NEW ZEALAND COMPLEMENTARY PROTECTION DECISIONS

Last updated 31 March 2020

Shaded cases are precedents.

The decisions are organised in reverse chronological order, from January 2017 onwards. Decisions from previous years are archived on the Kaldor Centre website.

There is sometimes a delay in the publication of decisions so it is prudent to check back through the tables for updates.

Case	Decision date	Relevant paras	Comments
AR (India) v Attorney-General [2020] NZHC 421 (Unsuccessful)	25 February 2020	25-36	The court stuck out an Indian plaintiff's claim for breach of the New Zealand Bill of Rights Act on the basis that it does not show a reasonable cause of action, but in doing so, discussed risk of loss of life and a reduction in quality of life as these concepts relate s. 8 and s. 9 (torture, or to cruel, degrading or disproportionately severe treatment or punishment) of the Act.
HA (Fiji) [2019] NZIPT 801634 (Successful)	18 December 2019	67-76, 91-95	The Tribunal found that a Fijian appellant, who feared serious harm by the family members of a woman whom he was engaged but who he declined to marry, was a protected person within the meaning of the ICCPR.
Kim v Minister of Justice of New Zealand [2019] NZCA 209 (Successful) (Note also, Minister of Justice and Attorney General v Kyung Yup Kim [2019] NZSC 100 (20 September 2019))	11 June 2019	275, 278, and see also extensive table of contents	The court allowed the appeal of a South Korean appellant and a permanent resident of New Zealand and quashed the decision to surrender him under s 30 of the Extradition Act of 1999, considering, *inter alia*, New Zealand's international obligations. The summary of the court's decision on each ground of appeal and the matters to be addressed by the Minister in reconsidering the appeal (as excerpted below) provide an overview of the extensive judgment. On 20 September the NZSC granted leave to appeal and cross-appeal the NZCA decision on the question of whether the NZCA was correct to quash and remit the decision to surrender. 'At [10]–[21] of this judgment we set out the legal framework and procedural steps which must be taken

			when an application is made to surrender a person resident in New Zealand to stand trial for a crime they are alleged to have committed in another country.' (Para 271) As noted at [11], under this framework Parliament has entrusted the Minister (not the courts) to make the final decision as to whether or not the person should be surrendered. However, the power to make that decision, which is the subject of this review application, is constrained by mandatory and discretionary restrictions. These restrictions derive from fundamental principles and rights contained within various international covenants ratified by New Zealand which also underlie, to some extent, the rights and freedoms contained within the New Zealand Bill of Rights Act. All parties in this matter have proceeded on the basis that there are good grounds for concern as to the observance and protection of human rights in the PRC.' (Para 272) 'On judicial review, the Court is required to ensure the Minister's decision was guided by a correct understanding of the law, was reached with sufficient evidence, and was fully and accurately reasoned on the basis of the evidence before her. We have applied heightened scrutiny to the Minister's decision as the standard of judicial review. This is because of the importance of the rights alleged to be at risk. Mr Kim has argued that if he is surrendered to the PRC he will be denied the most fundamental human rights; the right to be free from torture and the right to a fair trial.' (Para 273)

			‘The concerns we have identified are wide-ranging. Some of the matters we have identified raise serious issues as to whether a decision to surrender Mr Kim could be made in a manner which is compliant with New Zealand’s international obligations. We have identified the difficulty that exists in obtaining assurances adequate to meet the risk of torture in a country where torture is illegal yet remains widespread because of cultural and systemic features of the PRC criminal justice system. Other issues may be still more difficult to address: the existence of direct political influence in the criminal justice system and the evidence of harassment, and even persecution, of criminal defence lawyers. We do not exclude the possibility however that further inquiry may produce information on these matters of which we are unaware, and which show a different picture of the PRC criminal justice system.’ (Para 274) ‘Applying this standard of review of the Minister’s decision, we have found that the Judge erred in some respects in refusing Mr Kim’s application for judicial review, but not in others. We summarise our conclusions as follows: First ground —diplomatic assurances (a) The Judge did not err in finding that it was open to the Minister to seek diplomatic assurances to meet the risk of torture. New Zealand’s international obligations provide no absolute prohibition on relying on assurances as relevant to an assessment of the risk of torture.

			(b) The Judge correctly found that before relying upon assurances, the Minister was required to address the preliminary question, whether the general human rights situation in the PRC was such that assurances should be sought. The reason for addressing this issue is that such an inquiry may reveal whether the value of human rights is recognised in the requesting state, and whether the rule of law as it exists in that state is sufficient to secure those rights to the person the subject of the request. However, we consider that the Judge erred in concluding that the Minister did address that preliminary question. The Minister referred to the "general situation" in the PRC but only with regards to torture and only as part of her reasoning as to the risk of torture faced by Mr Kim. The Minister did not address as a separate and preliminary question whether the human rights situation in the PRC more generally is such that assurances should not be sought or accepted. Second ground —irrelevant considerations (c) The Judge did not err in rejecting an argument that the Minister took into account an irrelevant consideration, namely helping the PRC establish credibility in the international community. The briefings provided to the Minister did not put the matter on that basis. Rather, officials highlighted that the PRC would be motivated to honour its assurances because of the serious consequences for the bilateral relationship as well as the PRC's international reputation should the assurances not be honoured. This material was clearly relevant to the Minister's assessment of the likelihood

			of whether the PRC would comply with its undertakings. Third ground —torture (d) The Judge was correct to conclude that it was relevant for the Minister to ascertain whether Mr Kim was in one of the classes of people at high risk of torture in the PRC. However, the Judge erred in concluding that on the material before the Minister it was open to her to find that Mr Kim, as a murder accused, is not at high-risk. Relevant evidence asserting that murder accused were at a high-risk of torture could not reasonably be put to one side and no evidence before the Minister went so far as to conclude that murder accused were not at a high-risk of torture. (e) The Judge erred in upholding the Minister's reliance on the fact that Mr Kim could be tried in Shanghai, the stage of the investigation, and the strength of the case against Mr Kim, as reducing the risk of torture. There was insufficient evidence for treating those factors as reducing the risk of torture in this case. (f) The Judge erred in failing to identify the following deficiency in the Minister's consideration of the adequacy of the assurances against torture. The Minister erred in failing to address how the assurances (which depended upon opportunities being created for Mr Kim and others to report torture, and upon monitoring) could protect against torture when: (i) torture is already against the law, yet persists;

			(ii) the practice of torture in the PRC is concealed, and its use can be difficult to detect; (iii) videotaping of interrogations is selective and torture often occurs outside the recorded session; (iv) evidence obtained by torture is frequently admitted in court; and (v) there are substantial disincentives for anyone, including the detained person, reporting the practice of torture. Fourth ground —death penalty (g) The Judge did not err in upholding the Minister's reliance upon the assurance received that Mr Kim would not be sentenced to death. The Minister obtained evidence of the PRC's previous compliance with similar assurances from New Zealand (in the context of deportation) and other countries. Fifth ground —extra-judicial killings (h) The Judge did not err in upholding the Minister's approach to the risk of extra-judicial killings. However, the material provided for Mr Kim in respect of extra-judicial killing, while not bearing on the risk for him, is nevertheless relevant to the preliminary question identified at [275](b)] above; whether, in light of the general human rights situation, assurances should be sought or relied upon in the case of Mr Kim. Sixth ground —legal standard (i) The Judge erred in finding the Minister applied the correct legal test to determining whether the risk to Mr Kim's right to a fair trial was such that he should not be

			surrendered. The inquiry for the Minister is whether Mr Kim is at a real and not merely fanciful risk of a departure from the standard such as to deprive him of a key benefit of a procedural right under the ICCPR, which are procedural rights designed to secure the right to a fair trial. When revisiting the decision whether or not to surrender Mr Kim, the Minister should apply the test as articulated at [179] above. Seventh ground —fair trial (j) The Judge erred in finding it was reasonably open to the Minister to be satisfied that the assurances met the risk that Mr Kim would not receive a fair trial if surrendered to the PRC. We have identified the following issues in connection with the following fair trial rights that were not adequately addressed by the assurances: (i) The right to a hearing before an independent panel or public tribunal: Mr Kim has a right to be tried before a tribunal that decides cases on the evidence before it and free from political pressure. There was material before the Minister to suggest that political influence is pervasive in the PRC's criminal justice system and this is how the system is designed to work. There was also material to suggest that the political influence prioritises social policy objectives over individual procedural protections. (ii) The right to legal representation, including the right to present a defence, receive legal assistance, adequately prepare a defence and to examine witnesses: there were a number issues in connection with this right including the discretionary nature of disclosure to the defence and the fact that witnesses for the prosecution rarely give

