IMMIGRATION AND PROTECTION TRIBUNAL NEW ZEALAND **[2011] NZIPT 800035**

AT AUCKLAND

Appellant:	**AC (Syria)**
Before:	B L Burson (Member)
Counsel for the Appellant:	D Mansouri-Rad
Counsel for the Respondent:	No Appearance
Date of Hearing:	14 March 2011
Date of Decision:	27 May 2011

DECISION

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INTRODUCTION

[1] The appellant is an elderly Christian woman in her late 80s from Syria. Prior to coming to New Zealand she lived alone for a number of years. She appeals against a decision of a refugee status officer of the Refugee Status Branch (RSB) declining to grant her refugee status on the basis of a fear of harm from criminals operating in her area.

[2] The effective grounds of appeal in this case relate to the appellant's entitlement to be recognised as a Convention refugee under section 129 of the Immigration Act 2009 (the Act) and her entitlement to be recognised as a protected person under section 131 of the Act. Counsel concedes that no claim lies under

section 130 of the Act in that the harm feared by the appellant does not fall within the definition of torture set out under section 130(5) of the Act.

[3] Given that the same claim is relied upon in respect of all aspects of the appeal, it is appropriate to record it first.

THE APPELLANT'S CASE

[4] The appellant's ability to give coherent evidence was significantly compromised by her age and related frailty. As a result, the Tribunal also heard evidence from the appellant's eldest son. The account which follows is a summary of that given by the appellant and her son at the appeal hearing. It is assessed later.

Evidence of the Appellant

[5] The appellant was born in a small village near what is now the Iraq/Turkey border. During genocide against the Assyrian population her mother, father and many other relatives were killed; only the appellant and her sister survived. They were taken to Turkey but subsequently fled to, what is now, Syria following further anti-Christian violence. The appellant and other Assyrians were settled in the Y region by French forces while the region was still a French protectorate. They were settled in a small village of approximately 30 houses known as X (the village). The village was inhabited only by Assyrian Christians. The appellant married and raised her family in the village. She lived there her entire life prior to coming to New Zealand in early 2008.

[6] The appellant and her husband had seven children. Her husband worked their small land holding. They lived a very basic rural existence. Their house was made of mud. After her husband died in the early 1980s, four of her five sons left the village seeking better opportunities overseas. She has had no contact with them since. Her eldest son remained living with her at the family home, as did two daughters who remained until they married. One daughter subsequently emigrated to Australia after her marriage. The other daughter moved to another town situated approximately 60 kilometres away. She is now partially disabled. The appellant's eldest son came to New Zealand approximately seven or eight years ago and since that time the appellant has been living on her own. The appellant supported herself by growing produce on the small family land holding and from occasional remittances sent to her by her daughter in Australia and her son in New Zealand.

[7] Life in the village was generally difficult. The village was one of a number of Assyrian villages situated in a valley dependent upon a river which flowed from Turkey. From time to time the Turkish authorities cut the water supply making it difficult for the villagers to grow crops. The appellant said she often went hungry.

[8] The village was also isolated from essential public services. It had no doctor. The nearest medical facilities were in Y situated over one hour's drive away. For significant medical issues villagers had to travel to Aleppo, many hours away. On a number of occasions villagers died because they were too poor to afford to travel to Aleppo to seek emergency medical attention.

[9] Similarly, there was no police station in the village. The nearest police station was in Y. Consequently, the men in the village patrolled the village on their motor bikes looking out for troublemakers although the police did respond on occasions when there were disturbances in the village caused by drunken youths.

[10] The appellant experienced trouble with Arabs in the area. On one occasion some Arab men came to her home and stole her stove. During this incident she was pushed and fell down, hurting her head. She started screaming and the villagers from the neighbouring house, situated a short distance away, came running to her aid. On another occasion, some curtains that were around her bed were stolen.

[11] The appellant also recalled another incident when a man on a motorbike came and said that her son owed him money and requested that she pay it to him. She refused. The man insisted and eventually her daughter, who was visiting, handed him 500 Syrian pounds.

