

The emerging New Zealand jurisprudence on climate change, disasters and displacement

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Abstract

In mid-2014, there was global media coverage of a decision by the New Zealand Immigration and Protection Tribunal, heralded as the first legal recognition of ‘climate change refugees’. Despite the hype, the Tribunal had made no such finding. The case concerned a family of four from the small Pacific island State of Tuvalu, who argued, among other things, that the effects of climate change—in particular, a lack of fresh drinking water and sea-level rise—would have adverse impacts on them if they were forced to return home. While the Tribunal ultimately permitted them to stay in New Zealand, this was not because of the impacts of climate change in Tuvalu, but rather because of their strong family ties within New Zealand. The decision was based purely on humanitarian and discretionary grounds, not on any domestic or international legal obligation.

However, since 2013, New Zealand has started to specifically and systematically delineate the legal protection framework applicable to claims based on the impacts of climate change, natural disasters or environmental degradation. While no one has yet been granted protection on these grounds, New Zealand’s jurisprudence provides the most comprehensive analysis by decision-makers to date about the scope and content of protection for people escaping the impacts of climate change and disasters. Using the recent Tuvaluan case as a starting point, this article examines the development of New Zealand’s case law and its implications for other jurisdictions.

Keywords: refugees, protection, international law, migration, climate change, displacement

1. Introduction

In mid-2014, there was global media coverage of a decision by the New Zealand Immigration and Protection Tribunal,¹ heralded as the first legal recognition of ‘climate change refugees’ (Noack 2014; Aulakh 2014; Ewart and Curtis 2014; Weiss 2015). Despite the hype, the Tribunal had made no such finding. The case concerned a family of four from the small

doi:10.1093/migration/mnu055

Pacific island State of Tuvalu, who argued, among other things, that the effects of climate change—in particular, a lack of fresh drinking water and sea-level rise—would have adverse impacts on them if they were forced to return home. While the Tribunal ultimately permitted them to stay in New Zealand, this was not because of the impacts of climate change in Tuvalu, but rather because of their strong family ties within New Zealand. The decision was based purely on humanitarian and discretionary grounds, not on any domestic or international legal obligation. In fact, the Tribunal expressly held that the family in this case was *not* entitled to protection under refugee law or human rights law (*AC (Tuvalu)*).

The case was also not the first of its kind. Both Australian and New Zealand authorities had considered a number of similar cases going back at least as far as 1995.² However, since 2013, New Zealand has started to specifically and systematically delineate the legal protection framework applicable to claims based on the impacts of climate change, natural disasters or environmental degradation. While no one has yet been granted protection on these grounds, New Zealand's jurisprudence provides the most comprehensive analysis by decision-makers to date about the scope and content of protection for people escaping the impacts of climate change and disasters.

In 2013, almost three times as many people were newly displaced by disasters than by conflict (Internal Displacement Monitoring Centre (IDMC) 2014: 7). Some 22 million people were displaced in at least 119 countries, mostly by rapid-onset weather-related disasters (IDMC 2014: 7, 9). The vast majority of displacement occurred within developing countries—97 per cent between 2008 and 2013—and almost 81 per cent was within Asia (IDMC 2014: 9). Small island States were disproportionately affected relative to their population size, 'because when a hazard strikes it can severely affect a very high proportion of their inhabitants' (IDMC 2014: 9).

The UN Emergency Relief Coordinator has observed that more frequent and severe disasters may be 'the new normal' (Holmes 2008). An increase in the frequency and intensity of disasters and extreme weather events is consistent with climate change, which means that without interventions, we are likely to see even more displacement in the future (Ferris 2014). Climate change will also have slower-onset and longer-term impacts, such as desertification, drought, increased temperatures and sea-level rise, that may jeopardize the ongoing habitability of particular parts of the world.

It is important to emphasize, however, that displacement or migration in response to such effects is not attributable to climate change or disasters alone. Rather, these act as 'tipping points' when a community's or individual's adaptive capacity is reached. Climate change and disasters exacerbate existing economic, social and political pressures. This is why already vulnerable communities are the ones most at risk.

