islands Forum [2006] NZTS 3 (27 October 2005).

<sup>10</sup> "Foreign affairs ministers gather for Pacific Islands Forum meeting in Fiji" (10 August 2016) Radio New Zealand <<http://www.radionz.co.nz/international/pacific-news/310589/foreign-affairs-ministers-gather-for-pacific-islands-forum-meeting-in-fiji>>.

<sup>11</sup> "Woodhouse cool on climate refugees" (17 September 2015) Radio New Zealand <<http://www.radionz.co.nz/news/political/284512/woodhouse-cool-on-climate-refugees>>.

<sup>12</sup> Radio New Zealand, above n11.

<sup>13</sup> Letter from Andrew Lockhart (National Manager Refugee and Protection Immigration New Zealand) to Jake Robertson regarding Climate Change Refugee immigration applications (3 May 2016).

<sup>14</sup> *AF (Kiribati)* [2013] NZIPT 800413.

<sup>15</sup> Known as *Ioane Teitiota v The Chief Executive of MBIE* [2013] NZHC 3125 (*Teitiota (HC)*) in the High Court, then on appeal as *Ioane Teitiota v The Chief Executive of MBIE* [2014] NZCA 173 (*Teitiota (CA)*) and *Ioane Teitiota v The Chief Executive of MBIE* [2015] NZSC 107 (*Teitiota (SC)*).

Zealand other than as refugees through the Convention relating to the Status of Refugees<sup>16</sup> (Refugee Convention), this label will be adopted for simplicity and consistency, as the term is used both in the media and by academic commentators. Therefore, the term 'refugee' is being used in the sociological sense, rather than in its strict legal sense. Additionally, the focus will be on protection available to Climate Change Refugees displaced internationally, rather than internally.

Chapters I and II will explore the current protection available to immigrants under the Refugee Convention and the International Covenant on Civil and Political Rights<sup>17</sup> (ICCPR). The arguments made to extend the scope of this protection to cover Climate Change Refugees will also be discussed in light of the leading case *AF (Kiribati)*. Chapter III will then examine the decision made in *AD (Tuvalu)*,<sup>18</sup> reported in the media as the first successful Climate Change Refugee case. The extent that climate change contributed to a successful Humanitarian Appeal will be evaluated. Chapter IV will go on to look at the extent that other jurisdictions protect Climate Change Refugees. Finally, Chapter V will propose possible law reform that could be implemented to provide for Climate Change Refugees to emigrate to New Zealand.

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<sup>16</sup> Convention Relating to the Status of Refugees 189 UNTS 137 (opened for signature 28 July 1951, entered into force 22 April 1954).

<sup>17</sup> Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1465 UNTS 85 (opened for signature 10 December 1984, entered into force 26 June 1987).

<sup>18</sup> *AD (Tuvalu)* [2014] NZIPT 501370-371.

## CHAPTER I: The Refugee Convention

There are three ways that a displaced migrant can remain in New Zealand as of right under the Immigration Act 2009. First, under s 129 a person has the right to remain if recognised as a refugee under the Refugee Convention. Second, under s 130 a person has to right to remain if they are recognised as a Protected Person under the Convention against Torture. Thirdly, under s 131 a person has the right to remain if recognised as a protected person under the ICCPR. In determining whether or not a migrant has the right to remain in New Zealand, the claim is to be considered in this order.<sup>19</sup> Accordingly, this chapter will examine the elements of the Refugee Convention and the arguments made by Climate Change Refugees to extend the interpretation so that they are protected.

### I. Elements of The Refugee Convention

Section 129(1) of the Immigration Act provides that a person must be recognised as a refugee if he or she is a refugee within the meaning of the Refugee Convention. 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

The essential elements of Article 1A(2) are:

1. The claimant is outside the country of his or her nationality;
2. Is unable or unwilling to return to his or her home country;
3. Because of a 'well-founded fear of being persecuted'; and
4. For a recognised reason of race, religion, nationality, membership of a particular social group or political opinion

For the purpose of this dissertation, elements one and two are not contentious issues and are not typically litigated on in applications for protection made by Climate Change Refugees. However, interpreting elements three and four is more complex. As a context for the discussion of these elements with respect to Climate Change Refugee applications, these elements will be discussed first.

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<sup>19</sup> Immigration Act 2009, s 137(1).



## A. Element Three: Well-founded fear of being persecuted

### 1. 'Well-founded fear'

To qualify for protection, the claimant's fear of persecution must be 'well-founded'. To meet this, there must be a 'real chance' of persecution occurring rather than a remote chance.<sup>20</sup> Thus, the threshold to meet is high, where a reasonable possibility of persecution, although alarming, is insufficient. While evidence of past persecution alone does not establish a well-founded fear of persecution, it is relevant to consider if it serves as an indicator of future persecution.<sup>21</sup>

The assessment for well-founded fear is 'entirely objective'.<sup>22</sup> Although formerly the assessment involved a mixed objective and subjective test, arguably an objective test is more consistent with the fear of persecution being 'real'. If there is cogent objective evidence that an applicant should fear persecution, an analysis of the applicant's subjective fear is redundant. *Refugee Appeal No 76044*<sup>23</sup> exemplify this. The applicant applied for Refugee status on the grounds that she feared persecution. There was objective evidence to establish her fear through threats made by her former husband and father in law of a planned honour killing against her as well as evidence that honour killings are not typically reported and punished in Turkey. The applicant's subjective fear of being killed was not strictly relevant to the analysis so was not taken into account by the Tribunal.

### 2. 'Persecution'

Persecution is neither defined in the Refugee Convention itself nor by the legislature in the Immigration Act 2009. While this means it is possible for 'persecution' to take on a very wide meaning of general ill-treatment or oppression, under Article 31 of the Vienna Convention on the Law of Treaties,<sup>24</sup> treaties are to be interpreted in good faith and in accordance with the ordinary terms in context and in light of the objects and purpose. For this reason, the Tribunal has avoided dictionary meanings of persecution, as they lead to a "sterile and mistaken interpretation".<sup>25</sup> Rather, New Zealand has closely aligned itself with the approach taken by the Canadian Supreme

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<sup>20</sup> *Chan v Minister of Immigration and Ethnic Affairs* (1989) 169 CLR 379 at [12].

<sup>21</sup> Doug Tennent *Immigration and Refugee Law* (Lexis Nexis, Wellington, 2010) at 160.

<sup>22</sup> *Refugee Appeal No 76044* (11 September 2008) at [57].

<sup>23</sup> At [58].

<sup>24</sup> Vienna Convention on the Law of Treaties 1155 UNTS 331 (opened for signature 23 May 1969, entered into force 27 January 1980).

<sup>25</sup> *Refugee Appeal No. 74665/03* (7 July 2004) at [39].

Court in *Canada (Attorney General) v Ward*<sup>26</sup> (*Ward*). The Supreme Court endorses the approach that academic commentator Hathaway takes to persecution. Under the ‘Hathaway approach’, persecution is defined as the “sustained or systematic violation of basic human rights demonstrative of a failure of state protection”.<sup>27</sup> This approach has also been simplified into the formula that “persecution = serious harm + failure of state protection”.<sup>28</sup>

The serious harm component of the formula represents the idea that there has been a violation of human rights. The Court reasoned in *Ward* that “underlying the Convention is the commitment of the international community to the assurance of basic human rights without discrimination”.<sup>29</sup> In terms of identifying the human rights covered by the Convention, Hathaway states that the focus is on rights derived from “extraordinary consensus”, namely the “International Bill of rights consisting of the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social and Cultural Rights”. While human rights instruments “are ‘living instruments’, constantly evolving and developing”, Hathaway cautions against embracing every new convention of human rights as being relevant to defining the scope of persecution.<sup>30</sup> Taking this caution allows for refugee status determinations “to be taken seriously as law-based rather than as an exercise in humanitarian ‘do-goodism’”.<sup>31</sup> Thus, the Refugee Convention is not intended to cover all harm but is reserved for circumstances where there is risk of injury of such a type that the state should be offering protection.<sup>32</sup> An example of a human rights breach that has been accepted as within the scope of persecution is involuntary medical intervention for people who identify as homosexual.<sup>33</sup>

In addition to serious harm, the Hathaway formula makes it clear that persecution also rests on failure of state protection. This is because the Refugee Convention was created as a fall back for when home state protection is unavailable.<sup>34</sup> Failure of state protection embraces the idea that the state has failed to protect its population from ‘human agents’ causing persecution. *AF (Kiribati)* outlined the two possible ‘failure

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<sup>26</sup> *Canada (Attorney General) v Ward* [1993] 2 SCR 689 (Can).

<sup>27</sup> *Refugee Appeal No. 74665/03*, above n25, at [41].

<sup>28</sup> At [52].

<sup>29</sup> At [56].

<sup>30</sup> At [70].

<sup>31</sup> At [67].

<sup>32</sup> At [77].

<sup>33</sup> At [61].

<sup>34</sup> At [54].

of state protection’ scenarios that rest on human agency.<sup>35</sup> First, a state fails to protect its population if it is unwilling or unable to control its own agents who commit human rights violations, or if the state fails to take steps it is obliged to take under international human rights law. Secondly, a state fails to protect its population when serious harm is caused by non-state actors and the state fails to take steps to reduce the risk of harm perpetrated by the non-state actors. From this it is clear New Zealand takes an ‘ends’ based approach, where the state’s ability to protect its population is central to the analysis. This approach differs significantly to the English approach in *Horvath v Secretary of State for the Home Department*,<sup>36</sup> which takes a ‘means’ based approach. Under this approach, a person cannot claim refugee status in England if their home state has a system for protecting its citizens and a reasonable willingness to operate such system, even if the system has not been effective at curtailing persecution.<sup>37</sup>

#### B. Element Four: Persecution for a Recognised Reason

The Refugee Convention makes it clear that not all cases of protection will result in a claimant being granted protection. Instead, protection is only granted if a claimant is persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion. In the context of Climate Change Refugees, the main issue is whether those claiming protection are members of a particular social group. Therefore, it is useful to address the current scope of what ‘social group’ includes.

The inclusion of ‘membership of a particular social group’ was put forward as an amendment by a Swedish representative when the Refugee Convention was being drafted and was adopted without debate.<sup>38</sup> Including this ground as a recognised reason for persecution has been described as an ‘afterthought’. It has been reasoned that this ground responds to concerns that the Refugee Convention is limited, as it is broader than the other grounds.<sup>39</sup>

The New Zealand approach has been guided by the United States decision *Re Acosta*,<sup>40</sup> which held the idea of people being ‘of the same kind’ was fundamental to the meaning of social group. The Court in *Re Acosta* drew on commentator Goodwin-Gill, who defined a social group as a group brought together by “certain unifying features,

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<sup>35</sup> *AF (Kiribati)*, above n14, at [54].

<sup>36</sup> *Horvath v Secretary of State for the Home Department* [2001] 1 AC 489 (UK).

<sup>37</sup> *Refugee Appeal No. 74665/03*, above n25, at [54].

<sup>38</sup> Doug Tennent, above n21, at 179-180.

<sup>39</sup> At 180.

<sup>40</sup> *Re Acosta* (1985) 19 I&N Dec 211 (BIA 1985) at 211 (USA).

these features being a combination of matters of choice and matters over which the members of the group have no control”.<sup>41</sup> Further, Hathaway built on this definition, arguing that a social group included groups defined by innate or unalterable features, groups defined by their past of voluntary status since their history is not within their power to change, and groups defined by volition if the group association is so fundamental to their human identity that they should not be required to abandon it.<sup>42</sup> Essentially, if it is possible to dissociate from the group being persecuted, then it is not a social group caught within the meaning of the Convention.<sup>43</sup>

## II. Refugee Convention interpretation by Climate Change Refugees

The approach taken by the New Zealand Courts and the Tribunal towards the Refugee Convention shows that there are strict requirements that must be met for a claimant to be recognised as a refugee. Although there is scope for the interpretation of the Convention to evolve, Climate Change Refugees have found it difficult to put forward a persuasive argument that they should be protected under the Convention. The proposed interpretation for the Convention to protect people displaced by climate change has been described as “novel and optimistic”.<sup>44</sup>

### A. Factual Background of *AF (Kiribati)*

*AF (Kiribati)* concerned Mr Teitiota, a Kiribati native in his mid 30s who claimed protection under the Refugee Convention and Protected Persons jurisdiction on the basis that rising sea levels associated with climate change affected his living environment.<sup>45</sup> In 2007 Teitiota and his wife decided to emigrate from Kiribati to New Zealand because of the climate change problems they were suffering while living on the Kiribatian island, Tarawa.<sup>46</sup> The adverse effects identified included; coastal erosion, migration of resources including tuna fish, high spring tides flooding residential areas, increased social tensions over limited land resulting in physical fights causing injury and on occasion death, and drinking water contamination causing illness to children.<sup>47</sup> The Tribunal accepted the evidence that South Tarawa had a limited capacity to carry its population, where negative environmental impacts

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<sup>41</sup> Doug Tennent, above n21, at 180.

