

AT AUCKLAND

Appellants:

AD (Tuvalu)

Before:

B L Burson (Member)

Counsel for the Appellants:

C Curtis

Date of Decision:

4 June 2014

DECISION

INTRODUCTION

[1] These are humanitarian appeals by the appellants, citizens of Tuvalu, under section 194(5) and (6) and 195(6) and (7) of the Immigration Act 2009 (“the Act”) against liability for deportation on the ground of being unlawfully in New Zealand. The decision needs to be read in conjunction with the contemporaneously issued decision of the Tribunal in respect of the refugee and protected person claims lodged by the appellants; see *AC (Tuvalu)* [2014] NZIPT 800517-520.

[2] The appellants claim that if deported to Tuvalu they will be separated from the husband’s family, all of whom are living in New Zealand as either citizens or residents, and with whom they have particularly close bonds. The appellants also claim that they will be at risk of suffering the adverse impacts of climate change and socio-economic deprivation. The primary issue for determination is whether these factors, either alone or in combination, amount to exceptional circumstances of a humanitarian nature. For the reasons which follow, the Tribunal is satisfied that this is the case and that it would not be contrary to the public interest to allow the appellants to remain in New Zealand. They, and their two children, are each to be granted residence visas.

BACKGROUND

[3] The appellant in NZIPT [2014] 501370 is the husband of the appellant in NZIPT [2014] 501371. They will be referred to as “the husband” and “the wife” respectively. They have two children who were born in New Zealand in mid-2008 and late 2011 and are five and three years old respectively. The two children are included in the father’s humanitarian appeal.

[4] The husband and wife are both aged in their early 30s. They are nationals of Tuvalu. The appellants arrived in New Zealand in late 2007 together with the husband’s mother as the holders of visitor visas. In 2008, the husband was offered employment working as a maintenance manager at a fast-food restaurant and made an application for a work permit. This application was unsuccessful. Despite the existence of another potentially viable pathway to residence under then immigration instructions, acting under the advice of an immigration agent, the husband instead lodged an application under the Pacific Access Category even though he was not eligible to do so as he had become unlawful in New Zealand in February 2009. Therefore, although his application was selected in a ballot which took place in mid-June 2009, it could not be pursued.

[5] The husband then attempted to regularise his immigration status by way of the issue of a work permit but this was unsuccessful. Instead, in October 2010, he was granted a three-month visitor permit to allow him to pursue registration as a teacher. This did not happen and, in February 2011 he became unlawful in New Zealand for a second time. A further application by him to be issued with an interim visa to allow him to remain in New Zealand to apply for a residence class visa on the basis he was the last remaining sibling in Tuvalu was rejected by Immigration New Zealand in June 2011. The immigration officer noted that while the husband may well have a pathway towards a New Zealand residence class visa, given that the process might be a lengthy one, it was not appropriate to grant a visa to allow him to remain in New Zealand while that application was assessed.

[6] The appellants and their two children lodged claims for refugee and protected person status in November 2012. By decision dated 27 March 2013, their claims were dismissed by the Refugee Status Branch and by decision dated 4 June 2014 the Tribunal has dismissed their appeals from that decision.

THE APPELLANTS' CASE

[7] The husband's humanitarian appeal is based, in part, on the same grounds as his claim to be recognised as a protected person. Additionally, he claims that he will be separated from his five sisters and their families, all of whom reside in New Zealand, and from his mother who is also a New Zealand resident and to whom he is particularly close.

Evidence of the Appellants

[8] The husband and wife lived in Tuvalu until 2007. The husband obtained a teaching qualification and taught at various primary schools on different islands in Tuvalu between 1999 and 2007. The wife completed her schooling and, in approximately 2000, obtained work as a pre-school teacher-aid in her home island. However, this finished after two years when the pre-school closed due to a lack of funding.

[9] Life became increasingly more difficult in Tuvalu due to the effects of climate change and overpopulation. The husband's home island of X became increasingly more vulnerable to inundation by sea-water as a result of sea-level rise. Whereas, he recalled that, as a small child, the land was only inundated by storm surges during the hurricane season, now land on both the lagoon and seaward sides of the island was inundated with sea-water regularly during monthly king-tides. This resulted in coastal erosion. Trees died and it became progressively more difficult to grow crops. Similar problems affected the wife's home island.

[10] The husband and wife met when he came to teach on her home island. She had returned there after a period of time in Z, where she had stayed with her mother to attend high-school. The wife and her mother had to leave Z when the house they were staying in became overcrowded.

[11] While teaching in islands other than his home island, the husband and wife stayed in accommodation rented from the government. This was generally of a more solid construction and had better facilities than the husband and wife's family dwellings on their home islands. Following the death of the husband's father in 2001, the owner of the land on which their family dwelling stood, told the husband that his family could no longer live there.

[12] The couple wished to start a family. However, two babies died at advanced stages of pregnancy. The appellants attribute this to the lack of the full range of medical services that were available in Tuvalu. Concerned about the future and the life any children they had would have in Tuvalu, in 2007 the husband and wife travelled to New Zealand accompanied by the husband's mother.