Moving away from anticipated or actual harm is a rational adaptation response. However, the extent to which movement is facilitated, or blocked, will depend on legal and policy developments at the national, regional and international levels. At present, current legal frameworks do not easily accommodate cross-border movement in this context.³

The lack of dedicated migration pathways for people in such circumstances means that some people have sought to use international protection frameworks—based on refugee and human rights law—to remain in New Zealand or Australia. Using the recent Tuvaluan

case as a starting point, this article examines the development of New Zealand's case law and its implications for other jurisdictions.

2. The Tuvaluan case

The case concerned a family of four from Tuvalu: a husband and wife in their early thirties, and their small children, aged five and three. The family claimed that they were refugees, or, in the alternative, that there were substantial grounds for believing that they would be in danger of being arbitrarily deprived of their lives or in danger of being subjected to cruel treatment if returned to Tuvalu. They based their claim on the fact that they had no land available to them in Tuvalu; that the father would have difficulties finding a job as a teacher in Tuvalu and might not be able to support his family; and that the effects of climate change—in particular, a lack of fresh drinking water and sea-level rise—would have adverse impacts on them, especially the children.

The central issue was whether the government of Tuvalu could be said to be failing to take steps within its power to protect the family from the effects of climate change such that their lives could be said to be 'in danger', and whether or not the harm they feared amounted to ill-treatment.

New Zealand's Immigration Act 2009 reflects certain protection obligations under international law by providing that a person may receive protection as 'a refugee within the meaning of the Refugee Convention' (Immigration Act: s. 129(1)) or 'under the [International] 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' (Immigration Act: s. 131(1)). 'Cruel treatment' is defined for the purposes of the section as 'cruel, inhuman, or degrading treatment or punishment' (Immigration Act: s. 131(6)).

3. Refugee claim

On the day of the hearing, the Tuvaluan family abandoned the claim that they were refugees. In light of the Tribunal's findings in *AF (Kiribati)*,⁴ they acknowledged that 'there was no basis upon which [they] could be recognised as refugees' (*AC (Tuvalu)*: para. 45). Whatever harm the family might face in Tuvalu due to the anticipated adverse effects of climate change, it did not arise by virtue of one of the factors stated in the Refugee Convention.

Under article 1A(2) of the 1951 Refugee Convention (read with the 1967 Protocol), a refugee is someone with a

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.

As previous applicants had already found, there are a number of difficulties in applying refugee law to the present context. First, refugees must show that they fear ‘persecution’. This entails violations of human rights that are particularly egregious owing to their inherent nature or cumulative impact, and which derive from human actions. In *AF (Kiribati)*, the Tribunal recognized that natural disasters and environmental degradation could involve significant human rights issues, especially where the State abdicates its duty to protect people against known risks (*AF (Kiribati)*: para. 63, referring to *Oneryildiz* and *Budayeva*; UN Committee on Economic, Social and Cultural Rights 1999, 2000). But while the adverse impacts of climate change and disasters are harmful, they generally do not satisfy the concept of ‘persecution’ as this is currently understood in international and domestic law.

Secondly, even if it were possible to establish that the impacts of climate change and natural disasters amounted to persecution, the Refugee Convention poses an additional hurdle: persecution must be *for reasons of* an individual’s race, religion, nationality, political opinion, or membership of a particular social group. The impacts of climate change and natural disasters are largely indiscriminate, rather than tied to particular characteristics. Someone fleeing the indiscriminate effects of a natural disaster would not be eligible for protection, because of the absence of a link to a Convention ground (*AF (Kiribati)*: para. 56; *Teitiota* 2013: para. 54; *Teitiota* 2014: para. 19).

Thirdly, any attempt to argue that the ‘persecutor’ here was the international community, on account of its failure to reduce greenhouse gas emissions, was an attempt ‘to stand the Convention on its head’ (*Teitiota* 2014: para. 40). Drawing tacitly on the present author’s analysis (McAdam 2012: 45),⁵ the New Zealand High Court said that this completely reverses the traditional refugee paradigm. Traditionally, a refugee

is fleeing his own government or a non-state actor from whom the government is unwilling or unable to protect him. Thus the claimant is seeking refuge within the very countries that are allegedly ‘persecuting’ him. (*Teitiota* 2013: para. 55).