			evidence with trial mostly being conducted on the papers. More troubling is the position of the defence bar in the PRC. Defence counsel must be able to honestly and responsibly represent an accused person without fear of repercussion if the procedural right is to operate in accordance with its purpose. There was material before the Minister to suggest that defence counsel operate in an environment in which they fear persecution for their representation of their client. (iii) The right not to be compelled to testify or confess guilt: there was material before the Minister to suggest that Mr Kim could be interrogated for a period of months in the absence of a lawyer. Eighth ground —disproportionate punishment (k) The Judge erred in finding the Minister made no error in failing to seek a specific assurance that the five years spent in custody in New Zealand would be deducted from any finite sentence of imprisonment in the PRC. As a matter of sentencing methodology, and considering New Zealand's international obligations, to not account for the time Mr Kim spent in custody would lead to a disproportionately severe punishment. Ninth ground —access to mental health care (l) We do not consider it appropriate to address the issue of Mr Kim's access to mental health services on the basis of the material before the Court.' (Para 275)

			'The Minister of Justice must reconsider the issue of Mr Kim's surrender. In particular, the Minister should address the following matters: (a) Whether the general human rights situation in the PRC suggests that the value of the human rights recognised under the ICCPR and the Convention against Torture are not understood and/or valued, and further, if they are, whether the rule of law in the PRC is sufficient to secure those rights. (b) The Minister is to make further inquiry as to whether murder accused are at high-risk, or higher risk, than the notional ordinary criminal. (c) The Minister should not treat the fact that Mr Kim will be tried in Shanghai, the stage of the investigation, or the strength of the case against Mr Kim as reducing the risk of torture, unless further inquiries provide a sufficient evidential basis for proceeding on that basis. (d) In assessing the effectiveness of the assurances to address the risk of torture, the Minister must address such evidence as there is that: (i) torture is already against the law, yet persists; (ii) the evidence is that practice of torture in the PRC is concealed and that its use can be difficult to detect; (iii) videotaping of interrogations is selective and torture often occurs outside the recorded sessions; (iv) evidence obtained by torture is regularly admitted in court; and (v) there are substantial disincentives for anyone, including the detained person, reporting the practice of torture.

			(e) When addressing the issue of the risk that Mr Kim will not receive a fair trial in the PRC should he be surrendered, the Minister should: (i) seek further information in connection with the extent to which the judiciary is subject to political control, and the extent to which tribunals that did not hear persons, or groups, or tribunals that did not hear the case, control or influence decisions of guilt or innocence; (ii) seek further information as to the position of the defence bar in the PRC, the right the defence has to disclosure of the case to be met, and the right to examine witnesses; and (iii) seek further assurances that Mr Kim will be entitled to disclosure of the case against him (detailed as to timing and content), that he will have the right, through counsel, to question all witnesses, and the right to the presence of effective defence counsel during all interrogation. (f) The Minister should address the risk that Mr Kim will be sentenced to a finite term of imprisonment and receive no credit for time already served in New Zealand. Relevant to consideration of this issue will be any assurances the Minister is able to obtain in relation to this.' (Para 278)
ES (China) [2019] NZIPT 801466 (Successful)	7 June 2019	2, 58, 63-69, 71, 85-87	A Chinese appellant was found to face a real chance of being tortured in pre-trial detention, in order to extract a confession from him, if he returns to China. The persecution the appellant feared was found not to be for a Convention reason, hence the failure to obtain refugee status.

			‘The appellant says that he gave help to a group of North Korean nationals who were illegally in China, by driving them from his home settlement of Z to another town. The arrest of another participant in the group’s flight from North Korea has led to the Chinese and North Korean authorities becoming aware of the appellant’s involvement and, he says, he is at risk of being detained and suffering serious harm arising from breaches of his human rights.’ (Para 2). ‘It is not overlooked that, by assisting illegal immigrants, the appellant participated in actions which likely infringed Chinese criminal law. Nor could it be said that it is unreasonable or unconscionable for countries to have and enforce laws relating to the regulation and control of immigration. Indeed, New Zealand itself detains and removes illegal immigrants under such laws. Further, there is international concern at the scourge of human trafficking and people smuggling, and most countries view such offending gravely.’ (Para 58.) ‘To return to the substance of the law, it is apparent that, on its face, Chinese law make reasonable, and not draconian, provision for the criminalisation of providing assistance to illegal migrants.’ (Para 63.) ‘The matter does not rest there, however. As has been explained consistently by the Tribunal and its predecessor over the past quarter of a century, legitimate prosecution can become persecutory where disproportionately severe punishment or mistreatment occurs. See the discussion in *Refugee Appeal No29/91*

			(17 February 1992), at pp7–13. For the reasons which follow, it is not necessary to dwell on the issue at any greater length here. The mistreatment of which the appellant is at risk far exceeds anything justifiable by legitimate investigation and prosecution.' (Para 64.) 'The appellant can be expected to be detained on his return to China – either at the airport or soon thereafter. The sustained adverse interest in him by the Chinese authorities makes this almost inevitable.' (Para 65.) 'Country information makes it clear that the appellant is likely to be held in pre-trial detention for some two to seven months, depending on the severity with which his actions are viewed – see *CK (China)* [2018] NZIPT 800775-776, at [385]. During that period of detention, he will be at risk of torture or cruel, inhuman or degrading treatment in an attempt to make him confess. It is irrelevant for the purposes this enquiry whether or not the appellant is guilty. He has an absolute, non-derogable right not to be tortured or to suffer other such mistreatment.' (Para 66.) 'The Tribunal need only find that the risk of serious harm to the appellant reaches the real chance threshold – that it is a substantial, or real, risk that is not merely remote or speculative. The country information satisfies us that that threshold is reached.' (Para 67.) 'There are likely to be other forms of serious harm to which the appellant would be exposed, such as an unfair trial by a judicial body which was not independent or impartial, and an absence of a presumption of

			innocence. But it is not necessary to spend time on those concerns - the exposure to a real chance of torture and/or cruel, inhuman or degrading treatment, causing serious harm, amply suffices.' (Para 68.) 'Lastly, for the sake of completeness, the Tribunal observes that the use of severe pain or suffering to extract a confession will, in these circumstances, amount to torture as it is defined in Article 1(1) of the 1984 *Convention Against Torture*, …' (Para 69.) 'It would constitute torture under both the *Convention Against Torture* and Article 7 of the ICCPR.' (Para 71.) 'The enquiry, under this limb, requires us to determine, on the same facts, the risk of the same human rights violations which have already been considered in the course of the refugee enquiry. The Tribunal has already found the appellant to face a real chance of being tortured in pre-trial detention, in order to extract a confession from him, if he returns to China. The use of torture in such conditions is widely acknowledged by reliable human rights monitors to be routine.' (Para 85.) 'The Tribunal finds that the "in danger of" threshold is met. As with the "real chance" threshold in the refugee enquiry, it requires a degree of risk which is more than speculative or remote – see *AI (South Africa)* [2011] NZIPT 800050-053, at [81]-[83]. That threshold is comfortably met' (Para 86.) 'It follows that there are substantial grounds for believing that the appellant would be in danger of being

			subjected to torture if deported from New Zealand. He is a protected person under section 130 of the Act.' (Para 87.)
AZ (Malaysia) [2019] NZIPT 801520 (Successful)	31 May 2019	2, 22, 30, 62-63, 66-67	In this case, a Malaysia appellant is found to be at risk of cruel treatment at the hands of loan sharks/criminal gangs. His claim did not satisfy the definition of torture. 'The appellant alleges that he is at risk of being severely harmed in Malaysia by criminal gangs because he cannot repay funds he borrowed to finance his gambling. The primary issue on appeal is whether the appellant's fears are well-founded.' (Para 2). 'By early 2015, the appellant was hopelessly in debt, incapable of meeting his interest payments from his monthly income and had exhausted his sources of credit and loans. He was forced to again ask his parents for help. He had borrowed over RM1 million, most of it from loan sharks at illegal rates of interest. His parents insisted that, as his debts were too large to repay, he had no option but to leave the country otherwise he risked being harmed or killed. The appellant therefore resigned from his position as sales manager and departed Malaysia for Australia. He lived in Perth and when his three-month visitor visa expired he remained unlawfully in Australia for several more months working as a fruit-picker. He says he had been ignorant about work visas. On his departure he was informed that, because of his overstaying, he was subject to a five year ban on re-entry to Australia.' (Para 22).