[13] Over time, all but one of the husband's six sisters have migrated to New Zealand and have obtained New Zealand residence or citizenship. These sisters have their own families here and the siblings and their families share a close relationship. Culturally, as the only son, the husband is the one who is required to look after his mother. She has health issues and the husband is responsible for taking her to the doctor and hospital as required. The wife is now integrated into the husband's family.

Material and Submissions Received

[14] On 31 May 2013, the Tribunal received submissions from the appellants' former representative in support of the humanitarian appeal. It was submitted that the appellants would be deprived of their ability to have "a safe and fulfilling life" if forced back to Tuvalu because of the effects of climate change. Attached to those submissions were:

- (a) Selected excerpts from *Concluding Observations of the Committee on the Elimination of Discrimination Against Women: Tuvalu* (7 August 2009);
- (b) Two selected excerpts from national report submitted by the Government of Tuvalu to Human Rights Council for the Universal Periodic Review (12 September 2008);
- (c) Press statement by United Nations Special Rapporteur on the human right to safe drinking water and sanitation (19 July 2012);
- (d) United States Department of Labour Bureau of International Labour *2011 Findings on the Worst Forms of Child Labour – Tuvalu* (26 September 2012);
- (e) Various other excerpts from reports as set out in appeal submissions; and

- (f) Bundle of photographs showing effects of water inundation on Z, people sleeping on the runway due to overcrowding and other aspects of life in Z.

[15] On 1 October 2013, the Tribunal received from counsel now representing the appellants, documents relating to the eldest child who now attends primary school. The early reports confirm he has “become fully integrated” and made some “great relationships” with his peers in class.

[16] On 1 April 2014, the Tribunal received a further bundle of information relating to the situation in Tuvalu and also further certificates, worksheets and other certificates issued by the eldest child’s school, together with a championship certificate issued by his local athletics club of which he is a member.

STATUTORY GROUND OF APPEAL

[17] The grounds for determining a humanitarian appeal are set out in section 207 of the Act:

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

[18] The Supreme Court stated that three ingredients had to be established in the first limb of section 47(3) of the former Act, the almost identical predecessor to section 207(1): (i) exceptional circumstances; (ii) of a humanitarian nature; (iii) that would make it unjust or unduly harsh for the person to be removed from New Zealand. The circumstances “must be well outside the normal run of circumstances” and while they do not need to be unique or very rare, they do have to be “truly an exception rather than the rule”, *Ye v Minister of Immigration* [2009] NZSC 76, [2010] 1 NZLR 104 at [34].

ASSESSMENT

The Presence of the Husband's Family in New Zealand

[19] Letters in support have been filed by the husband's mother and four of his sisters. In her letter, the husband's mother states that of her seven children all but one live in New Zealand. The remaining child, a daughter, lives in Fiji. She herself has been living in New Zealand for over six years. The husband's mother confirms that she has been living with the appellants ever since their arrival from Tuvalu. She relies entirely on the husband as the only son in the family for her needs. Whenever a situation affects her he is the one who has to assist. She has hip and knee pain which impacts upon her mobility. The husband assists her to the car, takes her to the doctor and to church. She regards the wife as her own daughter and is very close to her. She interacts daily with the appellant children and is "deeply saddened" by the thought of the appellants having to leave New Zealand.

[20] The letters that have been filed from the husband's sisters confirm that they all enjoy a close relationship with the appellants. One of the sisters resides in the same city and they are enjoying family life together. The other sisters live in different parts of the country. One of these sisters confirms that the removal of the husband would affect her own children because he is their only maternal uncle and that her children are close to the appellant children. The appellants' deportation would affect her and her sisters because, as the only brother, they rely on him culturally, physically, emotionally and spiritually. She speaks to the appellants daily and visits every summer, when they enjoy doing things together as a family.

Wider Integration into their Community

[21] In support of an application made to Immigration New Zealand for a visa to allow him to remain in New Zealand, a letter dated 16 February 2012 was filed from the reverend of the Tuvalu Christian church, a copy of which is on the Immigration New Zealand file. The reverend speaks highly of the husband's personal attributes, and confirms that he is an active member of the congregation and is a "dedicated member" of the church choir and in youth fellowships.

[22] It is also clear from the letters that have been filed that the eldest child has to some extent become integrated into the New Zealand school system. Although he is only young it appears he is settling well into school life in New Zealand.

The Best Interest of the Children Appellants

[23] As already noted the two children are aged five and three years. As an action affecting them, the Tribunal is required under Article 3 of the 1989 United Nations Convention on the Rights of the Child to have regard to their best interests when considering the question of their removal from New Zealand and to make this a primary consideration in its assessment.

[24] Although not New Zealand citizens, both children were born in New Zealand and have never been to Tuvalu. Life in New Zealand as part of an extended family network is the only life they have known. The eldest of the children has commenced schooling in New Zealand, albeit at new-entrant level.

[25] Also, their young age makes them inherently more vulnerable to natural disasters and the adverse impact of climate change as noted above.