Fourthly, in the cases considered in New Zealand so far, evidence has been adduced that each of the countries of origin (Kiribati and Tuvalu) is doing whatever it can to mitigate the impacts of climate change and disasters. However, the Tribunal has noted that if State protection were lacking (and the other elements of the refugee definition were also satisfied), then protection could potentially be forthcoming. For instance, a decade ago, the Tribunal’s predecessor body noted that ‘the right to life (Article 6 ICCPR) in conjunction with the right to adequate food (Article 11 ICESCR) should permit a finding of “being persecuted” where an individual faces a real risk of starvation’ (*Refugee Appeal No 74665*: para. 89). If a government were to restrict access to fresh water supplies or agricultural land, or to humanitarian assistance in the aftermath of a disaster, for a Convention reason, then the refugee definition might be satisfied (*AF (Kiribati)*: paras 58–9). However, in such cases, it would be the act or omission by government that constituted the harm, rather than the disaster or resource scarcity itself.

Finally, the Tribunal has noted that a person might have a Convention refugee claim arising from ‘secondary’ threats and human rights issues associated with displacement linked to a disaster (*AF (Kiribati)*)—for instance, ‘increases in gender-based violence in temporary shelters, discrimination in assistance and solutions, shortcomings in evacuation procedures, etc.’ (Ferris 2014).

4. Human rights claims

International human rights law has expanded States' protection obligations beyond the 'refugee' category to include people at risk of arbitrary deprivation of life, torture, or cruel, inhuman or degrading treatment or punishment. This is known generically as 'complementary protection' because it describes protection that is complementary to that provided by the Refugee Convention. These protections derive from the International Covenant on Civil and Political Rights (ICCPR) and the Convention against Torture (CAT), and are also reflected in the European Convention on Human Rights (ECHR).

It is possible that conditions in a disaster-affected area, or an area rendered uninhabitable by the impacts of climate change, may mean that returning someone there would expose them to a real risk of death or cruel, inhuman or degrading treatment. This is especially so when the conditions are considered cumulatively (for example, if the area is disaster-prone, there are extreme water shortages, crops can no longer grow, and there is a heightened risk of illness).

4.1 Protection from arbitrary deprivation of life

The Tribunal has recognized in principle that natural or man-made disasters, including those linked to climate change, could 'provide a context in which a claim for recognition as a protected person' might be established (*AC (Tuvalu)*: para. 70). This is because under international human rights law, States have an obligation to protect people in the context of natural disasters, including the right to life. As such, 'the prohibition on arbitrary deprivation of life must take into account the positive obligation on the state to fulfil the right to life by taking programmatic steps to provide for the basic necessities for life' (*AF (Kiribati)*: para. 87, drawing on jurisprudence of the European Court of Human Rights and academic commentary).

However, the Tribunal has drawn a distinction between man-made and natural hazards, since a State has less control over the latter:

The disasters that occur in Tuvalu derive from vulnerability of natural hazards such as droughts and hurricanes, and inundation due to sea-level rise and storm surges. The content of Tuvalu's positive obligations to take steps to protect the life of persons within its jurisdiction from such hazards must necessarily be shaped by this reality. (*AC (Tuvalu)*: para. 75).

Accordingly, a State would be faced with 'an impossible burden' were it required as a matter of law to mitigate the underlying environmental drivers of these hazards (*AC (Tuvalu)*: para. 75).

In the Tuvaluan case, although the Tribunal accepted that life for the applicants would be more challenging in Tuvalu than in New Zealand, there was insufficient evidence to establish that their lives in Tuvalu would be so precarious as a result of any act or omission by the government of Tuvalu that they would be danger of being arbitrarily deprived of their lives. There was also no evidence that the government was failing to take steps within its power to protect people from known environmental hazards. As such, their claim failed on this ground.