<sup>42</sup> At 181.

<sup>43</sup> At 181.

<sup>44</sup> *Teitiota (HC)*, above n15, at [51].

<sup>45</sup> *AF (Kiribati)*, above n14, at [2].

<sup>46</sup> *Teitiota(HC)*, above n15, at [19].

<sup>47</sup> Full account of adverse effects discussed in *AF (Kiribati)*, above n14, [5]-[33].

were being exacerbated by both sudden onset events such as storms and slow onset processes such as rising sea levels.<sup>48</sup>

Mr Teitiota made his application for protection to avoid deportation back to Kiribati. His permit to live in New Zealand had expired so at the time of the Tribunal hearing he was an illegal over-stayer. Although Mr Teitiota and his wife had had three children since moving to New Zealand, the children were not entitled to New Zealand citizenship.<sup>49</sup>

## B. Proposed Interpretation of the Refugee Convention

### 1. Persecution

Mr Teitiota is outside his home country Kiribati and is unwilling to return. Therefore, elements one and two are interpreted in their conventional sense. However, a novel interpretation of ‘persecution’ in element three was submitted. Counsel for Mr Teitiota submitted that ‘being persecuted’ does not require human agency, as the word can encompass migrants having to flee, irrespective of the cause. As authority for this, counsel submitted that the Latin etymology of ‘persecute’ has a ‘passive voice’ and does not require an actor. Under this approach, a person can be persecuted by fleeing from climate change (a non-actor).<sup>50</sup> However, the tribunal rejected this interpretation on the basis that the legal definition of being persecuted shaped by case law requires human agency through failure of state protection and serious harm as discussed above.<sup>51</sup>

On appeal in the High Court, counsel submitted an alternative interpretation of persecution that embraced human agency. It was submitted that Teitiota had been harmed indirectly by human agents, on the basis that climate change was caused by two centuries of carbon emissions produced by humans.<sup>52</sup> However, the Court rejected this on the basis that this approach “completely reverses the traditional refugee paradigm”, because in applying for protection in another state, the claimant was seeking protection from one of the very countries it alleged were responsible for the persecution by failing to control its carbon emissions.<sup>53</sup>

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<sup>48</sup> *AF (Kiribati)*, above n14, at [38].

<sup>49</sup> *Teitiota (HC)*, above n15, at [19].

<sup>50</sup> *AF (Kiribati)*, above n14, at [51].

<sup>51</sup> At [52]-[54].

<sup>52</sup> At [46].

<sup>53</sup> *Teitiota (HC)*, above n15, at [55].

In neither the Tribunal nor the High Court was it expressly submitted by counsel that there was persecution on the basis that there was serious harm and a failure of the Kiribati Government to prevent human actors from causing climate change through carbon emissions. Even if this had been submitted, it is likely the Court would reject the claim on the basis that the environmental conditions were not “parlous” enough to amount to serious harm.<sup>54</sup> Submissions based on the idea that there was a failure on the part of the Kiribati Government were made when seeking protection under the ICCPR, and are discussed in Chapter II.

## 2. Convention Reason

Counsel for Teitiota failed to adequately address the requirement that there was a Convention reason for the alleged prosecution. Rather, the claimant admitted that the problems caused by climate change were “faced by the [Kiribati] population generally” and did not cite any relevant Convention ground. On appeal to the High Court, counsel submitted that the Tribunal erred in finding that “because all people on Kiribati suffer the same results of global warming this disqualifies the applicant from claiming refugee status”.<sup>55</sup> However, this was rejected on the basis that persecution requires an attributable Refugee Convention reason.<sup>56</sup>

Despite persecution for a Convention reason not being substantially explored in *AF (Kiribati)*, commentators have discussed how Climate Change Refugees could be ‘members of a particular social group’. Cooper has suggested that Climate Change Refugees are “members of a social group that lack the political power to protect their environment”.<sup>57</sup> It is unclear exactly how the Court or Tribunal would view this idea, were it to be submitted. In some ways the unifying feature of the group is not as simple or clear cut as sexual orientation or sex. However, because members of the group ‘lack the political power’ to protect their environment, in some ways the group is oppressed and it can hardly be said that anyone in this position can dissociate from the group.

In any event, even if this proposed group was found to be a social group within the ambit of the Convention, it is unlikely this would lead to a Climate Change Refugee getting protection. This is because lacking the political power to protect one’s environment does not cause one to be a target for persecution. In other words, there

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<sup>54</sup> *AF (Kiribati)*, above n14, at [74].

<sup>55</sup> *Teitiota (HC)*, above n15, at [56].

<sup>56</sup> At [56].

<sup>57</sup> Ceri Warnock “Small Island Developing States of the Pacific and Climate Change: Adaption and Alternatives” [2007] 4 NZYbkIntLaw 247 at 272.

is no nexus between the persecution and being a member of the social group, as required by the Convention. Castles has taken this view. He rejects Cooper's proposed social group and rather is of the position that, at an environmental level, the Convention only protects people "forced to flee when repressive forces use environmental destruction such as defoliation or polluting of water as an instrument of war *against* a specific group".<sup>58</sup> In contrast, it cannot be said that Climate Change Refugees are being persecuted *because* they lack the political power to protect their environment.

### C. Additional Reasons for Rejecting the Interpretation

While the interpretation of the Refugee Convention advanced by Climate Change Refugees fails to meet the legal requirements of the Refugee Convention, the Court in *AF (Kiribati)* appears to have additional contextual and factual reasons underpinning its decision to decline his application for protection.

In approaching Mr Teitiota's application for refugee status, the High Court had a strong focus on the historical context in which the Refugee Convention was developed. In the opening paragraphs of the judgment, Priestley J outlined that after the Second World War, a challenge that faced the international community was to "provide some mechanism for the protection of human beings who were the victims of persecution".<sup>59</sup> He then gave further details of persecutions spearheaded by Hitler through concentration camps and persecutions that occurred in the wake of communist regimes through imprisonment and execution.<sup>60</sup> In framing the judgment in this context, it is difficult to reason that climate change related persecution is a natural extension of the Convention. No jurisdiction has extended the interpretation of the Refugee Convention beyond the Convention grounds, and to this day, its interpretation remains strict despite the reasons for which people emigrate changing over time.<sup>61</sup> Extending the interpretation of the Convention in a way that protects Climate Change Refugees is a significant departure from how the Convention has been interpreted in previous case law. Overall, New Zealand Courts have not been prepared to take this step, as Priestly J stated "it is not for the High Court of New Zealand to alter the scope of the Refugee Convention in [this] regard".<sup>62</sup>

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<sup>58</sup> Ceri Warnock, above n 57, at 272.

<sup>59</sup> *Teitiota (HC)*, above n15, at [1].

<sup>60</sup> At [2]-[3].

<sup>61</sup> At [45].

<sup>62</sup> At [51].

Additionally, the Court may have been reluctant to offer protection to Mr Teitiota on the basis that the factual background of the application did not present a compelling enough case. At the time of making his application, Mr Teitiota was an illegal overstayer in New Zealand. This may indicate that Mr Teitiota was using the Refugee Convention as a means to remain in New Zealand rather than as a means to flee from the alleged persecution in Kiribati. Overall, on the facts of the case, the Tribunal described Mr Teitiota's move to New Zealand as a "voluntary adaptive migration" rather than one that was forced.<sup>63</sup> The Tribunal was prepared to say that although Mr Teitiota's standard of living may be less than what he was used to in New Zealand, his life would not be placed in jeopardy by returning to Kiribati.<sup>64</sup> Thus, although one can sympathise with Mr Teitiota and may want to offer him immediate protection, the Refugee Convention is not a mechanism that provides for this.

### III. Conclusion

Ultimately, the New Zealand Courts have taken the view that the Refugee Convention does not protect Climate Change Refugees. All Courts faced with this question have unanimously rejected the proposed interpretation of the key Convention elements put forward in the leading Climate Change Refugee Case, *AF (Kiribati)*. Despite this, the New Zealand courts wanted to make it clear that the mere fact that a person is suffering hardship due to environmental factors does not mean that they are automatically excluded from protection under the Refugee Convention. The New Zealand Supreme Court endorsed comments made by lower courts that the *AF (Kiribati)* decision "did not mean that environmental degradation resulting from climate change or other natural disaster could never create a pathway into the Refugee Convention or protected person jurisdiction".<sup>65</sup>

The Tribunal offered some examples of situations that could bring a person affected by environmental degradation under the Refugee Convention. For example, following a natural disaster in a non-democratic state, a recovery response that results in the needs of marginalised groups not being met could bring a person within the Refugee Convention.<sup>66</sup> Additionally, protection may be available under the Convention if environmental degradation is used as a weapon of oppression against an entire section of a population.<sup>67</sup> In both examples, there is clearly persecution for a

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<sup>63</sup> *AF (Kiribati)*, above n14, at [49].

<sup>64</sup> At [74].

<sup>65</sup> *Teitiota (SC)*, above n15, at [13].

<sup>66</sup> *AF (Kiribati)*, above n14, at [58].

<sup>67</sup> At [59].



convention reason. Thus, protection is not being offered merely on the basis that the environment is uninhabitable, as claimed by Climate Change Refugees.

## Chapter II: Protected Person Status

Exclusion from protection under the Refugee Convention does not lead to automatic expulsion from New Zealand.<sup>68</sup> Rather, after making a finding that a claimant is not a refugee, it is considered whether or not the claimant is a 'Protected Person' under the Convention against Torture and under the ICCPR. Under s 137(1) of the Immigration Act 2009, protection under these Conventions is considered secondary to protection under the Refugee Convention. As a result, interpretation of the elements is to some extent less developed. Recognition as a Protected Person allows possible protection to those who are not protected under the Refugee Convention for exclusionary reasons and to those who cannot establish nexus between persecution and a convention ground.<sup>69</sup>

While there may be factual circumstances that engage both the Convention Against Torture and the ICCPR, in the context of Climate Change Refugees, the Convention Against Torture is rarely likely to be relevant. In the leading case *AF Kiribati*, on the particular set of facts the Court held it was correct that no submissions were made for protection under the Convention Against Torture.<sup>70</sup> Accordingly, this chapter will focus on protection available under the ICCPR. The elements of this Covenant and the submissions made by Climate Change Refugees will be examined.

### I. Elements of the ICCPR

Section 131 of the Immigration Act states 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

The essential elements of the Covenant are:

1. If deported from NZ, there are substantial grounds for believing the claimant would be in danger of being;
2. Subjected to arbitrary deprivation of life; or
3. Subjected to cruel treatment

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<sup>68</sup> Doug Tennent, above n21, at 240.

<sup>69</sup> At 240.

<sup>70</sup> *AF (Kiribati)*, above n14, at [78].

As a context for the discussion of these elements with respect to Climate Change Refugee submissions, these elements will be discussed first.

#### A. Element One: Substantial grounds for believing the claimant would be in danger

For a claim to be successful, at an evidentiary level, it must be shown that there are ‘substantial grounds for believing the claimant would be in danger’. Under s 131(3), when determining whether a claimant is in danger, all relevant considerations may be taken into account, including whether the country concerned has a “consistent pattern of gross, flagrant, or mass violations of human rights”.

The standard of proof required by element one was interpreted in *Al (South Africa)*.<sup>71</sup> The case concerned a South African family claiming protection on the basis that they were in danger of notable violence including assault, murder and rape in South Africa because they were of European ethnicity.<sup>72</sup> It was held that the ‘in danger’ threshold is “less than the balance of probabilities but something more than mere speculation or a random or remote risk”.<sup>73</sup> The claim was rejected on the basis the risk was speculative or remote only.<sup>74</sup> Overall, the level required is akin to the ‘real chance’ standard under the Refugee Convention and “goes no further than that”.<sup>75</sup>

The Courts also take the approach that there must be a sufficient degree of danger to the plaintiff “at the present time” at which the plaintiff makes an application for protection.<sup>76</sup> In other words, there must be an ‘imminent’ risk of danger at the time of the application.<sup>77</sup> This is illustrated by the Dutch case *Aaldersberg and ors v Netherlands*<sup>78</sup> (*Aaldersberg*), in which over 2000 Dutch citizens claimed their right to life under the ICCPR was at risk of being violated because of the State’s potential use of nuclear weapons. The complaint was declared inadmissible on that basis that a person claiming a violation of a protected ICCPR right must show the “act or omission of a State party has *already* adversely affected his or her enjoyment of such right, or that such an effect is imminent”.<sup>79</sup>

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<sup>71</sup> *Al (South Africa)* [2011] NZIPT 80050.

<sup>72</sup> At [3].

<sup>73</sup> At [83].