			‘[30] The appellant fears to return to Malaysia. He cannot repay the impossibly large sums he owes to various loan sharks, including those with connections to Gang 24 and he believes that he is therefore at risk of being physically harmed or even killed. He cannot expect police protection if he receives threats because of the close connections the criminal gangs have with the police. He also believes that the police will be reluctant to help him because the Chinese in Malaysia are not liked and experience discrimination. He cannot safely avoid the gangs by living in another region in Malaysia as the gangs have a presence everywhere as well as connections to the police and other state institutions. He has been bankrupted so that he could even be arrested on his return to Malaysia, which could in turn lead to his being handed over to Gang 24.’ (Para 30). ‘The appellant has a real chance that he will be subjected to “severe pain or suffering” that would be for the purpose of “intimidating or coercing” him to pay money to loan sharks and/or associated criminal gangs. However, such entities are not public officials. The appellant’s predicament may arise because a corrupt police officer provides information about his whereabouts to a loan shark or criminal gang. However, this scenario, which was also in issue in *AN (Malaysia),* would not suffice to meet the definition of torture as explained at [89]: “[89] It is not overlooked that the police have been found to be corrupt and might well form the conduit by which the appellant’s whereabouts become known to

			the *ah long* FF. It might also be the case (though it need not be determined here) that the criminal activity of a corrupt police officer (in being in league with the *ah long*) could be said to be done by a public official, albeit that it would be a criminal act well outside his official duties. What is not established, however, is the requirement that the severe pain or suffering be inflicted "by or with the acquiescence of" a public official. The evidence does not establish that such pain or suffering would be inflicted *by* a police officer. Nor does it establish that any police officer would be acquiescing in the required harm. There is too little information before the Tribunal for it to say with any confidence that a police officer passing on information to the *ah long* would do so in the knowledge of the use to which it would be put, let alone that he/she would know that it would be used to inflict severe pain or suffering for one of the purposes set out in the Convention."' (Para 62). 'For this reason, there is no substantial ground for considering that the appellant would be at risk of being tortured if returned to Malaysia.' (Para 63). 'The question of whether the appellant has a real chance of being subjected to arbitrary deprivation of life or cruel treatment contrary to Article 6 and 7 of the ICCPR has been addressed in the refugee inquiry.' (Para 66). 'The appellant faces a real chance of serious physical mistreatment by loan sharks and/or criminal gangs as a means of enforcing repayment of loans. Such mistreatment falls within the ambit of cruel, inhuman and degrading treatment and the requite threshold of

			severity of such harm is met. While not excluding the possibility that the appellant may even be killed, it is not necessary (given the finding on cruel treatment), to also determine whether there are substantial grounds for believing that he would be subjected to arbitrary deprivation of life if deported to Malaysia.' (Para 67).
FK (Sri Lanka) [2019] NZIPT 801383 (Successful)	5 March 2019	1-2, 71-72, 75-76	In this case, a Sri Lankan appellant is found to be at risk of torture, satisfying the definition due to the involvement of what appeared to be public officials colluding with non-state agents. 'The appellants comprise a husband, wife and three minor children, who are all nationals of Sri Lanka. The mother is the responsible adult of the children for the purposes of section 375 of the Immigration Act 2009 (the Act).' (Para 1). 'The husband, a wealthy gemstone and jewellery merchant of Tamil ethnicity, claims to be at risk of being persecuted or otherwise being subjected to qualifying harm on two grounds. First, at the hands of an ex-army officer and his associates who wrongly believe the husband to have informed on their unlawful retention and sale of Liberation Tigers of Tamil Elam (LTTE) sourced gold. Second, because he has encouraged victims of anti-Muslim violence to bring charges against *Bodhu Bala Sena* (BBS) – a Sinhalese Buddhist nationalist organisation. The wife claims to be at risk because of her husband's problems and because she fears retribution from a brother who blames her for his deportation from Canada and the United States back

			to Sri Lanka. The mother, acting on their behalf as the children's responsible adult, claims they are also at risk from her brother. The central issue to be determined by the Tribunal is whether their fears are well-founded.' (Para 2). 'In relation to the husband, there is no link to any Convention ground whatsoever. His predicament arises not out of any actual or imputed political opinion. It is not linked to his race, his religion, or his membership of any particular social group. His predicament derives from the wish of the officers illegally selling the LTTE gold to silence him. Similarly, any harm he faces at the hands of the Special Task Force is again designed solely to maximise the chance the complaints that have been made are dismissed. The husband is Tamil. He is Muslim; but these attributes are irrelevant to his predicament.' (Para 71). 'As for the wife and children, however, the situation is different. Their predicament in the context of the husband's problems arising from his unwitting involvement in the sale of LTTE gold arises solely because of their familial relationship to the husband. There is no question that a family is a particular social group and their predicament arises because of their membership of it.' (Para 72). 'Section 130(5) of the Act provides that torture has the same meaning as in the Convention Against Torture, Article 1(1) of which states that torture is:

			... any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.' (Para 75). 'The Tribunal is satisfied that the husband is at risk of being tortured, so defined. Those pursing him in respect of his involvement in the unlawful sale of the LTTE gold will be highly motivated to either discover what he knows about them, if he has told the authorities about their dealings, or to punish him in the mistaken belief that he has already done so. While it has not been suggested that BB is currently a public official, the evidence of the wife was that uniformed men were looking for the appellant in connection with the gold-selling. Taking into account that the husband is likely to be subjected to serious physical harm while under the control of men who appear to be public officials acting in collusion with BB**,** and country information confirming the continued practice of torturing detainees, the Tribunal is satisfied that the husband is in danger of being subjected to torture in Sri Lanka.' (Para 76).

CM (Bangladesh) [2019] NZIPT 801411 (Successful)	14 January 2019	2-4, 80-81, 90, 100-101, 108	In this case the Tribunal considers the meaning of 'torture' and finds that wrongful conviction and imprisonment pursuant to trumped up charges would not be sufficiently severe as to amount to torture. The principal appellant was successful as he would face cruel, inhuman or degrading treatment. 'The appellants are a family – the parents and three daughters, aged 18 years, 13 years and 6 years.' (Para 2). 'The father says that he was a successful and prosperous businessman in Bangladesh and elsewhere until he attempted to migrate to New Zealand, entrusting the running of his YY business in Bangladesh to two long-standing colleagues. In fact, they attempted to cheat him. On being caught, they then reneged on a substantial settlement with him, causing him to lay criminal charges against them. His former colleagues then set about neutralising the father's efforts to secure the settlement sum by bribery and corruption and by systematically attacking his primary source of income – a ZZ factory in Bangladesh, such that the business collapsed.' (Para 3). 'The father says that he is at risk of serious harm if he returns to Bangladesh (and his family members, by association with him) because his former business colleagues are powerful and well-connected and will wish to prevent him continuing with the criminal charges. They also wish to acquire the land on which his

			former ZZ factory sat, because it is adjacent to their own land which is landlocked.' (Para 4). 'This limb of the enquiry can be answered shortly in the case of the appellant. The Tribunal is satisfied that, if he returns to Bangladesh, he faces a real chance of serious harm at the hands of, or at the instigation of, CC and DD or their associates. He continues to represent a threat to their business and personal interests in Bangladesh because of the legal proceedings arising from the dishonoured cheques. The sum involved is substantial and there is the prospect of at least one of the men (CC) being personally criminally liable as a director of the company which failed to honour the cheques. They have already taken aggressive steps to neutralise and intimidate him.' (Para 80). 'In response to the appellant's efforts to obtain restitution, he has suffered the systematic destruction of his ZZ business, the harassment, intimidation and physical assault of his staff and relatives and he has himself become the victim of false criminal allegations reported to the Magistrates Court by the police, undoubtedly through corrupt influence. Nothing in the evidence suggests that the appellant has done anything deserving of such mistreatment. Having been cheated by business associates, his attempts to secure compensation have seen him reduced from a person of some wealth to a bankrupt.' (Para 81). 'As to the appellant, the Tribunal finds that he is not at risk of being persecuted for any Convention reason. Any harm he suffers if he returns will be for reasons of