4.2 Cruel, inhuman or degrading treatment

The Tribunal also dismissed the argument that the family would be exposed to cruel, inhuman or degrading treatment in Tuvalu. There was no evidence that the family belonged to a section of the Tuvaluan population against which the government of Tuvalu had implemented discriminatory policy measures or had failed to discharge positive obligations, and nor was there any basis for finding that such a risk might arise in the future. The Tribunal observed that the Tuvaluan government was actively taking steps to meet the challenges caused by natural disasters and the adverse impacts of climate change. Accordingly, there was no basis for holding that the family was at risk of being subjected to cruel, inhuman or degrading treatment by the government (*AC (Tuvalu)*: paras 109, 113–14).

Previous New Zealand cases have established that in order to be protected from removal on the basis of cruel, inhuman or degrading treatment, there must be a ‘treatment’—an act or omission (committed or tolerated) by the State (see *BG (Fiji)*). Thus, general poverty or difficult socio-economic conditions alone will not suffice, nor will the fact that a State lacks the capacity to respond to a natural disaster (*BG (Fiji)*: para. 84). However, if a State were to arbitrarily deny access to available humanitarian relief, for example, or to arbitrarily withhold its consent for necessary foreign humanitarian assistance, then this could conceivably constitute ‘treatment’ (*AC (Tuvalu)*: paras 84–6, 97). Of course, the applicant would need to show that

there is a prospective risk of such treatment occurring to such a degree that extends beyond mere speculation or surmise . . . [and] as in any other case, the appellant must produce sufficient and compelling information and evidence to establish that a danger of such treatment exists at the time of determination. (*AC (Tuvalu)*: para. 98)

The Tribunal has confined the meaning of ‘treatment’ to treatment within the receiving State, not the act of removal itself.⁶ By contrast, the European Court of Human Rights has held that in exceptional circumstances, the act of removal may constitute the qualifying ‘treatment’ where intense pain or suffering resulting from illness or disease is a foreseeable consequence of removal (see *BG (Fiji)*: para. 181, referring to *D v. United Kingdom*). The New Zealand approach is based on a literal reading of the text of section 131 of the Immigration Act, which requires the decision-maker to assess the risk of harm if the person is removed from New Zealand (*BG (Fiji)*: para. 188). This is an important contextual factor to bear in mind when considering the relevance of this jurisprudence in other jurisdictions (*BG (Fiji)*: para. 197).

4.3 The best interests of the child

In international law, the best interests of the child must be a primary consideration in any decision concerning them (UN Convention on the Rights of the Child: art. 3). In the Tuvaluan case, the Tribunal accepted and acknowledged that, by reason of their young age, the two children were inherently more vulnerable to the adverse impacts of natural disasters and climate change than their parents. Nevertheless, the evidence established that the government of Tuvalu was sensitive to the specific vulnerabilities of children, and as

such, they were not in danger of being arbitrarily deprived of their lives or subjected to cruel, inhuman or degrading treatment if returned to Tuvalu (*AC (Tuvalu)*: paras 115–19).

4.4 Humanitarian claim

In the end, the Tribunal allowed the Tuvaluan family to remain in New Zealand on humanitarian grounds. This was because the husband's mother, five sisters and their families were all living in New Zealand as citizens or permanent residents, and they shared a close connection. Culturally, as the only son, he was expected to look after his mother and she was now integrated into his family. The children had never been to Tuvalu and were part of an extended family network in New Zealand.

The Tribunal's decision to let the family stay in New Zealand as permanent residents was not based on the impacts of climate change in Tuvalu. Indeed, the Tribunal deliberately refrained from making a finding on this point. It did not need to do so because there were other exceptional humanitarian circumstances—namely, strong family ties—that justified granting them resident visas.

As noted at the outset of this article, this was a wholly discretionary decision, not one based on any legal obligation. As such, it does not have precedential weight—in contrast to the findings on the refugee and human rights claims. It is also important to be mindful of the legislative framework in New Zealand that permitted the Tribunal to grant a visa on humanitarian grounds. Not all jurisdictions empower tribunals to do this.

Nevertheless, the Tribunal did make the following observations. First, it accepted that 'exposure to the impacts of natural disasters can, in general terms, be a humanitarian circumstance', that in the right factual matrix could make it unjust or unduly harsh to remove a particular individual (*AD (Tuvalu)*: para. 27).