<sup>74</sup> At [86].

<sup>75</sup> At [83].

<sup>76</sup> *AF (Kiribati)*, above n 14 at [89].

<sup>77</sup> At [89].

<sup>78</sup> *Aaldersberg and ors v Netherlands* CCPR/C/87/D/1440/2005 (14 August 2006) at [89] (Can).

<sup>79</sup> *AF (Kiribati)*, above n 14, at [89].

## B. Element Two: Arbitrary Deprivation of Life

A claimant is entitled to remain in New Zealand if it can be shown deportation to his or her home country would result in ‘arbitrary deprivation of life’. This is outlined in article 6 of the ICCPR, which provides that:

Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.

It should be noted that not all deprivation of life is protected. Rather, the Covenant protects those whose lives are in danger of being ‘arbitrarily’ deprived.<sup>80</sup> This is to accommodate the fact that not all states have abolished the death penalty, where those facing capital punishment exercised lawfully are not protected.<sup>81</sup> On the other hand, however, people subjected to deprivation of life through an act of genocide will always be protected.<sup>82</sup> Unlike the other limb of the ICCPR ‘cruel treatment’, ‘arbitrary deprivation of life’ has not been statutorily defined. Commentators have reasoned that despite the right to life being a ‘right’, this does not mean that human existence is guaranteed. A person will only be protected under the Covenant if life is deprived by state action or omission.<sup>83</sup> Human rights commentators have also outlined that for a deprivation of life to be arbitrary, the interference to life must not be prescribed by law, not proportional to ends sought, and not necessary in the particular circumstances of the case.<sup>84</sup>

In addressing the scope of ‘right to life’, the Human Rights Committee has stated that the right to life is to be interpreted broadly because it is important to the enjoyment of many other rights.<sup>85</sup> The Committee has stated that it is desirable that the right to life requires State parties to “take all possible measures to reduce infant mortality and to increase life expectancy, especially in adopting measures to eliminate malnutrition and epidemics”.<sup>86</sup> It is also accepted that the right to life places positive obligations on the state to provide the basic necessities for life.<sup>87</sup> Commentators have cited *EHP v Canada*<sup>88</sup> as support for this, where complaints of threats of cancer and genetic defects in a residential area proximate to a nuclear waste site raised “serious

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<sup>80</sup> *AF (Kiribati)*, above n14, at [83].

<sup>81</sup> Doug Tennent, above n21, at 250.

<sup>82</sup> At 250.

<sup>83</sup> *AF (Kiribati)*, above n14, at [85].

<sup>84</sup> At [84].

<sup>85</sup> At [82].

<sup>86</sup> At [82].

<sup>87</sup> At [87].

<sup>88</sup> *EHP v Canada*, Communication No. 67/1980, UN Doc CCPR/C/OP/1 at 20 (1984) (Human Rights Committee).

issues, with regard to the obligation of State parties to protect human life”.<sup>89</sup> While this example shows that a state has a responsibility to ensure that the environment a person lives in does not threaten their life, it has also been accepted that this positive duty arises in the wake of known natural disasters.<sup>90</sup>

### C. Element Three: Cruel Treatment

As an alternative to arbitrary deprivation of life, a claimant is entitled to protection under the ICCPR if it can be shown that he or she is in danger of cruel treatment. Under s 131(6) of the Immigration Act, cruel treatment is statutorily defined as “cruel, inhuman, or degrading treatment or punishment”. Commentators have discussed the idea that there is a hierarchy of severity to the cruel treatment definition in s 131(6), where cruel represents treatment that is the most serious, followed by inhuman, followed by degrading.<sup>91</sup> Academic commentator, Waldron, has suggested that inhuman treatment amounts to treatment that is unendurable and is inflicted on people under the control of others who are in authority. He proposes that inhuman treatment involves treatment that violates basic needs of sleep, the need to urinate, the need for daylight, and may include the need for human company.<sup>92</sup> At a lower level, Waldron proposes degrading treatment amounts to treatment that makes people feel fear, anguish and inferiority. However, treatment that is humiliating, may not always be enough to amount to ‘degrading’.<sup>93</sup>

It has been reasoned that Covenant drafters never intended that general socio-economic conditions should constitute ‘treatment’ for the purposes of the ICCPR. However, in certain circumstances, state acts and omissions that cause socio-economic harm can constitute ‘treatment’ for the purposes of the ‘cruel treatment’ limb.<sup>94</sup> Examples of cruel treatment in the socio-economic context include a state’s “discriminatory denial of available humanitarian relief” and “the arbitrary withholding of consent for necessary foreign humanitarian assistance”.<sup>95</sup>

The New Zealand courts have also discussed whether or not the act of deportation itself can amount to cruel treatment. The European Court of Human Rights held that in very limited circumstances, deportation could constitute ‘cruel treatment’ without considering whether the applicant was at risk of ‘cruel treatment’ in the receiving

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<sup>89</sup> *EHP v Canada*, above n88, at [8].

<sup>90</sup> *AF (Kiribati)*, above n14, at [87].

<sup>91</sup> Doug Tennent, above n14, at 251.

<sup>92</sup> At 252.

<sup>93</sup> At 252.

<sup>94</sup> *AC (Tuvalu)* [2014] NZIPT 800517-520 at [80]

<sup>95</sup> At [84].

state.<sup>96</sup> Cases of this kind typically concern applicants suffering illnesses such as HIV, whose condition will considerably worsen when returned to their home state if they are unable to access the same level of medical care or treatment. However, the New Zealand Courts reject this approach in favour of the orthodox view that cruel treatment must exist “in the receiving state before the Act’s protected person jurisdiction is engaged”.<sup>97</sup> According to the Court, the legislature intended this approach, where the statutory wording of s 131(1) states harm is considered ‘if a person “is deported” from New Zealand. This is reinforced by s 131(3), which states it is mandatory to consider the violations of human rights “in the country concerned”.<sup>98</sup>

## II. ICCPR Interpretation by Climate Change Refugees

Climate Change Refugees have found it difficult to put forward a persuasive argument that they should be protected under the ICCPR. In *AF (Kiribati)*, the application for protection failed on the basis that the factual background of the case was not compelling enough.

### A. Arbitrary Deprivation of Life

Counsel for Teitiota submitted that according to the Office of the High Commissioner for Human Rights, the right to life is one of the rights “most directly affected” by global warming. The Tribunal accepted this on the basis that climate change may negatively affect people’s ability to hunt, fish and farm “to such an extent that their ability to sustain life may be imperilled”.<sup>99</sup> The Tribunal did not explicitly state whether or not the ability to sustain life falls within the scope of ‘right to life’. However, since a broad approach is taken to right to life, it is more than likely that the ability to sustain life is something that would be protected. To some extent, the ability to sustain life may be seen as a ‘basic necessity’, which states have a positive obligation to protect.

Despite this, the claim failed because the right to life is not being ‘arbitrarily deprived’ by the Kiribati Government through any act or omission. Rather, the Tribunal held that the Government is aware of the climate-change related issues the population is facing and is doing its best to respond. The applicant himself acknowledged the

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<sup>96</sup> *BG (Fiji)* [2012] NZIPT 800091 at [181].

<sup>97</sup> At [188].

<sup>98</sup> At [188].

<sup>99</sup> *AF (Kiribati)*, above n14, at [80].

Government had been taking steps to protect inhabitants and their property from sea-level rise where possible by building sea walls and providing potable water.<sup>100</sup>

In a subsequent Climate Change Refugee case, the Tribunal reached a similar conclusion that a Government's omission by inability to mitigate climate change, the underlying driver of Tuvalu's problems, does not constitute arbitrary deprivation of life. The Tribunal stated that "to equate such inability with a failure of state protection goes too far. It places an impossible burden on a state."<sup>101</sup>

## B. Cruel Treatment

In *AF (Kiribati)*, it was held that the appellant had not established that there were substantial grounds for believing he was in danger of being subjected to cruel treatment by reason of an act or omission occurring in Kiribati.<sup>102</sup> The appellant did not make any clear submissions as to how he would be subject to cruel treatment.

Nonetheless, more substantial submissions were made concerning the cruel treatment limb in a subsequent Climate Change Refugee case, *AC (Tuvalu)*.<sup>103</sup> In this case, it was submitted that there was inhuman treatment on the basis that access to drinking water was deprived. It was submitted that although the Tuvalu Government did not intend to deprive its citizens of drinking water, inhuman treatment does not require bad intent.<sup>104</sup> Despite this, the Tribunal held there was no cruel treatment, as there was no evidence to establish that the applicant lived in a section of Tuvalu in which the Government had failed to implement policy measures to protect its citizens or failed to discharge positive obligations it was obliged to fulfil.<sup>105</sup> In the socio-economic context, the Tuvalu Government was not denying humanitarian relief, but rather, was seeking assistance when it lacked the domestic resources.<sup>106</sup>

## C. Substantial grounds for danger

The facts of Mr Tetiotia's case did not meet the threshold of 'substantial grounds for believing the plaintiff would be in danger'. The Tribunal noted the concerns of Mr Tetiotia's wife that her children could drown in a tidal event or storm surge. However, there was no evidence that these events were occurring with such frequency that the

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<sup>100</sup> *AF (Kiribati)*, above n14, at [88].

<sup>101</sup> *AC (Tuvalu)*, above n94, at [75].

<sup>102</sup> *AF (Kiribati)*, above n14, at [95].

<sup>103</sup> *AC (Tuvalu)*, above n94, at [55].

<sup>104</sup> At [55].

<sup>105</sup> At [109].

<sup>106</sup> At [109].

risk of death was “beyond conjecture and surmise”.<sup>107</sup> In other words, the wife’s fear was merely remote or speculative. Additionally, the Tribunal held that the claimant’s fear of danger was not imminent. It was accepted that the risk of danger caused by rising sea levels and other natural disaster may be more imminent than potential use of nuclear weapons in *Aaldersberg* because adverse environmental effects are more predictable. Nonetheless, the Tribunal held that any such effects were not yet imminent.<sup>108</sup>

### III. Conclusion

Overall, the idea that Climate Change Refugees should be protected under the ICCPR is less developed in both case law and commentary than the argument for protection under the Refugee Convention. Unlike the Refugee Convention, the elements of the ICCPR are more open and less legally complex. An applicant who applies for protection under the ICCPR does not face the same legal challenges of stretching the concept of persecution or linking this persecution to a convention ground. Despite this, the claims made by Climate Change Refugees for protection under the ICCPR primarily fail on the basis that the facts of the case are not strong enough to show that there are ‘substantial grounds’ to show an applicant is in danger of arbitrary deprivation of life or cruel treatment.

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<sup>107</sup> *AF (Kiribati)*, above n14, at [81].

<sup>108</sup> At [89]-[90].



## **CHAPTER III: Humanitarian Appeal**

On failing to obtain protection under the Refugee Convention and the Protected Person jurisdiction, an applicant may appeal the decision under s 207 of the Immigration Act, on the basis that there are humanitarian grounds for the applicant to remain in New Zealand. On a successful appeal, the applicant will no longer be liable for deportation. This chapter will examine the approach the Courts have taken to s 207. Additionally, this chapter will take a closer look at the decision made in *AD (Tuvalu)*,<sup>109</sup> where the applicant made a successful humanitarian appeal. The media reported that this was the first Climate Change Refugee case to succeed in New Zealand. However, the extent that climate change factors actually contributed to the Court's decision will be explored.

### **I. Lodging a Humanitarian Appeal**

To apply for an appeal against deportation on humanitarian grounds, an appeal must be lodged at the same time that other appeals are lodged in relation to the claim (i.e. lodged at the same time an appeal is lodged against a Refugee or Protected Person decision on a question of law or fact).<sup>110</sup> It should be noted that in the leading Climate Change Refugee case *AF (Kiribati)*, Mr Teitiota was prevented from applying for an immigration permit on humanitarian grounds because he had chosen to remain illegally in New Zealand.<sup>111</sup> While a person who is unlawfully in New Zealand may apply for an appeal on humanitarian grounds, he or she must do so no later than 42 days after first becoming unlawfully in New Zealand.<sup>112</sup> Under the former Immigration Act, there were different statutory provisions and requirements for humanitarian appeals depending on whether the appellant was unlawfully in New Zealand as an overstayer or a resident liable for deportation. This distinction was removed by the Immigration Act 2009, where the same threshold now applies to all applicants.<sup>113</sup> Nonetheless, it has been acknowledged that it may be inherently easier for residents to succeed on a humanitarian appeal since they have become more integrated into New Zealand society.<sup>114</sup>

### **II. Legal Test under s 207**

Section 207 of the Immigration Act 2009 provides that:

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<sup>109</sup> *AD (Tuvalu)*, above n18.

<sup>110</sup> Immigration Act 2009, s 206(3)(a).