			crime and retribution or revenge. Counsel submits that an element of political opinion must exist, given the association of the appellant's opponents with various political figures but, even if they are able to exert some leverage against the appellant by calling in favours from political figures, the mere fact that corrupt political figures are involved does not imbue the harm with any nexus to political opinion.' (Para 90). 'As to the appellant, the Tribunal has identified two forms of serious harm of which he is at risk. The first is serious physical mistreatment but there is no suggestion that such mistreatment would be inflicted "by or at the instigation of or with the consent or acquiescence of a public official". It may be that the inflictors of the harm would, *post facto*, enjoy immunity from prosecution because of the influence that CC and DD seem able to wield with the police and courts, but that is not the same as the consent or acquiescence of a public official – an essential ingredient of the definition of torture.' (Para 100). 'As to the second form of harm, the appellant is at risk of prosecution on trumped up charges of misappropriation of a bank loan. Even supposing that such a prosecution resulted in the appellant's wrongful conviction and imprisonment, it is not possible to conclude that "severe pain or suffering" would ensue. The threshold of "severe" is high. The evidence does not establish the appellant to be in danger of suffering at the requisite threshold to constitute torture. It follows that there are no substantial grounds for believing that

			the appellant would be in danger of being subjected to torture if deported from New Zealand.' (Para 101). 'As to the appellant, for the reasons explained above in relation to the refugee enquiry, the Tribunal is satisfied that there are substantial grounds for believing that he would be in danger of cruel, inhuman or degrading treatment if he returns to Bangladesh. Given this finding, it is not necessary to consider whether or not there are also substantial grounds for believing that he is in danger of arbitrary deprivation of life. He is a protected person within the meaning of section 131 of the Act.' (Para 108).
AY (Iraq) [2018] NZIPT 801263 (Successful)	28 March 2018	2-3, 12-17, 21, 61-64, 73-78	This case concerned arbitrary deprivation of life and is an example of the Tribunal's reasoning in relation to an internal protection alternative (IPA) under the protected person's regime. 'The appellant is a Kurdish man aged in his early thirties. He claims to have a well-founded fear of being killed by agents of a well-known Kurdish political figure because he had knowledge about the latter's corrupt dealings which he made known to the leadership of the Gorran Party. The central issue to be determined is whether the risk of harm faced by the appellant is for one of the five reasons contained in the definition of a refugee under the Refugee Convention reason.' (Para 2). 'For the reasons which follow, the Tribunal finds that it does not and the appellant is not entitled to be recognised as a refugee; he is, however, entitled to be recognised as a protected person.' (Para 3).

			‘The appellant now understood that the cash he had been delivering to his employer monthly were in fact payments to AA who was very probably the actual owner of the hotel. It was a common practice in Iraqi Kurdistan that high-ranking politicians linked to the two main parties would have hidden interests if not outright ownership in major businesses. Corruption was rife and it was for this reason that many young people like himself became involved with the Gorran Party. Concerned by what he had seen, he reported what had occurred to a senior figure in the Gorran Party who promised to investigate what the appellant had divulged.’ (Para 12). ‘Within a couple of weeks of his disclosure, the appellant was telephoned by BB while at work and asked to come and see him in his office. He was first asked various questions relating to the operation of the departments in the hotel before BB asked him directly whether he had spoken to the men in the Land Cruiser and whether he had recognised them. The appellant denied doing either.’ (Para 13). ‘In the weeks and months following his disclosure of the payments to the Gorran Party, rumours began circulating on social media that AA was corrupt and in fact owned a number of businesses, including the hotel where the appellant was working. Things of this nature were also said to the appellant himself when socialising with friends and family.’ (Para 14). ‘In mid-August 2016, the appellant received a telephone call while at work one evening from the hotel

			receptionist, advising him there were some guests to see him. The appellant went to the reception area and saw four men who told him they wished to discuss something that was more suitable to discuss in a less public place and they went towards the hotel's garage area. There, the appellant saw the same Land Cruiser that was involved with the transfer of the money in March and he immediately became worried. His fears were confirmed when two of the men without warning forcibly grabbed him by the arm and bundled him into the Land Cruiser and drove away.' (Para 15). 'While detained inside the Land Cruiser, the appellant was verbally abused and the men indicated they knew who he was and where he lived. They told him that he had a "long tongue" and that they would kill him if they found out that he was the one who had been talking. The appellant was slapped in the face, causing bruising and a cut to his lip.' (Para 16). 'After 15 or 20 minutes, the Land Cruiser stopped and the appellant was dumped in the street. He telephoned his father who collected him and took him home. He told his father what had happened and his father admonished him for his actions which he considered foolish and reckless. Fearful of further attack, the appellant then began living in different places, alternating staying at his own house, and at those of friends and relatives for three or four nights at a time. He spent most his time at the home of the family lawyer, called CC.' (Para 17).

			‘The appellant does not believe it would be safe for him to return to Z city. The appellant believes that, if he returns to Iraqi Kurdistan, he will eventually be killed. This is how things work in that part of the country. The men involved are extremely powerful and people who are regarded as exposing their corrupt practices are routinely killed. It would not be possible for him to live in Baghdad. He is a Kurdish man with no support there and it would be difficult for him to live safely in a country dominated by Arabs, particularly in the current political climate.’ (Para 21). ‘The appellant has found himself unwittingly embroiled in corrupt financial transactions involving a very senior political figure in Iraqi Kurdistan. He disclosed what he had learnt to the political leadership of the Gorran Party and the politician at the centre of the affair has become the subject of a whispering campaign on social media and ‘on the street’ exposing his corruption.’ (Para 61). ‘The appellant has been subjected to a minor beating and was threatened with death if it was discovered that he was the source of the information becoming public. While he experienced no further episodes of harm before he left Iraq, a lawyer who assisted him has had shots fired at his house and has fled abroad for his own safety.’ (Para 62). ‘The Tribunal reminds itself that the real chance threshold of risk is a low one. It is possible that nothing further will come of this with the suspicion of the

			politician concerned that the appellant is the source of the leaked information remaining just that. However, in the circumstances, the Tribunal is satisfied that the risk that the appellant may be arbitrarily killed in breach of his rights under Article 6 of the ICCPR as the suspected whistle-blower cannot easily be dismissed as remote and speculative given the totality of the country information. The leadership of the Gorran Movement – which has successfully campaigned on an anti-corruption platform – has promised to look into the matter and it is possible that this may yield further information about the politician's corrupt practices which would only increase the risk to the appellant.' (Para 63). 'The Tribunal also bears in mind that it will likely have excited suspicion that the appellant 'disappeared' from his employment and the community when he fled the country. It is possible that it was his very act of departing which swung the beam of suspicion back onto him and resulted in the shots being fired at his lawyer's house.' (Para 64). 'In *AI (South Africa)* [2011] NZIPT 800050-53, at [80]-[85], the Tribunal considered a submission that the reference to being "in danger" means the 'standard' under section 131 equated to the real chance standard under the Refugee Convention. The Tribunal observed: "[82] The submission risks going too far. Sight must not be lost of the statutory terms, which provide that there must be substantial grounds for believing that the person "is in danger of...". There is a risk, in attempting to

			further define what is already a definition, that a test wholly distinct from that intended by Parliament becomes established. [83] The most that can be said is that "in danger of" raises a low threshold. What must be established is less than the balance of probabilities but something more than mere speculation or a random or remote risk. To that extent, the standard can be seen as analogous to the standard applied in refugee law but it goes no further than that." This was followed in *AK South Africa* [2012] NZIPT 800174-176, at [79].' (Para 73). 'The Tribunal, for the reasons set out in [61]-[65], is satisfied that there are substantial grounds for believing that the appellant faces an arbitrary deprivation of his life at the hands of or his associates should he return to Iraqi Kurdistan.' (Para 74). 'Section 131(2) of the Act provides that: "a person must not be recognised as a protected person in New Zealand under the Covenant on Civil and Political Rights if he or she is able to access meaningful domestic protection in his or her country or countries of nationality or former habitual residence."' (Para 75). 'In *AC (Russia)* [2012] NZIPT 800151the Tribunal held, at [110]:

			In order for the statutory test under section 131(2) to be satisfied it must be established that: (a) The proposed site of internal protection is accessible to the individual. This requires that the access be practical, safe and legal; (b) In the proposed site of internal protection there are no substantial grounds for believing that the appellant be will arbitrarily deprived of life or suffer cruel, inhuman or degrading treatment or punishment; (c) In the proposed site of internal protection there are no new risks of being exposed to other forms of serious harm or of refoulement; and (d) In the proposed site of internal protection basic civil, political and socio- economic rights will be provided by the State.' (Para 76). 'The Tribunal has turned its mind to the question of whether the appellant has a meaningful internal protection alternative (IPA) available to him in Iraq by moving to Baghdad. It is not necessary to dwell at length on this issue as, even if it were to be assumed that the appellant could safely travel there and reduce the risk of harm he faces arising from his whistle-blowing actions, he has no family or other support network in Baghdad. In the current fractured climate inside Iraq in the wake of the disputed independence referendum and the subsequent capture of Kirkuk by Baghdad, as a single Kurdish male without family support in Baghdad, the appellant would be in danger of

			being exposed to other forms of serious harm there. For this reason alone, he has no viable IPA available to him.' (Para 77). 'Accordingly, the appellant is entitled to be recognised as a protected person within the meaning of section 131(1) of the Act.' (Para 78).
AV (Nepal) [2017] NZIPT 801125 (Unsuccessful) See related case AW (Nepal) [2017] NZIPT 503106 (22 September 2017)	22 September 2017	6-9, 46-50	This case concerned the complementary protection provisions in relation to a natural disaster. 'Prior to the April 2015 earthquake, the husband and wife were retired and living in their home in Kathmandu. They regularly visited temples and socialised with friends and former work colleagues and occasionally had contact with members of their extended families. With their savings and assistance from their son, they built a further one and a half storeys on their small home in Kathmandu, intending to remain there.' (para 6). 'The husband and wife were at home when the April 2015 earthquake struck. The wife injured her leg trying to get out of the house. The couple lived for three months in a tent. Eventually, they were able to have the ground floor of their home repaired sufficiently to be habitable and had the water and electricity reconnected. However, with continuing aftershocks, they often slept on the verandah.' (para 7). 'Following the earthquake, the husband and wife were constantly fearful and both thought it might be better to have died in the earthquake rather than suffer the aftershocks. The husband had ongoing pain in his foot

			which was not alleviated by an operation in Nepal.' (para 8). 'The danger of further earthquakes in Nepal has not passed. Further, if they go back, the husband and wife would not have their son and daughter there to support them emotionally.' (para 9). 'In *AF (Kiribati),* cited above, the Tribunal examined the scope of the right not to be arbitrarily deprived of life within the context of natural disasters and noted, at [83], that not all risks to life fall within the ambit of section 131, only those which arise by means of "arbitrary deprivation". It determined that the prohibition on arbitrary deprivation of life must take into account the positive obligation on a state to protect the right to life from risks arising from known environmental hazards. Failure to do so might, in principle, constitute an omission for the purposes of the prohibition on the arbitrary deprivation of life. As already noted, the appellants have not presented any evidence that the Nepalese government, with the assistance which it accepted from the international (state and non-state) community, has failed to take steps to positively protect its population, including the appellants, as best it could from the consequences of the earthquake. There is no basis for finding that the position would be any different in the future such that the appellants "would be in danger" of being arbitrarily deprived of their lives.' (para 46). 'As to the nature and scope of the prohibition on cruel, inhuman or degrading treatment, this was examined in

			detail in *BG (Fiji)* [2012] NZIPT 800091. The Tribunal determined that this prohibition was not intended to allow general socioeconomic conditions to constitute "treatment" unless there was: a deliberate infliction of socioeconomic harm by state agents or a failure to intervene while non-state agents did the same; the adoption of the particular legislative, regulatory or policy regime in relation to a section of the population; or the failure to discharge positive obligations towards individuals wholly dependent on the state for their socioeconomic well-being.' (para 47). 'In *AC (Tuvalu)* [2014] 800517-520, this reasoning was applied in the context of natural disasters. The Tribunal stated at [84]: Just as it was not intended that consequences of general socio-economic policy should constitute a treatment under Article 7 of the ICCPR, nor does the mere fact that a state lacks the capacity to adequately respond to a naturally occurring event mean that such inability should, of itself, constitute a 'treatment' of the affected population. However, the existence of positive state duties in disaster settings means that, in some circumstances, it may be possible for a failure to discharge such duties to constitute a treatment. Specific examples will be the discriminatory denial of available humanitarian relief and the arbitrary withholding of consent for necessary foreign humanitarian assistance. ...' (para 48).

			'None of those examples or any other act or omission which could constitute state treatment is present in the appellants' case.' (para 49). 'For those reasons, there are no substantial grounds for considering that the appellants are in danger of being arbitrarily deprived of life or suffering cruel treatment as that term is defined in the Act, if they must return to Nepal. Neither appellant is entitled to recognition as a protection person under section 131 of the Act.' (para 50).
AZ (Afghanistan) [2017] NZIPT 801221 (Principal applicant successful; applicant children unsuccessful)	20 September 2017	4-6, 106-108	This case considered, and rejected, the claim that separation of the child applicants from their mother amounted to cruel, inhuman or degrading treatment. 'The principal issue for the mother, as a separated woman alone, is the extent to which religious and cultural restrictions on women in Afghanistan, including the requirement that she live with a male protector, and the predation on women with the mother's characteristics by men, including male relatives, gives rise to breaches of her human rights which would cause her serious harm.' (para 4). 'As to the children, the principal issues are whether they are at risk of serious harm arising from the country's general levels of insecurity and whether they are at risk of kidnapping and extortion as the children of a man living overseas.' (para 5).

			‘For reasons which will be explained, the Tribunal finds that the mother is entitled to be recognised as a refugee but that the children are not.’ (para 6). ‘It is accepted that separation from their mother as a result of being deported to Afghanistan would be likely to cause the children serious emotional and developmental harm. She has been their only caregiver for the past six years and, even if another relative provided care for them, the separation from the only parent that they know would cause such harm. However, it would not constitute an *arbitrary* interference with their right to family unity (Article 17, ICCPR) because any such deportation would be in accordance with ordinary immigration laws in New Zealand which would include consideration of appropriate humanitarian circumstances, either by way of appeal to this Tribunal under section 154 of the Act (presuming they are eligible to lodge such as appeal), and/or by an Immigration New Zealand interview under section 177 of the Act.’ (para 106). ‘Nor could it be said that the act of returning the children would constitute cruel, inhuman or degrading treatment, because there would be no “treatment” of any kind in Afghanistan and the treatment element of the right cannot be located in the act of the New Zealand authorities in returning them. Such an approach to Article 7 has been applied intermittently by the European Court of Human Rights in the deportation context, but it has been rejected in this country and,

			more broadly, in the international jurisprudence in relation to the scope of Article 7, ICCPR. See the detailed discussion of this issue in *BG (Fiji)* [2012] NZIPT 800091, at [136]-[162].' (para 107). 'There are no substantial grounds for believing that either child would be in danger of being subjected to arbitrary deprivation of life or cruel treatment if deported from New Zealand. Neither child is a protected person under section 131 of the Act.' (para 108).
DF (India) [2017] NZIPT 801022 (Unsuccessful)	16 March 2017	25-26, 67, 85-88	This case concerned an Indian husband and wife whose claims concerned, inter alia, lack of employment, poverty and lack of access to medical care. Pursuant to s 131(5) of the Act, the medical claim was rejected and the socio-economic claims could not succeed due to lack of relevant treatment for which the state could be held accountable. 'The husband had to borrow more than NZD100,000 for his liver transplant in India in late 2014. In the last two years he has repaid between NZD52,000 and NZD55,000. He thinks the bank has been paid back but the amount outstanding is payable to various family members. He is not paying interest. He is not under any particular pressure at the moment from family members because he is making regular repayments. He is expected to repay all the money.' (Para 25). 'The only way the couple can repay the debt in full is by staying in New Zealand. When the husband was working in India prior to 2010, he was earning approximately NZD100 a month. Earnings at that level