Secondly, it recognized that Tuvalu was particularly vulnerable to the adverse impacts of climate change and environmental degradation, including 'coastal erosion, flooding and inundation, increasing salinity of fresh ground-water supplies, destruction of primary sources of subsistence, and destruction of personal and community property' (*AD (Tuvalu)*: para. 29).

Thirdly, it acknowledged that the children's young age made them 'inherently more vulnerable to natural disasters and the adverse impact of climate change' (*AD (Tuvalu)*: para. 25).

5. Developing a protection framework for climate change and disasters

The New Zealand cases are the first to delineate deliberately the protection framework applicable to claims based on the impacts of climate change, natural disasters or environmental degradation. Drawing extensively on international jurisprudence and expert commentary, they show the capacity of existing law to respond, but also reveal where the limits lie. The cases have identified a number of significant issues.

First, the Tribunal has accepted in principle that environmental degradation, whether associated with climate change or not, may in certain circumstances trigger a State's protection obligations under the Refugee Convention or human rights law (*AF (Kiribati)*: paras 55, 57). The Tribunal has been at pains to emphasize the necessity of examining the individual circumstances of each case, rather than making general assumptions about the applicability or otherwise of the Refugee Convention and human rights treaties.⁷

In the cases considered to date, however, there has been insufficient evidence to establish that the environmental conditions likely to be faced by the applicants on return to their countries of origin would be 'so parlous that [their] life [would] be placed in jeopardy, or that [they would] not be able to resume their prior subsistence life with dignity' if returned (*AF (Kiribati)*: para. 74).

Secondly, inherent in certain human rights—such as the rights to life, health, and adequate food—is a requirement that States take positive steps to realize them, including in areas known to be at risk of disasters. The existence of such duties may give rise to a protection need in certain circumstances, such as if the State denies humanitarian relief on a discriminatory basis (see *BG (Fiji)*: para. 84; and discussion of the International Law Commission's Draft Articles on the Protection of Persons in the Event of Disasters in *AC (Tuvalu)*: paras 91–8).

Thirdly, as I have discussed elsewhere, the timing of a claim matters (McAdam 2012: 84–7). This is because harm needs to be relatively imminent for a protection claim to be made out, and the impacts of slow-onset climate change processes may take some time before they can be characterized in this way. The Tribunal has indicated that the imminence requirement means only that there is 'sufficient evidence to establish substantial grounds for believing the appellant would be in danger' (*AF (Kiribati)*: para. 90) and in that sense is akin to the 'well-founded fear' test in refugee law. This would seem appropriate, especially since any refugee determination is necessarily an 'essay in hypothesis, an attempt to prophesy what might happen to the applicant in the future, if returned to his or her country of origin' (Goodwin-Gill and McAdam 2007: 54). But in the cases considered by New Zealand authorities to date, the risk to life from sea-level rise and natural disasters—at this point in time—has been considered to fall 'well short of the threshold required to establish substantial grounds for believing that they would be in danger of arbitrary deprivation of life', and 'remains firmly in the realm of conjecture or surmise' (*AF (Kiribati)*: para. 91).

Fourthly, context is everything. As the Tribunal has made plain on several occasions, its interpretation of certain concepts, such as the meaning of 'treatment', is restricted by the text of the domestic legislation. Likewise, it has construed the potential scope of articles 6 and 7 of the ICCPR—including in relation to the meaning of 'treatment'—more narrowly than it might have done, because the Act itself contains a residual humanitarian discretion to enable a person to remain if compelling or compassionate circumstances exist. In another jurisdiction, the absence of such a provision might influence a decision-maker to interpret the scope of articles 6 and 7 more liberally.

In conclusion, the New Zealand cases highlight the limits of existing international protection frameworks to address the impacts of disasters and climate change, and the need for other legal and policy responses to fill the gap. Without special humanitarian or migration pathways, people affected by the longer-term impacts of climate change and disasters may be stuck. This is why States need to work proactively towards creating a toolkit of mobility

responses, alongside mitigation, adaptation and development strategies. It is also why the work of initiatives such as the intergovernmental Nansen Initiative on Disaster-Induced Cross-Border Displacement are so important.⁸

Funding

This work was supported by the Australian Research Council.

Acknowledgements

Conflict of interest statement. None declared.