<sup>111</sup> *AF (Kiribati)*, above n 14, at [43].

<sup>112</sup> Immigration Act 2009, s 154(2).

<sup>113</sup> Doug Tennent, above n21, at 144.

<sup>114</sup> *Minister of Immigration v Jooste* [2014] NZHC 2882 at [57].

- (1) The Tribunal must allow an appeal against liability for deportation on humanitarian grounds only where it is satisfied that—
  - (a) there are exceptional circumstances of a humanitarian nature that would make it unjust or unduly harsh for the appellant to be deported from New Zealand; and
  - (b) it would not in all the circumstances be contrary to the public interest to allow the appellant to remain in New Zealand.

There are two limbs that must be met to allow an appeal against deportation on humanitarian grounds; the humanitarian limb and the public interest limb. *Ye v Minister of Immigration*<sup>115</sup> (*Ye*) outlines that the two limbs are considered sequentially. While *Ye* itself predates the Immigration Act 2009, subsequent cases have confirmed it is still good law.<sup>116</sup> First, it must be determined whether there are exceptional circumstances of a humanitarian nature that would make it unjust or unduly harsh for the applicant to be deported. If this is shown, the analysis continues under the public interest limb, where it must be shown that allowing the appellant to remain in New Zealand is not contrary to public interest.<sup>117</sup>

#### A. Humanitarian Limb

The Supreme Court has outlined that there are three “ingredients” that make up the humanitarian limb: (i) exceptional circumstances; (ii) of a humanitarian nature; (iii) that would make it unjust or unduly harsh for the person to be removed from New Zealand.<sup>118</sup>

In addressing what makes circumstances ‘exceptional’, the Supreme Court held that the circumstances must be “well outside the normal run of circumstances found in overstayer cases generally”.<sup>119</sup> While the circumstances do not need to be unique or rare, they have to be “truly an exception rather than the rule”.<sup>120</sup> In *Minister of Immigration v Jooste*,<sup>121</sup> counsel for the Minister submitted that in approximately 85 percent of humanitarian appeal cases, it was found there were exceptional circumstances, suggesting that not all of these cases could be exceptional and that the Court was applying too low a threshold.<sup>122</sup> Katz J acknowledged that because the threshold being applied was a high one, it would only be expected that “a minority of

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<sup>115</sup> *Ye v Minister of Immigration* [2009] NZSC 76.

<sup>116</sup> *Tuitupou v The NZ Immigration and Protection Tribunal* [2015] NZHC 3158 at [27].

<sup>117</sup> *Ye v Minister of Immigration*, above n115 at [30].

<sup>118</sup> At [34].

<sup>119</sup> At [34].

<sup>120</sup> At [34].

<sup>121</sup> *Minister of Immigration v Jooste*, above n114.

<sup>122</sup> At [30].

cases” would progress past the humanitarian limb of the analysis. However, it has been proposed by Tennent, a commentator in the field, that the reason exceptional circumstances have been found in a high percentage of appeals is that there are a large number of people liable for deportation who do not appeal their case.<sup>123</sup>

While it is required that the exceptional circumstances are of a humanitarian nature, the Court has stated that it is “unnecessary and undesirable to attempt to define the compass of the word humanitarian” and that it is unlikely to be difficult to determine whether or not the circumstances are of such a nature.<sup>124</sup> Despite the Court’s reluctance to define ‘humanitarian’, factors that have been relevant to consider include the impact of deportation on an appellant’s partner and children, the partner’s interest, the children’s interest, personal history, character issues (including criminal history) and support networks.<sup>125</sup>

The final part of the humanitarian limb is to consider whether the circumstances would make it unjust or unduly harsh for the person to be removed from New Zealand. The Supreme Court held that just because there are exceptional circumstances in a case, it does not automatically mean that this would make it unjust or unduly harsh for an appellant to be deported. Rather, whether or not deportation is unjust or unduly harsh adds another layer of analysis to the humanitarian limb.<sup>126</sup> The Court also reasoned that ‘harsh’ being qualified by the word “unduly” recognises the fact that there is some degree of harshness involved in deportation. However, ‘unduly harsh’ means harshness that “goes beyond the level of harshness that must be regarded as acceptable in order to preserve the integrity of New Zealand’s immigration system”.<sup>127</sup>

## B. Public Interest Limb

Once the appellant satisfies the humanitarian limb, the public interest analysis follows. The issue is whether it would be contrary to public interest to allow the appellant to remain in New Zealand. While the public interest limb is very much a separate test to the humanitarian limb, the same factors may be relevant to both tests. However, the Supreme Court confirms that “in this step [the factors] are to be viewed through a different lens”.<sup>128</sup> Criminal convictions are most relevant to take into

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<sup>123</sup> Doug Tennent, above n21, at 146.

<sup>124</sup> *Ye v Minister of Immigration*, above n115, at [34].

<sup>125</sup> *Tuitupou v The NZ Immigration and Protection Tribunal*, above n116, at [33]-[36].

<sup>126</sup> *Ye v Minister of Immigration*, above n115, at [34].

<sup>127</sup> At [35].

<sup>128</sup> *Tuitupou v The NZ Immigration and Protection Tribunal*, above n116, at [28].

consideration under this limb.<sup>129</sup> Character concerns can also be relevant, where in *Hu v Immigration and Protection Tribunal*, “earlier unsuccessful attempts to obtain residence through sham marriages” was relevant to the public interest discussion.<sup>130</sup>

### III. AD (Tuvalu): A Successful Climate Change Refugee case?

*AD (Tuvalu)* concerned a humanitarian appeal of an appellant who was a Tuvaluan man in his early thirties.<sup>131</sup> He and his wife arrived to New Zealand in 2007 and left Tuvalu because they felt their future there was uncertain due to adverse effects of climate change. Land was becoming inundated with water more regularly, and it was harder to grow crops.<sup>132</sup> The couple were also concerned for the future of any children they might have. The appellant’s wife lost two babies at advanced stages of pregnancy and attributed this to the lack of the full range of medical services available in Tuvalu.<sup>133</sup> Since arriving in New Zealand, the appellant and his wife have had two children (aged three and five years old at the time of the hearing).<sup>134</sup>

#### A. Humanitarian Limb

The Tribunal considered the fact that all but one of the appellant’s six sisters, who shared a close relationship with the appellant, had migrated to New Zealand and obtained residency or citizenship.<sup>135</sup> Additionally, as the only son, the appellant was responsible for looking after his mother in New Zealand who had health issues. He was required to take her to the doctor and hospital as required.<sup>136</sup> It was also relevant that the oldest child had “become fully integrated” at school and made some “great friendships”.<sup>137</sup> The Tribunal was required to take the best interest of the appellant’s children into account under Article 3 of the Convention on Rights of the Child.<sup>138</sup> It considered that the children had never been to Tuvalu and that “their young age makes them inherently more vulnerable to natural disasters and the adverse impact of climate change”.<sup>139</sup> It was concluded that it was in the children’s best interest to

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<sup>129</sup> *Hu v Immigration and Protection Tribunal* [2016] NZHC 1661 at [30].

<sup>130</sup> At [30].

<sup>131</sup> *AD (Tuvalu)*, above n18, at [4].

<sup>132</sup> At [9].

<sup>133</sup> At [12].

<sup>134</sup> At [3].

<sup>135</sup> At [13].

<sup>136</sup> At [13].

<sup>137</sup> At [15].

<sup>138</sup> UN General Assembly, *Convention on the Rights of the Child* 1577 UNTS 3 (opened for signature 20 November 1989, entered into force 2 November 1990).

<sup>139</sup> *AD (Tuvalu)*, above n18, at [25].

remain in New Zealand.<sup>140</sup> Submissions on the adverse effects of climate change were acknowledged, where it was stated that “environmental degradation caused or exacerbated by climate change was already a feature of life in Tuvalu”.<sup>141</sup>

The Tribunal held that “when the above matters” were taken into account on a cumulative basis, there were exceptional circumstances of a humanitarian nature that would make it unjustly harsh for the appellants to be removed from New Zealand.<sup>142</sup> The Tribunal then made specific comments about climate change submissions and stated that although impacts of natural disasters can in general terms be a humanitarian circumstance, the Tribunal is not concerned with broad humanitarian concern but rather with exceptional circumstances as they relate to the “particular appellant” liable for deportation.<sup>143</sup> Ultimately, the Tribunal held that on the facts of the appeal, it was unnecessary to reach any conclusions on issues of climate change, as the other factors identified on the case were strong enough to satisfy the humanitarian limb.<sup>144</sup>

## B. Public Interest

It was held there was no adverse public interest in the case. The appellant has professional qualifications as a teacher and had the potential to act as a role model for children of Tuvaluan origin living in New Zealand.<sup>145</sup> Although the appellant had remained in New Zealand unlawfully for several short periods of time, this was partly due to erroneous advice of the appellant’s immigration advisor. This did not outweigh the other positive factors in the case to such an extent that deportation would be in the public interest.<sup>146</sup>

## C. A Closer Look at the Tribunal’s Climate Change Analysis

Commentators have had somewhat divided opinions about the extent to which the adverse effects of climate change contributed to the appellant’s successful humanitarian appeal. McAdam reasons that despite what the media reported, this was not the first successful Climate Change Refugee case since the Tribunal expressly held that the applicant was not entitled to protection under the Refugee Convention

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<sup>140</sup> *AD (Tuvalu)*, above n18, at [26].

<sup>141</sup> At [29].

<sup>142</sup> At [30].

<sup>143</sup> At [32].

<sup>144</sup> At [33].

<sup>145</sup> At [34].

<sup>146</sup> At [35].

or ICCPR.<sup>147</sup> In making this statement about unsuccessful ‘Climate Change Refugees’, it is clear McAdam is using the term ‘refugee’ in its legal sense, rather than in the sociological sense as defined at the start of this dissertation. Nonetheless, McAdam also considered whether climate change contributed to the humanitarian appeal, and stated that the Tribunal’s decision was not based on this as it deliberately refrained from making a finding on this point.

Academic commentator Rive agrees with McAdam that the Tribunal’s decision was not based on impacts of climate change. However, he takes a slightly different approach to McAdam, arguing that this “is not to say that the climate change-related factors were not taken into account at all” under the s 207 assessment.<sup>148</sup> Rive takes a literal reading of the Tribunal’s statement that the “above matters” were taken into account when it held that the humanitarian limb was satisfied. He reasons that the paragraphs under the heading “Climate Changed and Environmental Degradation as a Humanitarian Circumstance” immediately preceded the Tribunal’s conclusion, so must have formed part of its reasoning for the successful appeal. Additionally, while the Tribunal concluded that it did not have to make any conclusions about climate change because of the strength of the other factors, Rive does not interpret this as meaning that the climate change factors were put to one side entirely. Overall Rive states that although climate change factors in themselves will not be enough to establish a humanitarian appeal, adverse effects of climate change may be a relevant consideration if they form part of the “matrix of circumstances that will always need to be assessed cumulatively, on a case by case basis”.<sup>149</sup> Ultimately, he concludes that this may be a point for the Tribunal to clarify in the future.

#### **IV. Conclusion**

The Tribunal was unwilling to make a finding as to whether climate change was relevant to the humanitarian appeal. Therefore, it cannot be concluded that climate change factors helped to establish a successful appeal. However, equally, after discussing climate change factors, the Tribunal did not make a finding that climate change was not relevant to the humanitarian appeal.

In light of this, the media overstated the significance of climate change to the decision when reporting that this was a successful Climate Change Refugee case. If climate

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<sup>147</sup> Jane McAdam “No “climate refugees” in New Zealand” (14 August 2014) Newsroom <<http://newsroom.unsw.edu.au/news/law/no-climate-refugees-new-zealand>>.

<sup>148</sup> Vernon Rive ““Climate Refugees” revisited: a closer look at the Tuvalu decision” (14 August 2014) Point Source <[http://www.vernonrive.co.nz/PointSource/Climate\\_refugees\\_revisited\\_a\\_closer\\_look\\_at\\_the\\_Tuvalu\\_deci.aspx](http://www.vernonrive.co.nz/PointSource/Climate_refugees_revisited_a_closer_look_at_the_Tuvalu_deci.aspx)>.

<sup>149</sup> Vernon Rive, above n148.

change is relevant to the s 207 analysis, at present it is not a persuasive enough factor to allow a person to remain in New Zealand free from deportation. The key focus of s 207 is on whether there are humanitarian grounds specific to the *appellant* that mean he or she should not be deported. In this way, the Humanitarian Appeal works in a similar way to the Refugee Convention, where it is designed to facilitate the protection of individuals, rather than to provide large scale protection.