[12] The appellant could not recall anything more occurring or when these incidents occurred. She did confirm, however, that none of these incidents were reported to the police. She said she did not want to tell them because she was afraid that the Arab men would come back and the police were far away from them. Also, she was old and, as a woman, the appellant did not think she could make the police do something about it as the thieves had already run off. She did not ask her neighbours or her daughter to take these matters up with the police. She did not think her neighbours would care enough to follow the matter up with the police.

Evidence of the Appellant's Son

[13] The appellant's son was born in the village in 1950. He confirmed the appellant's account of the events which brought her to Syria. By the time he was

born his mother and father had taken up residence in the village. The family all lived in a house in the village that was made of mud. There were approximately 30 houses in the village. The villagers made their living out of growing vegetables and cotton. Life was hard. They had problems with water supply and there was often a lack of food.

[14] He has six siblings. His two sisters are married. One sister lives in Australia and the other lives in a village approximately 60 kilometres away and is permanently disabled. His father died in the early 1980s. His four brothers all left the village following the death of their father and the outbreak of fighting between Syria and Israel. Thereafter, his contact with his brothers has been rare. He last had contact with them approximately four or five years ago. He does not know where they are now. He has been in New Zealand for approximately seven or eight years. Since that time his mother has been living in the village alone.

[15] The son explained that there was trouble with petty theft in their area. There is no police station in the village and no telephone system. This made contact with the police very difficult. On occasions, cotton that he had harvested was stolen along with shovels. Although complaints were lodged with the police they did not attend for some days. When they did arrive, they took a report but informed him he should be more careful where he left his property. On one such occasion when the son complained, he found out approximately two or three months later that the police had caught a gang operating in another area about 100 kilometres away.

[16] The son explained that the police and government were not very powerful in their area. The government was far away and could not control people in the village. They did not live in a big city and the police could not do anything. Thieves take their possessions and threaten that if they telephone the police they will have bigger problems.

[17] In more recent times the son was able to contact the appellant as someone in the village has a cell phone. The son was in contact with the appellant every month or six weeks. According to the son, each time he telephones his mother she is distressed. She is always crying and says she has problems. He told the Tribunal that the appellant had told him that her stove and curtains had been stolen by thieves and that the men who stole her stoves threatened to burn her. He stated that during this incident his mother had fallen over and injured herself. On another occasion, some men came to the house and demanded money from her as they believed she had been sent money by her children who were overseas. She told them she was poor and could not give them money.

Documents and Submissions

[18] On 11 March 2010 the Tribunal received counsel's written memorandum of submissions. Attached to the submissions was a letter 10 February 2011 from the appellant's doctor detailing her current medical problems and a fact sheet on one of them. There was a further statement from the appellant which was signed at the hearing.

[19] At the commencement of the hearing the Tribunal was handed a letter dated 11 February 2011 from an electoral agent confirming that the appellant and her family members had contacted their local electorate office regarding the appellant's immigration matters following expiry of her visa. At the conclusion of the hearing Mr Mansouri-Rad made extensive oral submissions to the Tribunal.

[20] On 17 March 2011, the Tribunal served on counsel, a copy of the decision in *Refugee Appeal No 75787* (31 October 2006) and a copy of the report United States Department of State *International Religious Freedom: Syria* (17 November 2010). On 31 March 2011 the Tribunal received written submission from counsel in relation to this material.

ASSESSMENT OF THE APPELLANT'S CASE

Credibility

[21] The Tribunal's assessment of credibility in this case has been rendered difficult by the appellant's advanced age and frailty. Although counsel was satisfied that the appellant had sufficient capacity to answer questions, it was clear to the Tribunal that her comprehension of the process and ability to understand and answer the questions she was asked was heavily circumscribed. She often drifted off topic and frequently resorted to holding aloft a small picture of Jesus and the rosary she wore around her neck while stating that she "prayed for the world", the Tribunal member, her lawyer, and various other people. During the hearing she often cried and lamented that her other sons were not in contact with her and who had effectively abandoned her. For reasons that now follow, the Tribunal finds that only a partially reliable account of her problems in Syria has been provided.