			would not allow him to make repayments. Even IT jobs in India now are not sufficiently highly-paid for him to feed his children, pay school fees, pay for his medicine and make loan repayments.' (Para 26) 'The appellants state that they fear poverty, corruption, crime and the prevalence of drugs in India.' (Para 67). 'The appellants may have some difficulty obtaining employment in India. They may suffer a diminution in their standard of living in India. However, a lower standard of living is not, of itself, 'treatment' within the meaning of section 131. In *BG (Fiji)* [2012] NZIPT 800091 the Tribunal determined that, as a general rule, socio-economic deprivation arising from general policy and conditions in the state to which a claimant may have to return, does not constitute cruel, inhuman or degrading treatment. This is because there is no relevant 'treatment' of the appellant for which the state can be held accountable.' (Para 85). 'As to being in danger of arbitrary deprivation of life, a distinct issue, the conditions in India are not such that the appellants are subject to this risk. As to the husband's medical condition, section 131(5) of the Act makes it clear that the impact on a person of the inability of a country to provide medical care, or medical care of a particular type or quality, is not to be treated as arbitrary deprivation of life or cruel treatment. In any case, the husband has been able to access sophisticated medical treatment in the past in India (his liver transplant), paid for with the assistance of his family, and it has not been established that he would be

			unable to access ongoing monitoring and medication for his condition.' (Para 86). 'Neither of the appellants faces a real chance of cruel, inhuman or degrading treatment or of arbitrary deprivation of life, as a form of 'being persecuted' in the context of the International Covenant on Civil and Political Rights. Any such risk is no more than speculative and remote and does not reach the threshold of being "in danger of" such harm.' (Para 87). 'The appellants are not persons in need of protection under section 131 of the Act.' (Para 88).
(AI) Tuvalu [2017] NZIPT 801093 (Unsuccessful) See also AJ (Tuvalu) [2017] NZIPT 801120 (20 March 2017) for a similar decision relating to climate change in Tuvalu.	23 February 2017	29-33, 49-51, 53-54, 59-60, 62, 75-76	This case concerned a husband and wife from Tuvalu whose claims related to the effects of climate change and lack of employment prospects. The case was unsuccessful (manifestly unfounded) in reliance on *AC (Tuvalu)* [2014] NZIPT 800517 and *AF (Tuvalu)* [2015] NZIPT 800859. The Tribunal also addressed family unity. 'In summary, the grounds of the appellants' claims are that they are at risk of serious harm due to the adverse effects of climate change on Tuvalu. The appellants claim to not have access to safe, clean drinking water and adequate sanitation in Tuvalu. The government is not undertaking its responsibilities to ensure there is adequate access to safe, clean drinking water and adequate sanitation.' (para 29).

			‘The appellants also claim that, while they are currently healthy, if they become unwell, they will not be able to access adequate health care in Tuvalu, in particular due to the unsanitary water.’(para 30). ‘In addition, the representative submits that the appellants would not have access to any housing in Tuvalu as they sold their house before coming to New Zealand. While they have family members there, they cannot assist the appellants as they have families of their own and lack the means of supporting them. This would result in a situation of overcrowding, an increasing problem in Tuvalu due to the flow of individuals to the capital city as a result of the effects of climate change.’ (para 31). ‘The appellants also claim that they would be unable to obtain employment, due to the general lack of employment opportunities in Tuvalu. Approximately 40 per cent of the Tuvaluan population is unemployed. Around 75 per cent of the labour force works in subsistence agriculture and fisheries. The remaining 25 per cent work for the government or are self-employed. They would not be able to access an adequate standard of living and would be forced into a situation of extreme hardship.’ (para 32). ‘Finally, the best interests of the wife’s children (and husband’s stepchildren), aged 21 years old and 17 years old, require that the appellants remain in New Zealand and enjoy the opportunities here, which are not available in Tuvalu. Both children are New Zealand citizens and were born here. Separation from their

			parents would cause distress to all family members.' (para 33). 'Furthermore, as for the appellant's claims to be at risk of serious harm in the form of arbitrary deprivation of life, in *AC (Tuvalu)*, the Tribunal, differently constituted, found in relation to Tuvalu that it had not been established that the state failed, or is failing to take steps, to protect the lives of its citizens from known environmental hazards such that the appellants would be in danger of being arbitrarily deprived of their lives: "[107] That challenges remain in this area is also acknowledged in the [Universal Periodic Review] National Report which, at paragraph [81], notes the [National Adaptation Programme of Action] project and other climate change adaptation measures face challenges and constraints. These include the accessibility and availability of funds to procure materials for project development, complex United Nations funding processes, the unavailability of materials to progress projects, poor internal management systems and slow staff recruitment processes [108] While it is accepted that challenges do exist, particularly in relation to food and water security in Tuvalu, in light of the information as a whole, the Tribunal finds that it has not been established that Tuvalu, as a state, has failed or is failing to take steps to protect the lives of its citizens from known environmental hazards such that any of the appellants

			would be in danger of being arbitrarily deprived of their lives."' (para 49). 'In *AF (Tuvalu)* 800859, the Tribunal also found that: "[69] ... there is no evidence that the Government of Tuvalu is failing to take steps to protect its citizens from the effects of environmental degradation to the extent that it can."' (para 50). 'No information has been provided in support of the appeals which would require the Tribunal to reach a different conclusion on the issue of the taking of future steps by Tuvalu to protect its citizens from risks to their lives as result of the adverse impact of climate change. There is no basis to find that the appellants face a real chance of being 'arbitrarily' deprived of their life.' (para 51). 'Specifically, in relation to the appellants' claims of serious harm based on no access to clean drinking water and sanitation, the Tribunal, has previously stated in *AF (Tuvalu)* (at [74]) that: "The question is what is at the core of the right to safe drinking water. This does not require that safe drinking water comes necessarily from the tap. What is required is that a person is able to access, after whatever *process* is necessary, water that they are able to drink. According to Ms Albuquerque, at p7 of her report,

			this is possible in Tuvalu. There has been substantial international assistance with the provision of rainwater tanks:"' (para 53). 'The appellants have provided evidence that during periods of drought they have been required to purchase clean water, which constitutes access for the purposes of the right to safe drinking water. No evidence has been provided on appeal, disputing this fact.' (para 54). 'The appellants' claims with regards to their New Zealand citizen children, falls outside the scope of their refugee and protected person appeals. Refugee status (and protected person status for that matter) is a status held by the individual. The question of whether any of the other members of your family are to be recognised as refugees or protected persons is not before the Tribunal. This appeal concerns only the appellants and it is their status only which requires to be addressed. These children are New Zealand citizens and are protected from being forcibly sent to Tuvalu.' (para 59). '*Family unity* Finally, the appellants claim they will be at risk of serious harm due to a breach of their right family unity, under articles 17 and 23(1) of the ICCPR and articles 7 and 9 of United Nations Convention on the Rights of the Child. However, the right to family unity, as it is understood in international law, does not require that the unity be provided in a certain locale. The family is able to be united in Tuvalu. However, the children in question are New Zealand citizens, and are able to

			remain here. If they do so, no issue of being persecuted arises as this would not amount to failure of state protection by Tuvalu. On the facts as found, there is no other reason why the appellants cannot return to Tuvalu. If the children wish to accompany them, then they are able to exercise their right to family unity.' (para 60). 'Of particular relevance to this aspect of the enquiry is the reality that socio- economic difficulties are often inter-linked and aggravate each other. A lack of employment for example, may well directly affect an ability to find housing. If the appellants are unable, collectively, to find employment sufficient to provide for their needs, it can be expected that their standard of living will be compromised. But that is the case anywhere. What is as critical to this aspect of the assessment, as it was to the various concerns separately, is that the risk of serious harm befalling either of the appellants on this cumulative basis is no more than speculative, falling below the level of a real chance. Even if the appellants were both to have the misfortune to fail to secure employment, the evidence does not establish that any ensuing harm would arise from a breach of internationally recognised human rights.' (para 62). 'It is accepted that the appellants may suffer a diminution in their standard of living in Tuvalu. However, a lower standard of living is not, of itself, 'treatment' within the meaning of section 131. In *BG (Fiji)* [2012] NZIPT 800091, the Tribunal held that, generally, socio-economic deprivation arising from general policy and conditions in the receiving country