## CHAPTER IV: Protection Offered in Other Jurisdictions

After reviewing the scope of protection available under the Refugee Convention and the ICCPR, it is clear the New Zealand courts are not prepared to extend the scope of the Convention or the Covenant to protect Climate Change Refugees. While the adverse effects of climate change may be a relevant factor to consider when determining whether to grant a Humanitarian Appeal, the presence of adverse effects of climate change alone is not sufficient to establish a successful appeal. Accordingly, at present, Climate Change Refugees are not offered protection in New Zealand. In spite of this, other jurisdictions offer varying levels of protection to people displaced because of environmental disasters. This chapter will examine the protection offered by these jurisdictions and will consider whether the scope of this protection could be extended to include Climate Change Refugees.

### I. Australia

The approach Australia takes to Climate Change Refugees is of interest because similar to New Zealand, Australia has obligations to its Pacific neighbours under the Pacific Islands Forum. Like New Zealand, Australia has received immigration applications by Climate Change Refugees. The cases have again focused on expanding the scope of the Refugee Convention. Uniquely, the Refugee Convention is heavily codified in Australia under the Migration Act 1958. The Act explicitly defines ‘well-founded fear of persecution’ and ‘membership of a social group’.<sup>150</sup> Ultimately however, the provisions are very similar to the New Zealand approach.

Refugee Appeal 0907346,<sup>151</sup> is an example of a typical Climate Change Refugee case that was heard by the Refugee Review Tribunal of Australia. The case concerned a Kiribati appellant who feared returning because he might not be able to work or support his family because rising sea levels were spoiling drinking water and making it difficult to grow crops.<sup>152</sup> It was candidly submitted that although the Refugee Convention as currently interpreted did not protect Climate Change Refugees, “in the absence of specific legislation to deal with this, the laws should be interpreted in a creative way to allow people such as the applicant to be recognised as refugees”.<sup>153</sup> The application primarily failed on the basis that there was no ‘motivation’ for the persecution.<sup>154</sup> To express this in terms of the New Zealand approach, the case was

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<sup>150</sup> Migration Act 1958, s 5J–5L (Aus).

<sup>151</sup> 0907346 [2009] RRTA 1168 (10 December 2009) (Aus).

<sup>152</sup> At [16]-[17] and [21].

<sup>153</sup> At [22].

<sup>154</sup> At [51].



unsuccessful because the persecution was not happening *because* of a convention ground. The Tribunal concluded that countries that were historically high emitters of carbon dioxide and greenhouse gases did not have the motivation to impact residents of low lying countries for reasons of race, religion, or membership of a social group.<sup>155</sup>

Contrastingly, in Refugee Appeal 1318935,<sup>156</sup> a Chinese applicant received protection under the Refugee Convention partly because of the attitudes he held towards climate change. The applicant was a practitioner of Guanyin Famen, a religion that involved a vegan diet, meditation and the belief that two thirds of the world must become vegan to prevent the catastrophic effects of climate change.<sup>157</sup> This religion was banned in China. The Tribunal was satisfied that the applicant had a well-founded fear of persecution because of his religion (a recognised Convention reason). Nonetheless, this case cannot be considered a win for Climate Change Refugees, as it was the element of religion, rather than the adverse effects of climate change that warranted protection.

Overall, Australia takes a very similar approach to New Zealand and does not yet offer protection to Climate Change Refugees. Humanitarian Appeals are not offered in Australia. Therefore, it may be even harder for Climate Change Refugees to make a successful claim in Australia than in New Zealand, as there is no ground for protection in which adverse effects of climate change may be able to be brought in as a relevant considering.

## II. Canada and USA

The Canadian approach to Climate Change Refugees is of interest because Canada has sociological and economic similarities to New Zealand and has a reputation as a refugee friendly jurisdiction. However, there is no case law concerning Climate Change Refugees in Canada. Additionally, when providing protection to people whose home state has suffered an environmental disaster, Canada has responded on an ad hoc basis.<sup>158</sup> As a result, there is no Canadian law on the subject to guide New Zealand.

The United States of America does not explicitly have any laws that offer protection to Climate Change Refugees. However, under immigration law, if there is civil

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<sup>155</sup> 0907346, above n151, at [51].

<sup>156</sup> 1318935 [2014] RRTA 890 (10 December 2014).

<sup>157</sup> At [51].

<sup>158</sup> Eric Omexiri and Christopher Gore “Temporary Measures: Canadian Refugee Policy and Environmental Migration” (2014) 29 Refuge 43 at 44.

conflict or an environmental disaster in a person's home state, he or she may be entitled to remain in America temporarily if granted 'Temporary Protection Status' (TPS).<sup>159</sup> As the name suggests, this is a temporary source of humanitarian relief and is discretionary. Although recipients of TPS do not get permanent residency and are not eligible to apply for citizenship, they are eligible to work.<sup>160</sup> TPS only applies to people who are currently living in America at the time that their home state endures an environmental disaster.<sup>161</sup> Therefore, people who arrive to America after the disaster has struck are not protected. Unlike New Zealand immigration protection which assesses applicants at an individual level, TPS applies to *all* people whose home state has endured an environmental disaster (subject to exceptions depending on criminal records).<sup>162</sup>

Formerly, TPS was labelled 'Extended Voluntary Departure', and it was up to the Executive to determine whether or not to grant nationals protection. However, commentators argue that the decision was often politically motivated.<sup>163</sup> As a response, TPS was introduced and legal criteria were set out to determine how a country's nationals could qualify for protection. Section 302 of the Immigration Act of 1990 (USA) provides the criteria of TPS:

(1) The Attorney General, after consultation with appropriate agencies of the Government, may designate any foreign state (or any part of such foreign state) under this subsection only if –

...

(B) the Attorney General finds that—

- (i) there has been an earthquake, flood, drought, epidemic, or other environmental disaster in the state resulting in a substantial, but temporary, disruption of living conditions in the area affected,
- (ii) the foreign state is unable, temporarily, to handle adequately the return to the state of aliens who are nationals of the state, and
- (iii) the foreign state officially has requested designation under this subparagraph;

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<sup>159</sup> Susan Martin "Climate Change, Migration, and Governance" (2010) 16 *Global Governance* 397 at 405.

<sup>160</sup> Madeline Messick and Claire Bergeron "Temporary Protected Status in the United States: A Grant of Humanitarian Relief that is Less than Permanent" (2 July 2014) *Migration Information Source* <<http://www.migrationpolicy.org/article/temporary-protected-status-united-states-grant-humanitarian-relief-less-permanent>>.

<sup>161</sup> Susan Martin, above n159, at 405.

<sup>162</sup> Madeline Messick and Claire Bergeron, above n160.

<sup>163</sup> Madeline Messick and Claire Bergeron, above n160.

The initial period of protection granted under TPS is 6-18 months.<sup>164</sup> This can subsequently be extended. Notably, Somalian nationals have been protected under TPS for the past 25 years because of civil conflict in their home state. However, commentators argue that granting TPS for such length time periods is contrary to the legislative intent.<sup>165</sup> The most significant application of TPS in response to an environmental disaster was Haiti, where 58,000 Haitians have been granted temporary protection following the 2010 earthquake.<sup>166</sup>

### A. Application of TPS to Climate Change Refugees

If sea level rising in low lying countries is severe enough, this may amount to flooding, which is recognised as a ground for TPS and in theory, could protect Climate Change Refugees. However, it is unlikely TPS would be applied since the disruption to living conditions cannot be said to be ‘temporary’. Rather, it is likely the disruption would be permanent and those displaced would be unable to return. Despite TPS previously being applied for lengthy amounts of time, it is unlikely this would justify granting protection to nationals who have no possibility of returning home. If TPS was found to extend to Climate Change Refugees, it is unlikely this is the best means of protection since those under TPS cannot change their status to become permanent residents or citizens.<sup>167</sup> As a result, those displaced have a high chance of becoming second class citizens with lesser rights. Additionally, TPS fails to protect Climate Change Refugees at the time their low lying country becomes flooded but only protects those who have precautionarily left the country. Ultimately, TPS is geared towards providing temporary protection for sudden onset environmental disasters. Nonetheless, the advantage of the wording for the state offering protection is that the wording of the provision is discretionary. This gives the receiving state more control to help where practical but avoids being obliged to take on massive influxes of people when the receiving country does not have the capacity to do so. However, this results in less certain protection for Climate Change Refugees.

### III. Finland and Sweden

Akin to TPS protection offered in America, both Finland and Sweden offer protection to people displaced from their home states because of environmental disasters. However, unlike TPS, the protection available under these laws is not discretionary, making this avenue of protection more certain.

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<sup>164</sup> Madeline Messick and Claire Bergeron, above n160.

<sup>165</sup> Madeline Messick and Claire Bergeron, above n160.

<sup>166</sup> Madeline Messick and Claire Bergeron, above n160.

<sup>167</sup> Madeline Messick and Claire Bergeron, above n160.

Under the Finnish Aliens Act 2004, an alien 'is' issued a residence permit if he or she is unable to return to his or her home state because of an environmental catastrophe. Section 88a of the Act 2004 provides that:

- (1) An alien residing in Finland is issued with a residence permit on the basis of humanitarian protection, if there are no grounds under section 87 or 88 for granting asylum or providing subsidiary protection, but he or she cannot return to his or her country of origin or country of former habitual residence as a result of an environmental catastrophe or a bad security situation which may be due to an international or internal armed conflict or a poor human rights situation.

Chapter 4 of the Swedish Aliens Act 2005, s 2 provides that:

In this Act a 'person otherwise in need of protection' is an alien who in cases other than those referred to in Section 1 is outside the country of the alien's nationality, because he or she

...

- (3) is unable to return to the country of origin because of an environmental disaster.

Discussions around the Swedish provision are more developed than those around the Finnish provision. To date, s 2 has never been applied in Sweden.<sup>168</sup> However, guidance from the 'travaux préparatoires' (drafting history) reveals how the law was intended to be applied. In drafting this law, it was emphasised that disasters will normally result in a temporary need for protection and that there is a need for burden-sharing and durable solutions.<sup>169</sup> Only sudden disasters are included as 'environmental disasters' in the law, which is not intended to cover "degradation of people's livelihood".<sup>170</sup> Similar to the Refugee Convention, before seeking protection under this law, there is a prerequisite that internal protection in a person's home state is not available.<sup>171</sup> Protection is granted on an individual basis.<sup>172</sup> To address the possibility of a mass influx of nationals who have endured a natural disaster all seeking protection under the law, it is possible for the law to be restricted if Sweden's absorption capacity is exhausted. While this is only to occur in 'an exceptional situation', as of 20 July 2016, this law has been suspended and will not be effective

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<sup>168</sup> Vikram Kolmannskog and Finn Myrstad "Environmental Displacement in European Asylum Law" (2009) 11 European Journal of Migration and Law 313 at 323.

<sup>169</sup> At 322.

<sup>170</sup> At 323.

<sup>171</sup> At 323.

<sup>172</sup> Susan Martin, above n159, at 406.

again until 19 July 2019.<sup>173</sup> Information on this suspension specifically has not been discussed in international media. However, it is likely the ‘exceptional situation’ is the mass influx of Syrian refugees that Sweden is already taking on, who are fleeing the ongoing Syrian Civil War. After being overwhelmed by the arrival of up to 10,000 asylum seekers a day, Sweden has introduced temporary border checks as well as a number of major amendments to the Swedish Aliens Act 2005 that will reduce asylum seekers’ access to full refugee status, permanent residency and family reunification.<sup>174</sup>

#### A. Application to Climate Change Refugees

Because the travaux préparatoires provide that s 2 protection is targeted at sudden onset disasters, it is very unlikely the provision will protect Climate Change Refugees. Nonetheless, the advantage of this protection over TPS protection is that protection offered is not discretionary and as a result, is less political (as long as the law is not suspended). Additionally, the law offers wider protection than TPS, as people who are in their home state at the time a natural disaster strikes are able to seek protection. Whether or not New Zealand could model a new law on the Swedish law and extend it to protect Climate Change Refugees will be discussed at chapter IV.

#### IV. Africa

There is nothing to suggest Climate Change Refugees are afforded protection by any African countries per se. However, the Organisation of African Unity Convention<sup>175</sup> (OAU) was adopted in 1974 in parts of Africa to extend the definition of refugee on the basis that the Refugee Convention 1951 did not reflect the “prevailing realities in many parts of the world”.<sup>176</sup> Under Article 1(2) of the OAU, ‘Refugee’ was expanded to include:

[a]ny person, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or in the whole of his [or her] country of origin or nationality, was compelled to leave his [or her] place of habitual residence in order to seek refuge in another place outside his [or her] country of origin or nationality

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<sup>173</sup> Email from Christina Allard (Associate Professor, Luleå University of Technology) to Jacinta Ruru (Professor, University of Otago) regarding Swedish Aliens Act 2005 Chapter 4 section 2 a, para 1 point 2 regarding environmental disasters (27 July 2016).