[26] In light of these matters, the best interests of the children clearly are to remain living with their parents in New Zealand as part of an extended family group.

Climate Change and Environmental Degradation as a Humanitarian Circumstance

[27] Much has been made in the submissions of the vulnerability of the appellants, as citizens of Tuvalu, to the adverse impacts of climate change as a humanitarian factor in this case. That exposure to the impacts of natural disasters can, in general terms, constitute a circumstance of a humanitarian nature is something which is reflected in state practice. Although expressed in different ways and conferring different forms of relief, a number of states have policies in place to provide for temporary protection in this regard. For a comprehensive summary see Jane McAdam *Climate Change, Forced Migration, and International Law* (Oxford University Press, Oxford, 2012) at pp100-115. See also Walter Kälin and Nina Schrepfer *Protecting People Crossing Borders in the Context of Climate Change: Normative Gaps and Possible Approaches*, UNHCR Legal and Protection Policy Research Series (February 2012), at pp45-46.

[28] The current and future impacts of climate change on human systems and well-being has been expressly acknowledged in the recent report of the Intergovernmental Panel on Climate Change Working Group Two *Climate Change 2014: Impacts, Adaptation, And Vulnerability – Summary for Policymakers* (IPCC,

Bonn, 2014) at p7. It is also widely accepted that the impacts of climate change can adversely affect the enjoyment of basic human rights. That such impacts may affect enjoyment of human rights was expressly acknowledged in *AF (Kiribati)* [2013] NZIPT 800413 at [63].

[29] In the refugee and protection decision in relation to these appeals, the Tribunal considered in detail the exposure of the Tuvaluan population to natural hazards generally, and in the context of climate change. It noted that Tuvalu, as a country comprising low-lying topical islands was “no stranger to natural disasters” and is particularly vulnerable to the adverse impacts of climate change. Environmental degradation caused or exacerbated by climate change was already a feature of life in Tuvalu; see [14]-[18]. These impacts included 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. As for future vulnerabilities, the Tribunal noted, at [16]:

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

Conclusion on Exceptional Circumstances of a Humanitarian Nature

[30] The Tribunal is satisfied that, when the above matters are taken into account on a cumulative basis, there are exceptional circumstances of a humanitarian nature, which would make it unjust or unduly harsh for the appellants to be removed from New Zealand.

[31] The appellants are well-loved and integral members of a family which has, effectively, migrated to New Zealand in its entirety. The husband’s mother, the matriarch of the family, particularly relies on the husband as the only son for her mobility and health-care needs. Of the 22 grandchildren in the family, all but three are in New Zealand. Significantly, the Sibling and Adult Child category under which the husband may well have qualified for residence was closed in May 2012, and no longer provides the husband with an alternative pathway to maintain his relationship with his family. The deportation of the appellants to Tuvalu would amount to an unusually significant disruption to a dense network of family

relationships spanning three generations in New Zealand. It would also impact upon the quality of life for the husband's mother, a New Zealand resident, who relies on him for her mobility-related needs.

[32] As for the climate change issue relied on so heavily, while the Tribunal accepts that exposure to the impacts of natural disasters can, in general terms, be a humanitarian circumstance, nevertheless, the evidence in appeals such as this must establish not simply the existence of a matter of broad humanitarian concern, but that there are exceptional circumstances of a humanitarian nature such that it would be unjust or unduly harsh to deport *the particular appellant* from New Zealand.

[33] It is not, however, necessary on the facts of this appeal to reach any conclusion on this issue in relation to any of the appellants as the Tribunal is satisfied that by reason of the other factors identified in this case, there are exceptional circumstances of a humanitarian in the sense contemplated by Glazebrook J in *Ye v Minister of Immigration*, and that it would be unjust or unduly harsh for the appellants to be deported from New Zealand.

Public Interest

[34] There is no adverse public interest in this case. The husband has professional qualifications as a teacher and has been in employment in a semi-skilled role for a fast-food chain. The husband is a qualified teacher and has the potential to qualify as a teacher in this country and act as a role model for other resident or citizen children of Tuvaluan origin.

[35] The Tribunal does not overlook that the husband and wife became unlawful in New Zealand in 2009 and remained here without status for some short periods of time. However, the Tribunal notes that this arose, in part, due to the erroneous advice of his then immigration agent on whom he relied on and that during this period of unlawful presence in New Zealand, the husband was seeking to regularise his status and was partially successful in doing so. This is not a case of someone unlawful in New Zealand seeking to hide from New Zealand immigration authorities. The breach of the Immigration Act in this case does not outweigh the other positive factors in this case and create a public interest in deporting him.

[36] Both the husband and wife have clear New Zealand Police clearance certificates dated 1 May 2014. A clear Tuvalu Police certificate was filed with the

work permit application. They have not been back to Tuvalu since 2007 and it is not necessary to obtain a further police clearance certificate from there.

DETERMINATION AND ORDERS

[37] Pursuant to section 210(1)(a) of the Act, the appellants are granted resident visas.

[38] The appeals are allowed.

"B L Burson"

B L Burson
Member

Certified to be the Research
Copy released for publication

B L Burson
Member