			does not constitute cruel, inhuman or degrading treatment, because there is no relevant 'treatment' of the appellant for which the state can be held accountable – see [149] and [197]. Nothing the appellants have asserted indicates any relevant treatment by the Tuvaluan government or otherwise.' (para 75). [76] The appellants are not persons in need of protection under section 131 of the Act.' (para 76).
BN (South Africa) [2017] NZIPT 800973 (Unsuccessful)	25 January 2017	3-4, 184-188, 196, 198, 224-225, 247, 249-251, 271-272, 281-283	This case concerned a white lesbian couple and their daughter from South Africa. While the majority of the analysis occurs under the refugee framework, it has been included because of its consideration of the rights in the ICCPR in defining the level of harm and because these conclusions on the ICCPR are then adopted under the complementary protection analysis. 'The couple claim to be at risk of serious harm as white lesbian women, who will be forced, through discrimination in employment from non-state and state actors and a lack of family support, to live at a low socio-economic level, or worse (in poverty and in an informal settlement or squatter camp) upon return to South Africa. In particular, they fear arbitrary deprivation of life, and cruel, inhuman and degrading treatment or punishment, in the form of sexual or gender-based harassment and violence. They also fear being victims of general crime in South Africa.' (para 3). 'The couple claim that CC will be at risk of discrimination, arbitrary deprivation of life, and cruel, inhuman and degrading treatment or punishment on

			account of her association with her parents as lesbians, and from the high crime rate generally. They also fear she will suffer psychological harm upon return to South Africa, as she will be forced to live within narrow confines, given her parents' lesbian relationship and the escalating crime levels in the country. She will be leaving family behind in New Zealand to whom she is closely bonded. Further, she will not be able to continue her education to the standard that she is used to in New Zealand.' (para 4). 'It is necessary to assess the claim that, owing to discrimination against them as white, lesbian women, AA and BB will be denied employment and will return to live in poverty in South Africa. As their status as white and lesbian women, are overlapping statuses for the feared harm, the Tribunal considers these together.' (para 184). 'Article 26 of the ICCPR provides for a general guarantee of equality before the law: "All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."' (para 185). 'Further, Article 2(2) of the ICESCR provides for a general obligation on states to ensure enjoyment of the

			rights recognised in the ICESCR without discrimination on specified grounds.' (para 186). 'The Committee on Civil and Political Rights has stressed in its *General Comment No 18: Non-Discrimination* (10 November 1989) at [13], that not every differentiation in treatment will constitute discrimination. Whether the differentiation in treatment is justifiable, or not, depends on whether the criteria for differentiation are reasonable and objective and whether the differentiation is proportionate to a legitimate aim; see also D Moeckli "Equality and Non Discrimination" in D Moeckli *et al* (eds) *International Human Rights Law* (Oxford University Press, Oxford, 2010) at p201.' (para 187). 'The right to work is found in Article 6 of the ICESCR, of which Article 7 recognises the right to the enjoyment of "just and favourable conditions of work" including fair wages and safe and healthy working conditions. The ESCR Committee in *General Comment No 18: The Right to Work (Article 6 of the Covenant)* (6 February 2006) emphasises the importance of assuring the individual's right to freely chosen decent work as a fundamental aspect of individual dignity and the importance of work not only for professional development, but also for social and economic inclusion. Critically, the Committee also stresses the enjoyment of the right to work must be available without discrimination.' (para 188).

			‘However, for the purpose of this assessment, is it not necessary to consider whether such differentiation in treatment is discriminatory, as the reality is that the evidence does not establish that AA or BB would face a real chance being prevented from finding suitable employment upon return to South Africa on account of their shared status as white, lesbian women. While they may experience some discrimination in employment owing to their status, and may have limited opportunities for employment in certain fields, such as in government service, they are not wholly shut out of the labour market and have in the past each been able to find employment commensurate with their qualifications and experience notwithstanding the enactment and implementation of the 2004 Broad-Based Black Economic Empowerment Act.’ (para 196). ‘The Tribunal accepts that AA and BB may face a period of unemployment upon return to South Africa (as, indeed, AA has submitted that she has in the past, for a period of some eight months), but the risk that they will be unemployed for any significant period of time, let alone on account of their status is purely speculative. AA and BB have the support of each other, and both have employment prospects. They also have family and friends who may offer assistance during any transition period upon their return home.’ (para 198). ‘The evidence does not support that AA and BB will be so socially and economically vulnerable and without support, giving rise to a real chance of their experiencing arbitrary deprivation of life or cruel, inhuman or degrading treatment or punishment. While

			the adverse societal attitudes held towards LGBTI persons in South Africa means there is a real chance that the adult appellants will, as they have in the past, encounter occasional verbal abuse and harassment of LGBTI, this does not of itself rise to the level of serious harm.' (para 224). 'However it is necessary to consider whether AA and BB's current or prospective mental health upon return to South Africa, increases the intensity of their psychological suffering arising from any harassment or discrimination they may encounter to a level of seriousness to constitute a breach of Article 7 of the ICCPR such as may amount to being persecuted.' (para 225). 'AA may continue to experience verbal abuse, harassment and discrimination in some of her interpersonal relations and in the wider community. She will also need to process any media reports covering mistreatment of LGBTI persons and this will have an adverse impact. Such may trigger certain bouts of anxiety and/or periods of depression. She will experience these emotions as a person presenting as having a significant suicide risk. Her coping mechanisms may also be reduced by her susceptibility to migraines, which she manages with medication. However, having regard to her particular characteristics in the context of all the evidence and country sources, the Tribunal finds that the psychological harm she may experience over the course of her lifetime in South

			Africa falls short of the level of seriousness to fall within the ambit of Article 7 of the ICCPR.' (para 247). 'Concerning the risk of psychological harm to BB, the Tribunal is conscious that Ms McFadden finds her to be vulnerable to a suicide risk in the future, although she has no presentation of concern on any of the other clinical scales administered. Ms McFadden highlights the feelings of personal failure, including guilt, shame and blame, which BB carries with her owing to her commission of theft in New Zealand. Ms McFadden also highlights in her report that BB talked about handing over the custody of her daughter to her mother in order to protect CC from having to return to South Arica. She states that: "this thinking provides some insight to her motivations for staying in [New Zealand] and her perception of future harm and degree of anxiety that she is currently experiencing as a result of the current situation".' (para 249). 'Such vulnerabilities identified by Ms McFadden, will elevate the intensity of any adverse experiences for BB, including any episodes of harassment and discrimination she may face as a lesbian woman in the future, the impact of not feeling able to be open about her sexual orientation and relationship with AA, the ongoing need to protect her child from perceived harms, and the effect of processing media reports covering the mistreatment of LGBTI persons, in contrast to the freedoms she has experienced in New Zealand. BB will not be able to live close to her mother, who has provided her with practical and emotional support throughout her life. However, the lines of

			communication will remain open to them and BB will be returning to South Africa with her long-term partner, AA and her daughter CC. She will likely engage again in employment and share a home with her family there. The couple also share a group of friends and will have AA's family with whom they may enjoy ongoing social interactions and support. There are also members of BB's extended family in South Africa, albeit, it is accepted that they are not close.' (para 250). 'Having regard to BB's particular characteristics in the context of all the evidence and country sources, the Tribunal finds that the psychological harm she may experience over the course of her lifetime in South Africa falls short of the level of seriousness required to fall within the ambit of Article 7 of the ICCPR.' (para 251). 'CC may suffer some psychological effects from her parents living a more circumspect lifestyle to minimise their subjective fears of mistreatment as white, lesbian women in a relationship, and in order to feel more secure on account of the high crime rates generally in South Africa. CC may also experience some discrimination as a consequence of her association with her lesbian parents, and witness some hostility towards her parents given their sexual orientation and relationship status. As a child, CC will be less equipped to deal with stress than an adult, and the subjective concern of her parents about crime and personal safety will have a detrimental effect on her mental and emotional well-being. However, even having regard to CC's added vulnerability as a child with a developing

			personality and her state of immaturity in the face of such harms, the psychological effect on CC does not rise to the level of seriousness to constitute degrading treatment under Article 7 of the ICCPR. It can be anticipated that her parents will be able to provide the necessary level of support that she needs for her development and wellbeing. There are also other family members in South Africa to whom she is capable of developing bonds, including her grandparents ([AA's]), and other family members of AA. Such effects on CC will not rise to the level of serious harm.' (para 271). 'Concerning the matter of her education, put simply, the fact that she will not be able to attend a certain type of primary school through prohibitive cost is not an infringement on her right to education. Further, the fact that she may return to live in South Africa at a lower socio-economic level than she has in the past, but at a level where she still enjoys an adequate standard of living, is not an infringement of her right to a standard of living adequate for the child's physical, mental, spiritual, moral and social development.'' (para 272). 'As to cruel, inhuman or degrading treatment, it is important to bear in mind that such treatment still requires a person to suffer a level of harm not less than that required for recognition as a refugee. See, in this regard, the discussion in *AC (Syria)* [2011] NZIPT 800035 at [70]- [86], notably the reliance on *Taunoa v Attorney General* [2007] NZSC 70; [2008] 1 NZLR 429 (SC).' (para 281).