<sup>174</sup> Tom Rollins “Even humane Sweden is getting tough on refugees” (22 March 2016) IRIN <<http://www.irinnews.org/news/2016/03/22/even-humane-sweden-getting-tough-refugees>>.

<sup>175</sup> Organization of African Unity (OAU) *Convention Governing the Specific Aspects of Refugee Problems in Africa* 1001 UNTS 45 (opened for signature 10 September 1969, entered into force 20 June 1974).

<sup>176</sup> Alice Edwards “Climate change and international refugee law” in Rosemary Rayfuse and Shirley V. Scott *International Law in the Era of Climate Change* (Edward Elgar Publishing Limited, Cheltenham, 2012) at 67.

The extension was designed to accommodate mass displacements caused by ongoing civil conflicts within newly independent states. However, commentator Rwelanira claims that the phrase “events seriously disturbing public order” can include ecological challenges such as famine or drought.<sup>177</sup> Therefore, the extension ought to protect those fleeing degraded living conditions caused by an environmental disaster. Despite this, Edwards argues that there is no case law to confirm this interpretation. Additionally, there is nothing to suggest that African states have felt an absolute obligation to protect those fleeing natural disasters neither through the expansion nor through any other framework.<sup>178</sup> Rather, any sort of protection offered as a result of ecological problems has fallen into the realm of ‘humanitarianism’ or ‘regional generosity’.<sup>179</sup>

#### A. Application of OAU to Climate Change Refugees

In theory nothing about the phrase ‘events seriously disturbing public order’ suggests that the disturbing event must be a sudden onset disaster. Therefore, the wording could embrace slow onset sea level rising and protect Climate Change Refugees displaced as a result of this. Nonetheless, the phrase is broad and at a practical level, if the OAU has not been applied in the context of environmental disasters, it would be a bold step to offer Climate Change Refugees protection.

#### V. Conclusion

At present, no jurisdiction has any law that expressly provides protection to Climate Change Refugees. Additionally, there is no evidence that any jurisdiction has interpreted the Refugee Convention or the ICCPR in a way favourable to Climate Change Refugees. While some jurisdictions offer protection to migrants displaced by environmental disasters, these provisions have been intended to protect sudden onset disasters or only offer temporary protection. As a result, these provisions do not protect slow onset environmental events or offer permanent protection, both of which are necessary in order to protect Climate Change Refugees adequately.

It should also be noted that the existing laws protecting migrants displaced by an environmental disaster are discretionary (TPS protection) or can be suspended (Sweden). This allows countries offering protection more control, as these states can recant on protecting migrants if they are unable to cope with a mass influx of migrants

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<sup>177</sup> Alice Edwards, above n176, at 68.

<sup>178</sup> At 68.

<sup>179</sup> At 68.

or are unwilling to do so. Thus, it may be useful for a provision that addresses Climate Change Refugees to be flexible in its application.

## CHAPTER V: Reform to New Zealand Law

This chapter will discuss possible reform to New Zealand immigration law that provides for Climate Change Refugees to migrate to New Zealand because the adverse effects of climate change make their home country uninhabitable. Although some commentators call for a new international convention to provide protection to Climate Change Refugees, it has been acknowledged that this would be a lengthy process and it could be a long time before such action takes place.<sup>180</sup> It has even been argued that negotiating binding legal agreements can be used “as a technique to avoid concrete action”.<sup>181</sup> Regardless of this, discussions about what the international community should or could do are beyond the scope of the research question guiding this dissertation. Rather, the focus will be on what New Zealand can or should do within its own jurisdiction, given its obligations to Pacific Island countries under the Pacific Islands Forum.

Anchoring reform to the New Zealand jurisdiction affects the way that Climate Change Refugees should be protected. Due to limited resources, the extent that Climate Change Refugees can be protected by New Zealand law may be less than the level of protection that could be achieved through an international convention. With this in mind, this chapter will discuss key issues that need to be taken into consideration when proposing a law that provides for the protection of Climate Change Refugees. Looking forward, the most feasible way in which Climate Change Refugees can be protected, whether through reinterpreting existing laws or through reform, will be discussed.

### I. Expanding the Interpretation of Existing Immigration Law

It has been acknowledged that there is little guidance given to states regarding protection of trans-boundary environmentally displaced persons.<sup>182</sup> As a result, there is no one clear way of how Climate Change Refugees could be protected, but rather many different approaches. Viability of extending the interpretation of existing immigration laws to protect Climate Change Refugees will be assessed.

#### A. Expanding the Interpretation of the Refugee Convention and ICCPR

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<sup>180</sup> Elliot Sim “Updating Refugee Convention no silver bullet for climate-displaced, says legal expert” New Zealand Law Society <<https://www.lawsociety.org.nz/news-and-communications/latest-news/news/updating-refugee-convention-no-silver-bullet-for-climate-displaced,-says-legal-expert>>.

<sup>181</sup> Christine Gibb and James Ford “Should the United Nations Framework Convention in Climate Change recognize climate migrants?” (2012) 7 Environ. Res. Lett 4 at 2.

<sup>182</sup> Jennifer Skinner, above n6, at 418.



The current legal avenues which commentators and Climate Change Refugees themselves have argued they should be protected under are the Refugee Convention and the ICCPR. As discussed in depth in Chapter I and Chapter II, it is clear Climate Change Refugees are not protected under these conventions based on how they are currently interpreted. However, what if the courts were to accept the submissions put forward in *AF (Kiribati)* and extend the interpretation of either convention to include Climate Change Refugees?

The main problem that stems from expanding the interpretation of these laws is the potential for mass influxes of claimants. Rive reasons that because it is predicted there could be up to 200 million Climate Change Refugees by 2050, the Convention could fall apart.<sup>183</sup> New Zealand would not have the capacity to accept all of these displaced people if it is the only jurisdiction to provide them protection. Additionally, if a creative interpretation of the Refugee Convention or ICCPR was accepted, it is unclear how far the courts would be willing to extend the interpretation further. Due to these practical implications, it is unlikely that this is the best way in which Climate Change Refugees can be protected.

#### B. Extending Protection under s 207 Humanitarian Appeal

As discussed in Chapter III, Climate Change Refugees are not protected under s 207. Although the adverse effects that climate change have on an appellant may be relevant to consider in granting a humanitarian appeal, these effects alone are not enough to establish a successful appeal. Nonetheless, this approach could be reformed so that the effects of climate change alone are enough to warrant protection under s 207.

If the effects of climate change were considered for a humanitarian appeal only, this would not necessarily be an issue. Factors can be relevant to the granting of a humanitarian appeal, even if the same factors would not be relevant to the decision to grant a claimant protection under the Refugee Convention or ICCPR. Despite this, it is likely that recognising Climate Change Refugees would degrade the threshold of ‘exceptional circumstances’, which underpins the section. Since the effects of climate change are expected to be felt by large amounts of people, being displaced by climate change can hardly be considered “well outside the normal run of circumstances found in overstayer cases generally”.<sup>184</sup> If it was considered an exceptional factor, then the humanitarian appeal standard would become lower and easier to satisfy. This goes against the purpose of this section because by virtue of being an appeal, protection from deportation is only to apply to an exceptional *individual appellant*, rather than

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<sup>183</sup> Elliot Sim, above n180.

<sup>184</sup> *Ye v Minister of Immigration*, above n115, at [34].

being available to all. As a result, this is not a best way for New Zealand to protect Climate Change Refugees.

## II. Climate Change Refugee Law: Issues to Consider

Since it is inappropriate to extend the interpretation of existing laws to protect Climate Change Refugees, the most practical way for New Zealand to offer protection is to create a new law. If a law is created and targeted specifically at Climate Change Refugees, then radically changing the interpretation of existing laws can be avoided. Before proposing a law that New Zealand could adopt, first this chapter will consider issues that the reform will have to address.

### A. Defining the scope of ‘Climate Change Refugee’

In order for the law to provide protection to Climate Change Refugees, the logical starting point is to determine who the law is intending to protect. Gibb and Ford state that defining a Climate Change Refugee is not straightforward because there is never one sole reason for why a person migrates.<sup>185</sup> While the most proximate trigger for a Climate Change Refugee’s migration may be environmental, whether a person migrates is often “deeply embedded in underlying and interacting social, economic, political, cultural and personal factors”.<sup>186</sup> Despite this, Gibb and Ford go on to reason that there are other terms that lack a formal, uniform, legal meaning such as ‘terrorism’, yet there are many laws on this subject that operate successfully.<sup>187</sup>

Because it is difficult to come up with a precise legal definition, it is useful to approach the concept of Climate Change Refugee by considering who is *not* intended to be protected under the term. In my view, ‘Climate Change Refugee’ does not embrace people who have been economically disadvantaged because of adverse effects of climate change. For example, previous submissions made in Climate Change Refugee cases that there are no employment opportunities, or that climate change makes it ‘more difficult’ to grow crops would not in themselves be enough to warrant protection.<sup>188</sup> Were the definition to embrace these people, it would be too wide in scope and there would be countless people claiming protection. Rather, something of a higher level should be required. For a person to be a Climate Change Refugee, their

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<sup>185</sup> Christine Gibb and James Ford, above n181, at 2.

<sup>186</sup> At 2.

<sup>187</sup> At 2.

<sup>188</sup> Submissions made in 1004726 [2010] RRTA 845 (30 September 2010) at [22] (Aus), and *AF (Kiribati)*, above n14, at [19] respectively.

home must be uninhabitable to such a degree that an adequate way of life cannot be sustained in or on it.

In addition to determining the scope of Climate Change Refugee, if New Zealand reforms its law by creating a new law rather than reinterpreting an existing one, the wording of a provision will have to be considered. While there is a growing amount of commentary on Climate Change Refugees and forced migration due to the environment, there are comparatively few proposed legal definitions. Ultimately, this may be because there is debate as to how Climate Change Refugees should be protected. Nonetheless, one definition comes from Kniveton et al. who define ‘climate migrants’ as:

persons or groups of persons who, for compelling reasons of sudden or progressive changes in the environment as a result of climate change that adversely affect their lives or living conditions, are obliged to leave their habitual homes, or choose to do so, either temporarily or permanently, and who move either within their country or abroad<sup>189</sup>

While this is only one proposed definition, arguably the phrase ‘results of climate change that adversely affect [persons’] lives or living conditions’ is broad enough to include economically adverse effects, making it too wide in scope. Additionally, in order to avoid countless numbers of people claiming protection, a legal definition of Climate Change Refugee that affords protection should not include people who ‘choose’ to leave their habitual homes, but should only protect those ‘obliged’ to leave. Nonetheless, the definition succeeds at making reference to ‘climate change’ as the driver or the adverse effects, so the scope of the provision is sufficiently defined in that regard. An exact phrase that could be adopted to protect Climate Change Refugees will be discussed below.

## B. The Threshold Issue

In reforming the law to protect Climate Change Refugees, another issue to consider is the threshold that must be met in order for a migrant to be protected. Specifically, how uninhabitable must a Climate Change Refugee’s habitat be before he or she is entitled to protection?

As seen in *AF (Kiribati)*, in low lying Pacific island countries, land gradually becomes uninhabitable due to slow onset sea level rising.<sup>190</sup> If it can be predicted with certainty that rising sea levels will inundate the land and render it uninhabitable, there are two migration options. First, New Zealand could wait for the land to become

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<sup>189</sup> Christine Gibb and James Ford, above n181, at 2.

<sup>190</sup> *AF (Kiribati)*, above n14, at [2].

uninhabitable before offering protection to Climate Change Refugees. Second, New Zealand could intervene at an earlier stage and allow for the migration of Climate Change Refugees as an adaptive response. There has been varying support for both approaches. Former Tuvaluan Prime Minister Apisi Ielemia made a number of comments in 2008 and 2009 where he stated that although Tuvalu's future was uncertain, Tuvalu would fight to keep its country, culture and way of life and would be able to do so if the right actions were taken to address climate change.<sup>191</sup> This suggests international migration should come as a last resort (i.e. only once land becomes uninhabitable).

Conversely, Anote Tong who was President of Kiribati until March 2016 and who is very active is raising awareness of the threat posed by climate change, takes the view that it would be advantageous to start migration efforts as soon as possible.<sup>192</sup> His concern is that if migration is delayed and Kiribati people arrive all together as refugees, they will become "a football to be kicked around".<sup>193</sup> While Tong raises valid concerns, even if protection is not offered to Climate Change Refugees until their land is uninhabitable, this does not necessarily mean that migration will not occur over an extended period of time. While there is evidence that villages in some areas of Kiribati are already becoming uninhabitable, the whole of Kiribati itself is not yet uninhabitable.<sup>194</sup> Thus, if other areas of Kiribati do not have the capacity to accept people from displaced villages, then those displaced may be the first ones to be granted protection in New Zealand. Accordingly, it is unlikely the whole population will immigrate at once.