Notes

1. The case was examined in two related decisions: *AD (Tuvalu)* [2014] NZIPT 501370 (humanitarian claim); *AC (Tuvalu)* [2014] NZIPT 800517–520 (refugee and human rights claims).
2. New Zealand cases: *AD (Tuvalu)* [2014] NZIPT 501370; *AC (Tuvalu)* [2014] NZIPT 800517–520; *Teitiota v. The Chief Executive of the Ministry of Business Innovation and Employment* [2013] NZHC 3125 (Kiribati); *Teitiota v. The Chief Executive of the Ministry of Business, Innovation and Employment* [2014] NZCA 173 (Kiribati); *AF (Kiribati)* [2013] NZIPT 800413; *Refugee Appeal No 72719/2001*, RSAA (17 September 2001) (Tuvalu); *Refugee Appeal No 72313/2000*, RSAA (19 October 2000) (Tuvalu); *Refugee Appeal No 72314/2000*, RSAA (19 October 2000) (Tuvalu); *Refugee Appeal No 72315/2000*, RSAA (19 October 2000) (Tuvalu); *Refugee Appeal No 72316/2000*, RSAA (19 October 2000) (Tuvalu); *Refugee Appeal Nos 72179–72181/2000*, RSAA (31 August 2000) (Tuvalu); *Refugee Appeal Nos 72189–72195/2000*, RSAA (17 August 2000) (Tuvalu); *Refugee Appeal No 72185/2000*, RSAA (10 August 2000) (Tuvalu); *Refugee Appeal No 72186/2000*, RSAA (10 August 2000) (Tuvalu). Australian cases: *1004726* [2010] RRTA 845 (30 September 2010) (Tonga); *0907346* [2009] RRTA 1168 (10 December 2009) (Kiribati); *N00/34089* [2000] RRTA 1052 (17 November 2000) (Tuvalu); *N95/09386* [1996] RRTA 3191 (7 November 1996) (Tuvalu); *N96/10806* [1996] RRTA 3195 (7 November 1996) (Tuvalu); *N99/30231* [2000] RRTA 17 (10 January 2000) (Tuvalu); *V94/02840* [1995] RRTA 2383 (23 October 1995) (Tuvalu).
3. For a detailed overview, see McAdam 2012.
4. The case of *AF (Kiribati)* concerned Mr Teitiota, who claimed protection as a result of changes to the environment in Kiribati caused by sea-level rise associated with climate change. After a hearing in the High Court (*Teitiota* 2013), his case ultimately reached the New Zealand Court of Appeal (*Teitiota* 2014), without success. Most of the discussion here relates to the Tribunal's findings, rather than the judgments of the High Court or Court of Appeal, since the judges deferred largely to the Tribunal's

- 'admirably well structured, carefully reasoned and comprehensive decision' (*Teitiota* 2014: para. 7).
5. 'One might argue that the "persecutor" in such a case is the "international community", and industrialized countries in particular, whose failure to reduce greenhouse gas emissions has resulted in the predicament now confronting them. These are the very countries to which movement might be sought if the land becomes unsustainable. This delinking of the actor of persecution from the territory from which flight occurs is a complete reversal of the traditional refugee paradigm: whereas Convention refugees flee their own government (or private actors that the government is unable or unwilling to protect them from), a person fleeing the effects of climate change is not escaping his or her government, but rather is seeking refuge from—yet within—countries that have contributed to climate change.' (McAdam 2012: 45 (fns omitted))
 6. This is in deliberate contrast to the approach of the European Court of Human Rights in cases such as *D v. United Kingdom* and *Sufi and Elmi v. United Kingdom*.
 7. 'While in many cases the effects of environmental change and natural disasters will not bring affected persons within the scope of the Refugee Convention, no hard and fast rules or presumptions of non-applicability exist. Care must be taken to examine the particular features of the case' (*AF (Kiribati)*: para. 64).
 8. The Nansen Initiative is a State-led, bottom-up consultative process, initiated by the Norwegian and Swiss governments, that aims 'to build consensus on the development of a protection agenda addressing the needs of people displaced across international borders by natural disasters, including the effects of climate change' (Nansen Initiative 2013: 1).

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