			'As *AC (Syria)* pointed out, the rights enshrined in Article 7 of the ICCPR are among those which are directly relevant to the assessment of "being persecuted" in the refugee context. Just as a need for serious harm has meant that the appellants are not at risk of "being persecuted", so too does it mean that they are not in danger of cruel, inhuman or degrading treatment or punishment if they return to South Africa.' (para 282). 'The evidence does not establish that there are substantial grounds for believing that the appellants are in danger of being subjected to arbitrary deprivation of life, or to cruel, inhuman or degrading treatment if deported from New Zealand.' (para 283).
CV (India) [2017] NZIPT 801058 (Unsuccessful)	16 January 2017	2-3, 61-62, 68-74, 81-84	This case concerned the application of the internal protection alternative in section 131(2) of the Immigration Act 2009 (relating to complementary protection cases). 'The appellants are husband and wife respectively and will be referred to as such for the purposes of the decision. The couple have a daughter, born in October 2016. She is not included in the appeal.'(para 2). 'The appellants claim to have a well-founded fear of being persecuted or otherwise being subjected to qualifying harm on account of their marriage, which was undertaken against the wishes of the wife's family. The principal issue for determination by the Tribunal is

			whether the appellants can avoid harm at the hands of the wife's family by living elsewhere in India.' (para 3). 'The Tribunal notes that the 2012 Legislative Assembly list does not record that BB is currently a member of the Punjab Legislative Assembly in any relevant constituency. This was accepted by the appellants who agreed that at the time they left India, BB had been mired in a corruption scandal. However, CC was still active at a municipal level. Nevertheless, the Tribunal accepts the submission by counsel that, whether or not these people are politically active, this does not alter the fact that the family is politically connected to the ruling *Bharatiya Janata Party* (BJP Party) and, by this means, may be able to influence the local police to take no action against them or otherwise render null the effect of the protection order the appellants have obtained. Such a proposition cannot be dismissed as implausible having regard to the country information before the Tribunal.' (para 61). 'While noting that the wife's family do not appear in the months preceding their departure from India to have taken any steps to make good their threats to harm them in the knowledge that their political connections would shield them from prosecution and punishment, the risk that they would seek to do so should the appellants return to their home city rises to the real chance level. The Tribunal therefore finds that the appellants do have a well-founded fear of being persecuted in the form of being arbitrarily deprived of their lives in breach of their rights under Article 6 of the ICCPR.'' (para 62).

			‘In this case the appellants’ problems have been localised to their home city. There is no impediment to them relocating to a large metropolitan area such as Mumbai in terms of its safety, practicality and legality. Indeed, the husband’s occupation as a tailor would mean that he will be able to secure employment across India generally.’ (para 68). ‘As for the risk of being persecuted in the proposed IPA site, counsel submits that, while the political reach of the wife’s family was perhaps more limited than that in *AV (India)*, nevertheless, her family remains politically connected to the ruling BJP party. Moreover, the risk to the appellants is of a more prosaic nature, namely, that it is inevitable that the husband’s mother would mention their whereabouts to friends of hers. No matter how discreet she intended to be, it was human nature to talk and that this would inevitably in the fullness of time find its way back to the wife’s relatives who lived in the neighbourhood. The appellants themselves stressed in their evidence that, because India is corrupt, it would be easy for her family to ascertain their whereabouts as a particular identity card is needed to access services and therefore her family will be able to readily access information as to their whereabouts.’ (para 69). ‘In the Tribunal’s view the risk to them in any IPA site is highly speculative. Clearly, the husband’s mother knows of the degree of animosity with which the wife’s family are approaching her own son and now her daughter-in-law. They will no doubt maintain a high

			level of discretion as to the information they impart.' (para 70). 'As for the leverage the wife's family could bring to bear on third parties to ascertain the couple's whereabouts, even accepting that her uncle is linked of the ruling BJP party in their home city, it appears limited. One of the people AA has acted for has been mired in a corruption scandal and has not been part of the Legislative Assembly for at least four years; the other is a municipal councillor. While the wife's family's status in the city means they may be able to influence the local police to turn a blind eye to the appellant's predicament, there is nothing to establish that her family are of sufficient status so as to be able to influence the police at the national level. Further, in the Tribunal's view, it is speculative that their influence is such that they would be able to track the appellants down using the police, identity cards or other administrative process no matter where they are living in India.' (para 71). 'Moreover, there is no indication that the wife's family have sought to leverage their political connections in the dispute to date to try and prevent the marriage or to prevent her from leaving the country, even though they were aware of her plans to do so.' (para 72). 'For these reasons the Tribunal finds that it has not been established that the appellants would be at risk of being persecuted in a proposed site of internal protection

			alternative such as Mumbai or any other significant urban centre outside the Punjab state.' (para 73). 'Nor are there any new risks of being subjected to serious harm arising for either of the appellant's in the proposed sites of internal protection. Furthermore, they will each be able to enjoy basic civil, political and socioeconomic rights.' (para 74). 'By virtue of section 131(5): "(a) treatment inherent in or incidental to lawful sanctions is not to be treated as arbitrary deprivation of life or cruel treatment, unless the sanctions are imposed in disregard of accepted international standards: (b) the impact on the person of the inability of a country to provide health or medical care, or health or medical care of a particular type or quality, is not to be treated as arbitrary deprivation of life or cruel treatment."' (para 81). 'For the reasons set out above at [60]-[62], the Tribunal finds that, should the appellants be returned to their home city, there is a risk that they would be arbitrarily deprived of their life by the wife's family in breach of their rights under Article 6 of the ICCPR. For the reasons given above, there is a risk that the political connections of her family have will be leveraged so as to reduce the effectiveness of the protection order they obtained from the High Court. Against this background, the Tribunal cannot be satisfied that the level of state protection available to them in their home city would be

			such as to reduce the risk of them being arbitrarily deprived of their life to below the 'in danger of' standard.' (para 82). 'This, however, is not the end of the inquiry The Immigration Act 2009 requires the Tribunal to consider whether or not the appellants are able to access meaningful protection in their country of nationality: see section 131(2). The application of this requirement was considered in detail in *AC (Russia)* [2012] NZIPT 800151. After considering the matter the Tribunal concluded: [110] In order for the statutory test under section 131(2) to be satisfied it must be established that: (a) The proposed site of internal protection is accessible to the individual. This requires that the access be practical, safe and legal; (b) In the proposed site of internal protection there are no substantial grounds for believing that the appellant be will arbitrarily deprived of life or suffer cruel, inhuman or degrading treatment or punishment; (c) In the proposed site of internal protection there are no new risks of being exposed to other forms of serious harm or of *refoulement*; and (d) In the proposed site of internal protection basic civil, political and socio-economic rights will be provided by the State.' (para 83).

			‘This question of the appellants having access to meaningful domestic protection has been substantially addressed in relation to their claims for refugee status. For the reasons given there, the Tribunal is satisfied that the appellants can access meaningful domestic protection for the purposes of section 131(2). Neither of the appellants is therefore entitled to be recognised as protected persons under section 131 of the Act.’ (para 84).