For consistency with other laws that provide for a person to emigrate to New Zealand, it is likely that it would be more appropriate to provide protection to Climate Change Refugees only once their homes become uninhabitable. This is because a person is protected under the Refugee Convention and the ICCPR once it is established there is a sufficient degree of imminence of harm, rather than a speculative risk of harm.<sup>195</sup> Were Climate Change Refugees able to migrate adaptively before their homes were uninhabitable, this would favour them over conventional refugees. There is no clear reason for why a Climate Change Refugee would be more worthy of protection.

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<sup>191</sup> Jane McAdam *Climate Change, Forced Migration and International Law*. (Oxford University Press, New York, 2012) at 35.

<sup>192</sup> "Committee to campaign for Nobel Peace Prize for Anote Tong" (20 January 2014) Radio Australia <<http://www.radioaustralia.net.au/international/radio/program/pacific-beat/committee-to-campaign-for-nobel-peace-prize-for-anote-tong/1237552>>.

<sup>193</sup> Jane McAdam, above n191, at 203.

<sup>194</sup> 0907346, above n151, at [22].

<sup>195</sup> *Chan v Minister of Immigration and Ethnic Affairs*, above n20, at [12].

Finally, while it has been predicted that low lying countries will be uninhabitable by 2050, if there is successful action taken to reduce carbon emissions under the Paris Agreement, this may mean that these countries are inhabitable indefinitely. Since it cannot be predicted with absolutely certainty whether or not low lying countries will become uninhabitable, adaptive migration of Climate Change Refugees before their homes become uninhabitable is unlikely to be an appropriate response.

### C. Cultural Issues

If Climate Change Refugees are predominantly from Kiribati and Tuvalu, it is relevant to consider the effect that large scale migrations will have on these island cultures. Aota Tong expressed this concern and commented that starting migration efforts now could allow ‘pockets’ of Kiribati communities to be established in receiving countries in order to keep their culture and traditions alive.<sup>196</sup> Arguably however, it is possible that gradual migration could have the opposite effect, where Kiribati immigrants may integrate into existing New Zealand culture rather than preserving their own. While the exact effect immigration will have on Climate Change Refugee’s culture is unknown, it is a matter that should be considered, albeit at a policy level.

Another cultural issue to consider is to determine how ‘Climate Change Refugees’ should be referred to. In Kiribati and Tuvalu, the ‘refugee’ label is “resoundingly rejected” at official and personal levels because it invokes helplessness and is viewed as undignifying.<sup>197</sup> As a result, formal use of the term ‘Climate Change Refugee’ should be avoided and replaced with a more neutral phrase that does not imply that those who migrate are victims. Nonetheless, were a new law drafted, it would be inappropriate to use the term ‘refugee’ because this could result in confusion with the Refugee Convention, where refugee is strictly defined.

### D. The Potential for Mass Influxes

Although it is unlikely that an entire population of a low lying country will be displaced by climate change at the same time, it is possible that migration could occur in large numbers. If New Zealand is the first and only jurisdiction to offer protection to Climate Change Refugees, this could result in mass influxes of claimants to New Zealand. Additionally, unlike provisions in other jurisdictions that provide *temporary* protection to migrants displaced by an environmental disaster, this is unlikely to be an appropriate response if adverse effects of climate change mean a country is indefinitely uninhabitable. Therefore, any proposed law that allows for the

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<sup>196</sup> Jane McAdam, above n191, at 202.

<sup>197</sup> At 40.

immigration of Climate Change Refugees will have to be balanced with the fact that New Zealand may not have the endless capacity to accept claimants who are seeking permanent protection.

As a response to this issue, New Zealand could incorporate a limitation to the application of a law that provides for the protection of Climate Change Refugees. Protection could be entirely discretionary and left up to a decision maker (akin to TPS protection in America) or could be suspended if New Zealand does not have the capacity to accommodate mass influxes of claimants (akin to ‘Person otherwise in need of protection’ in Sweden). It is likely that the creation of a law that can be suspended is the more suitable option. This strikes a balance between providing protection that is as certain as possible and providing for the fact that New Zealand does not have unlimited capacity to accept all migrants.

### **III. Creating a New Provision for Climate Change Refugees**

To date, there is no law in any jurisdiction that protects Climate Change Refugees. The most relevant laws to this discussion provide temporary protection to people displaced by sudden onset environmental disasters. Nonetheless, New Zealand could reform its law using these other jurisdictions as guidance. Chapter IV involved a more complete analysis of the protection that other jurisdictions provide. In summary, New Zealand could reform its law based on the OAU in Africa, TPS in USA, or ‘person otherwise in need of protection’ law in Sweden.

The OAU protects people displaced by “events seriously disturbing public order”. This phrase is wide enough to include sea level rising, so could be adopted by New Zealand to protect Climate Change Refugees. However, the phrase is very broad. Other wording would more precisely define the scope of Climate Change Refugees. Additionally, since the OAU is merely an expansion of the Refugee Convention, it is closely related to the refugee concept, which for cultural reasons should be avoided. Conversely, TPS protects people if there is an ‘environmental disaster’ causing a ‘temporary, disruption of living conditions’. This is not the most useful example to model law reform on because it is so targeted at temporary protection. Overall, the ‘person otherwise in need of protection’ law in Sweden serves as the most suitable law for New Zealand to model its law reform on. This is because this law is not as explicitly targeted at temporary protection as TPS protection, making it most similar to the protection required by Climate Change Refugees.

#### **A. The Proposed Reform**

Accordingly, the proposed law that New Zealand law could adopt to protect Climate Change Refugees is as follows:

The Tribunal must allow for an appeal against deportation where it is satisfied that –

- (1) A person who is outside their country of nationality or country of former habitual residence and is unable to return because adverse effects of climate change have caused their country of nationality or former country of habitual residence to become uninhabitable.
  - (a) Uninhabitable does not include a habitat that for economic reasons is merely undesirable to live in
  - (b) This law only applies if internal protection in a person's country of nationality or former country of habitual residence is not available
  - (c) This law may be suspended by the Minister if New Zealand's absorption capacity is exhausted

Unfortunately, the Swedish law on which the proposed New Zealand law reform is based has never been applied, so there is no evidence of how the protection offered works in practice. Nonetheless, it is the most appropriate law to introduce to provide protection to Climate Change Refugees in light of the key issues to be considered when reforming New Zealand law. The proposed reform sufficiently defines the intended scope of claimants. Additionally, the term 'uninhabitable' ensures that a high threshold must be met in order for Climate Change Refugees to be granted protection. This standard conforms to thresholds that must be met under other international conventions to avoid Climate Change Refugees being favoured over people who emigrate to New Zealand for other reasons. The proposed law accommodates for mass influxes and for the fact that New Zealand may not have the capacity to accept all claimants as it can be suspended. Application of this law is again limited by the prerequisite that internal protection in a person's home country is not available. Although the proposed law does not provide for how migrants will culturally be affected, at a policy level, steps should be taken to ensure that migrants' cultures as preserved as far as possible.

#### **IV. Conclusion**

While some commentators call for a new international convention to provide for the protection of Climate Change Refugees, it has been acknowledged that this could take some time.<sup>198</sup> Despite this, within its own jurisdiction, New Zealand could adopt the proposed law reform above to become the first jurisdiction to provide protection to Climate Change Refugees. Although the shortcoming of the protection available to Climate Change Refugees under the proposed reform is that it is not guaranteed

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<sup>198</sup> Elliot Sim, above n180.

because it can be suspended, this is a necessary requirement which comes with the territory of New Zealand being the first jurisdiction to offer protection. Overall, implementing the proposed reform is a step that New Zealand could take in the near future.



## CONCLUSION

The purpose of this dissertation was to explore the extent that New Zealand law currently protects Climate Change Refugees. As discussed in Chapter I and Chapter II, the avenues that enable a migrant to immigrate to New Zealand as of right are the Refugee Convention and Protected Person Jurisdiction. Alternatively, as discussed in Chapter III, a successful Humanitarian Appeal allows an immigrant to remain in New Zealand free from deportation. Based on how these laws are currently being interpreted, Climate Change Refugees are not protected.

Under the Refugee Convention, the strict elements of the Convention prevent Climate Change Refugees from being protected. The main challenge that Climate Change Refugees face is satisfying the ‘persecution’ element, without interpreting it in a novel way.<sup>199</sup> Despite this, even if a submission was made that embraced human agency, it would likely fail on the basis that the facts are not strong enough to establish ‘serious harm’.<sup>200</sup> The other legal challenge applicants face is that Climate Change Refugees do not form a ‘social group’ which the persecution can be linked to.<sup>201</sup> Under the Protected Person Jurisdiction, the most applicable means of protecting Climate Change Refugees is the ICCPR. Although protection under this international Covenant is less legally strict than the Refugee Convention, Climate Change Refugees’ claims primarily fail on the basis that the facts of the case are not strong enough to establish arbitrary deprivation of life or cruel treatment.<sup>202</sup> Under a Humanitarian Appeal, Climate Change Refugees are not free from deportation based on factors of climate change alone.<sup>203</sup> Although adverse effects of climate change may be relevant to establishing a successful appeal, the nature of the Humanitarian Appeal is to focus on the exceptional circumstances of the individual appellant. Therefore, this is not an appropriate mechanism for all Climate Change Refugees in general to be protected under.

This dissertation then considered the extent that Climate Change Refugees are protected in other jurisdictions. It was found that Australia has received applications from Climate Change Refugees seeking immigration protection and takes a similar approach to New Zealand. Protecting Climate Change Refugees has not been addressed by either the courts or Legislature in Canada. In the United States of America, there is a law that provides temporary protection to nationals living in

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<sup>199</sup> *Teitiota (HC)*, above n15, at [51].

<sup>200</sup> *AF (Kiribati)*, above n14, at [74].

<sup>201</sup> *Teitiota (HC)*, above n15, at [56].

<sup>202</sup> *AF (Kiribati)*, above n14, at [89]-[90].

<sup>203</sup> *Vernon Rive*, above n148.

America at the time their home state has endured an environmental disaster.<sup>204</sup> However, due to the temporary nature of this protection, it is unlikely it would extend to protect Climate Change Refugees. Both Finland and Sweden have laws that protect people displaced because their home state has endured an environmental disaster.<sup>205</sup> The scope of this protection is wider than the protection offered in America, as people do not have to be living in Finland or Sweden at the time a disaster strikes their home state to be protected. Although the Swedish law has not been applied, drafting history suggests that the law is targeted at protecting sudden onset disasters, so is unlikely to protect Climate Change Refugees. In Africa, the OAU extends the definition of 'Refugee' to include people displaced by an "event seriously disturbing public order".<sup>206</sup> Although commentators argue that this term can include environmental disasters, it has never been interpreted in this way. Therefore, although in theory the term is broad enough to include Climate Change Refugees, it is unlikely they will be protected. Overall, other jurisdictions offer varying levels of protection to people displaced by environmental disasters, but it is unlikely these provisions protect Climate Change Refugees.

In light of the lack of protection offered, this dissertation argues that New Zealand should reform its law to provide protection to Climate Change Refugees. Chapter IV proposes law reform that addresses the scope of Climate Change Refugees, provides protection at a level consistent with other immigration conventions and accounts for mass influxes of immigrants seeking protection in New Zealand. While one hopes that New Zealand adopts a law such as the one proposed, at the very least, this proposed reform furthers the discussion around how New Zealand could protect displaced people from its vulnerable Pacific neighbours. In any case, discussions about climate change displacement must continue so that New Zealand is prepared to address this issue in the event that climate change mitigation efforts are unsuccessful.

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<sup>204</sup> Immigration Act of 1990, s 302 (USA).

<sup>205</sup> Aliens Act 2004, s 88a (Finland) and Aliens Act 2005, Chapter 4, s 2 (Sweden).

<sup>206</sup> Organization of African Unity (OAU), above n173, at art 1(2).

## BIBLIOGRAPHY

### I. Legislation

#### A. New Zealand:

Immigration Act 2009.

#### B. Other Jurisdictions:

Aliens Act 2004 (Finland).

Aliens Act 2005 (Sweden).

Immigration Act of 1990 (USA).

Migration Act 1958 (Aus).

### II. International Law

Agreement Establishing the Pacific Islands Forum [2006] NZTS 3 (27 October 2005).

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1465 UNTS 85 (opened for signature 10 December 1984, entered into force 26 June 1987).

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

International Covenant on Civil and Political Rights 999 UNTS 171 (opened for signature 16 December 1966, entered into force 23 March 1976).

Organization of African Unity (OAU) *Convention Governing the Specific Aspects of Refugee Problems in Africa* 1001 UNTS 45 (opened for signature 10 September 1969, entered into force 20 June 1974).

Paris Agreement under the United Nations Framework Convention on Climate Change (opened for signature 22 April 2016, not yet in force).

United Nations Framework Convention on Climate Change 1771 UNTS 107 (opened for signature 4 June 1992, entered into force 21 March 1994).

Vienna Convention on the Law of Treaties 1155 UNTS 331 (opened for signature 23 May 1969, entered into force 27 January 1980).

UN General Assembly, *Convention on the Rights of the Child* 1577 UNTS 3 (opened for signature 20 November 1989, entered into force 2 November 1990).

### III. Cases

#### A. New Zealand:

*AC (Tuvalu)* [2014] NZIPT 800517-520.

*AD (Tuvalu)* [2014] NZIPT 501370-371.

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

*AF (Tuvalu)* [2015] NZIPT 800859.

*Al (South Africa)* [2011] NZIPT 80050.

*BG (Fiji)* [2012] NZIPT 800091.

*Chan v Minister of Immigration and Ethnic Affairs* (1989) 169 CLR 379.

*Hu v Immigration and Protection Tribunal* [2016] NZHC 1661.

*Ioane Teitiota v The Chief Executive of MBIE* [2013] NZHC 3125.

*Ioane Teitiota v The Chief Executive of MBIE* [2014] NZCA 173.

*Ioane Teitiota v The Chief Executive of MBIE* [2015] NZSC 107.

*Minister of Immigration v Jooste* [2014] NZHC 2882.

*Refugee Appeal No. 72313/2000* (19 October 2000).

*Refugee Appeal No. 74665/03* (7 July 2004).

*Refugee Appeal No 76044* (11 September 2008).

*TRR v Refugee & Protection Officer* [2016] NZHC 233.

*Tuitupou v The NZ Immigration and Protection Tribunal* [2015] NZHC 3158.

*Ye v Minister of Immigration* [2009] NZSC 76.

B. Australia:

0907346 [2009] RRTA 1168 (10 December 2009).

1000208 [2010] RRTA 339 (13 April 2010).

1004726 [2010] RRTA 845 (30 September 2010).

1318935 [2014] RRTA 890 (10 December 2014).

C. Other Jurisdictions:

*Aaldersberg and ors v Netherlands* CCPR/C/87/D/1440/2005 (14 August 2006) (Can).

*Canada (Attorney General) v Ward* [1993] 2 SCR 689 (Can).

*EHP v Canada*, Communication No. 67/1980, UN Doc CCPR/C/OP/1 at 20 (1984) (Human Rights Committee).

*Horvath v Secretary of State for the Home Department* [2001] 1 AC 489 (UK).

*Re Acosta* (1985) 19 I&N Dec 211 (BIA 1985) (USA).

**IV. Journal Articles**

Ceri Warnock “Small Island Developing States of the Pacific and Climate Change: Adaption and Alternatives” [2007] 4 NZYbkIntLaw 247.

Christine Gibb and James Ford “Should the United Nations Framework Convention in Climate Change recognize climate migrants?” (2012) 7 Environ. Res. Lett 4.

Doug Tennent “The adverse effects of climate change” [2015] NZLJ at 23.

Doug Tennent “Absolute discretion in immigration” [2012] NZLJ 144.

Doug Tennent “Exceptional circumstances: *Minister of Immigration v Jooste*” [2015] NZLJ 144.

Elizabeth Burleson “Climate Change Displacement to Refuge” (2010) 25 J. Envtl. Law and Litigation 19.

Eric Omexiri and Christopher Gore “Temporary Measures: Canadian Refugee Policy and Environmental Migration” (2014) 29 Refuge 43.

Gregory McCue “Environmental Refugees: Applying International Environmental Law to Involuntary Migration” (1993) 6 Geo Int’l Envtl, L. Rev 151.

Iona Millar “There’s No Place Like Home: Human Displacement and Climate Change” [2007] AUIntLawJI 71.

Jennifer Skinner “The State Responsibility in the Face of Environmentally Displaced Persons” (2014) 4 Wake Forest J. L. & Pol’y 417.

Michelle Foster “International Refugee Law and Socio-Economic Rights: Refuge From Deprivation” (2007) 10 Melb. J. Int’l L. 579.

Sara C. Aminzadeh “Moral Imperative: The Human Rights Implications of Climate Change” (2006) 30 Hastings Int’l & Comp. L. Rev. 231.

Susan Martin “Climate Change, Migration, and Governance” (2010) 16 Global Governance 397.

Vikram Kolmannskog and Finn Myrstad “Environmental Displacement in European Asylum Law” (2009) 11 European Journal of Migration and Law 313.

William Thomas Worster “The Evolving Definition of the Refugee in Contemporary International Law” (2012) 30 Berkley J. Int’l L. 94.

Xing-Yin Ni “A Nation Going Under: Legal Protection for “Climate Change Refugees”” (2015) 38 B.C. Int’l & Comp. L. Rev 329.

## **V. Books**

Alice Edwards “Climate change and international refugee law” in Rosemary Rayfuse and Shirley V. Scott *International Law in the Era of Climate Change* (Edward Elgar Publishing Limited, Cheltenham, 2012) at 58.

Doug Tennent *Immigration and Refugee Law* (Lexis Nexis, Wellington, 2010).

Jane McAdam *Climate Change, Forced Migration and International Law*. (Oxford University Press, New York, 2012).

Jane McAdam *Swimming against the Tide: Why a Climate Change Displacement Treaty is Not the Answer* (2011) *International Journal of Refugee Law* 1.

John Vrachnas and others *Migration and Refugee Law Principles and Practice in Australia* (3rd ed, Cambridge University Press, New York, 2012).

Rosemary Rayfuse and Shirley V. Scott *International Law in the Era of Climate Change* (Edward Elgar Publishing Limited, Cheltenham, 2012) at 11-12.

Susan F. Martin *International Migration Evolving Trends from the Early Twentieth Century to the Present* (Cambridge University Press, New York, 2014).

## **VI. Internet Materials**

Alister Doyle and Barbara Lewis “With landmark climate accord, world marks turn from fossil fuels” (12 December 2015) Reuters <<http://www.reuters.com/article/us-climatechange-summit-idUSKBN0TV04L20151212#gVKudBATCD0EGdxL.97>>.

“Climate Change, Environment and Migration: Frequently Asked Questions” (December 2010) Climate Change, Environment and Migration Alliance <[https://www.iom.int/jahia/webdav/shared/shared/mainsite/activities/env\\_degradation/CC\\_EMA\\_top\\_10FAQs.pdf](https://www.iom.int/jahia/webdav/shared/shared/mainsite/activities/env_degradation/CC_EMA_top_10FAQs.pdf)>.

“‘Climate Refugee’ fighting to stay in New Zealand” (2 October 2013) New Zealand Herald <[http://www.nzherald.co.nz/nz/news/article.cfm?c\\_id=1&objectid=11133700](http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=11133700)>.

“Committee to campaign for Nobel Peace Prize for Aote Tong” (20 January 2014) Radio Australia <<http://www.radioaustralia.net.au/international/radio/program/pacific-beat/committee-to-campaign-for-nobel-peace-prize-for-aote-tong/1237552>>.

Elliot Sim “Updating Refugee Convention no silver bullet for climate-displaced, says legal expert” New Zealand Law Society <<https://www.lawsociety.org.nz/news-and-communications/latest-news/news/updating-refugee-convention-no-silver-bullet-for-climate-displaced,-says-legal-expert>>.

“Foreign affairs ministers gather for Pacific Islands Forum meeting in Fiji” (10 August 2016) Radio New Zealand <<http://www.radionz.co.nz/international/pacific-news/310589/foreign-affairs-ministers-gather-for-pacific-islands-forum-meeting-in-fiji>>.

Fram Dinshaw “Exodus” (30 October 2015) National Observer <<http://www.nationalobserver.com/2015/10/30/exodus-climate-refugees-has-just-begun-where-will-they-go>>.

“Human Mobility in the Context of Climate Change UNFCCC – Paris COP-21 Recommendations from the Advisory Group on Climate Change and Human Mobility” (November 2015) The UN Refugee Agency <<http://www.unhcr.org/565b21bd9.html>>.

James F Hollifield and Idean Salehyan “After Paris, What’s the Status of “Environmental Refugees?”” (7 January 2016) New Security Beat <<https://www.newsecuritybeat.org/2016/01/paris-whats-status-environmental-refugees/>>.

Jane McAdam “No “climate refugees” in New Zealand” (14 August 2014) Newsroom <<http://newsroom.unsw.edu.au/news/law/no-climate-refugees-new-zealand>>.

Jon Fraenkel “Pacific Islands and New Zealand – New Zealand and the Pacific” (20 June 2012) Te Ara – the Encyclopedia of New Zealand <<http://www.teara.govt.nz/en/pacific-islands-and-new-zealand/page-1>> at 1.

Kelly Buchanan “New Zealand: Climate Change Refugee Case Overview” (July 2015) Library of Congress <<https://www.loc.gov/law/help/climate-change-refugee/new-zealand-climate-change-refugee-case.pdf>>.

Khalid Koser “Australia and the 1951 Refugee Convention” (30 April 2015) Lowy Institute <<http://www.lowyinstitute.org/publications/australia-and-1951-refugee-convention>>.

Lewis Smith, “COP21: Paris deal won’t save low-lying island nations from rising sea levels, Kiribati President warn” Independent <<http://www.independent.co.uk/environment/climate-change/cop21-paris-deal-wont-save-low-lying-island-nations-from-rising-sea-levels-kiribati-president-warns-a6773311.html>>.

Lynda Hagen “Disappearing Pacific states – preparing for the deluge” (22 October 2015) New Zealand Law Society <<https://www.lawsociety.org.nz/lawtalk/lawtalk-archives/issue-876/disappearing-pacific-states-preparing-for-the-deluge>>.



Madeline Messick and Claire Bergeron “Temporary Protected Status in the United States: A Grant of Humanitarian Relief that is Less than Permanent” (2 July 2014) Migration Information Source <<http://www.migrationpolicy.org/article/temporary-protected-status-united-states-grant-humanitarian-relief-less-permanent>>.

Michael Clemens “Crossing borders to escape natural calamities is no easy option” (23 August 2012) The Guardian <<https://www.theguardian.com/global-development/poverty-matters/2012/aug/23/crossing-borders-escape-natural-calaminities>>.

Migration Information Source <<http://www.migrationpolicy.org/article/temporary-protected-status-united-states-grant-humanitarian-relief-less-permanent>>.

Oliver Milman “UN drops plan to help move climate-change affected people” (7 October 2015) The Guardian <<https://www.theguardian.com/environment/2015/oct/07/un-drops-plan-to-create-group-to-relocate-climate-change-affected-people>>.

Tom Rollins “Even humane Sweden is getting tough on refugees” (22 March 2016) IRIN <<http://www.irinnews.org/news/2016/03/22/even-humane-sweden-getting-tough-refugees>>.

Vernon Rive “Climate Change and displacement: new perspective from Paris. (17 December 2015) Deconstructing Paris <<http://paristext2015.com/2015/12/guest-editorial-vernon-rive/>>.

Vernon Rive “Climate Refugees” revisited: a closer look at the Tuvalu decision” (14 August 2014) Point Source <[http://www.vernonrive.co.nz/PointSource/Climate\\_refugees\\_revisited\\_a\\_closer\\_look\\_at\\_the\\_Tuvalu\\_deci.aspx](http://www.vernonrive.co.nz/PointSource/Climate_refugees_revisited_a_closer_look_at_the_Tuvalu_deci.aspx)>.

Vernon Rive “Formerly New Zealand’s Fourth Most Climate Refugee” (22 October 2013) Point Source <[http://www.vernonrive.co.nz/PointSource/Formerly\\_New\\_Zealands\\_Fourth\\_Most\\_Climate\\_Refugee.aspx](http://www.vernonrive.co.nz/PointSource/Formerly_New_Zealands_Fourth_Most_Climate_Refugee.aspx)>.

“Woodhouse cool on climate refugees” (17 September 2015) Radio New Zealand <<http://www.radionz.co.nz/news/political/284512/woodhouse-cool-on-climate-refugees>>.

## **VII. Honours Dissertation**

Harriet Farquhar “Migration with Dignity: Towards a New Zealand Response to Climate Change Displacement in the Pacific” (LLB (Hons) Dissertation, Victoria University of Wellington, 2014).

## VIII. Letters and Emails

Email from Christina Allard (Associate Professor, Luleå University of Technology) to Jacinta Ruru (Professor, University of Otago) regarding Swedish Aliens Act 2005 Chapter 4 section 2 a, para 1 point 2 regarding environmental disasters (27 July 2016).

Email from Michael Greene (Q.C.) to Jake Robertson regarding the Protection Canada offers to Climate Change Refugees (13 September 2016).

Letter from Andrew Lockhart (National Manager Refugee and Protection Immigration New Zealand) to Jake Robertson regarding Climate Change Refugee immigration applications (3 May 2016).

**Word Count:** 14,997