[22] On the whole, her evidence was confused and disjointed as to the problems she faced. When first asked about whether she had problems with Muslim people, she replied that she did not have any and that her problems were to do with

subsistence needs. When reminded that she told the RSB that people came to her house and caused problems she stated that only “dogs and cats” came to the house. The Tribunal considered it necessary to adjourn. After a 45 minute break the hearing resumed and she was asked again about problems with Muslims. Again she denied having any. When reminded that she had previously mentioned theft of her property, she now confirmed that her stove and curtains had been stolen on separate occasions. She also referred to an incident where her daughter had to give some money to a Muslim man who had demanded money. She could not recall any other incident.

[23] Her evidence before the Tribunal broadly mirrored her evidence to the RSB. However, this oral evidence can be contrasted with her Confirmation of Claim form in which she makes no specific mention of the theft of her stove or curtains. Instead, in this document, she placed her predicament within the bounds of it becoming local knowledge that her children had all emigrated and Muslim men from surrounding villages preying on her isolation and vulnerability on the assumption these children were sending her money. She provided details of incidents on precise dates in December 2005 and July 2007 when she claimed she was attacked or threatened with kidnapping by Muslim men who demanded money from her.

[24] Yet the weight that can be given to the information contained in her Confirmation of Claim form as to her past problems in Syria is limited. At the RSB interview the appellant’s son, who was present throughout her interview and spoke in response to some of the questions asked, stated that the claim form was completed by his own son because the appellant “doesn’t remember”. The appellant herself had no clear or coherent recollection of these events during her RSB interview. When asked about being visited by Arab people to her home she said initially that they had come but she had a big dog which “used to scare them”. Asked if these people broke into her house she replied that “I did not have much stuff, they look for money, don’t look for other stuff”. When asked to then clarify if these people had actually broken into her house she then replied “No. I was careful, I used to lock the door, put the lights on ‘till morning. I used to leave the TV on so they will think I have people inside the house”. She was also asked by the RSB about people demanding money from her as set out in her Confirmation of Claim form. In response, the appellant mentioned only the incident with the man on the motorbike and confirmed that this was the only time an Arab person had come to her home demanding money. This event took place after the incident when her curtains were stolen. She could not recall other incidents of Muslim men demanding money from her. Nor could she do so in her evidence before the Tribunal.

[25] The Tribunal notes the oral evidence of the son was that he telephoned his mother every six weeks or so and that on each occasion, she was distressed and told him that she had 'problems'. This assertion by the appellant to the son must be put in context. Throughout the relevant time, the appellant was living an isolated existence on her own despite her old age and accompanying frailties. She told the Tribunal that in recent years there were issues around shortages of bread and water. In other words, her problems were manifold. Her reference to 'problems' in these conversations is not accepted as being a reference to problems with thieves taking items from her or demanding money from her in a threatening manner on a frequent or ongoing basis. Finally in this regard, the Tribunal notes that a letter by the head of the church sub-commission at the village attesting to the appellant's general lack of support in the village. There is no mention of her being subjected to demands for money or other harassment from Muslims. Had there been the degree of harassment of her in the manner now claimed it is surprising that no mention is made of it in this letter.

[26] For these reasons, the Tribunal finds that the applicant has not established by reliable and credible evidence that she has experienced anything other than the incidents in which her stove and curtains were stolen and the incident where a man demanded money from her on the pretext her son owed him the money. Furthermore, the Tribunal does not accept her evidence that she was pushed when her stove was taken. It contradicts her evidence to the RSB where she told the refugee status officer that she was injured when she slipped over. This too was the evidence of her son.

Findings of Fact

[27] Making all due allowances for her age and frailty and noting the evidence of the son, the Tribunal, applying a generous benefit of the doubt, makes the following findings of fact.

[28] The appellant is an elderly Christian woman. She has, for at least the last seven or eight years lived an isolated existence, living on her own in a rural village in a remote part of Syria, surviving as best she can. Her village is populated by Christians. Of her children, only one, a daughter, remains in Syria but she lives 60 kilometres away and is partially disabled herself. There is no police station in the village and day-to-day security is provided by the men folk of the village who patrol on their motorbikes. The police have, however, come to the village to respond to disturbances between the Christian youths in the village. The police have also

responded to complaints of theft that have been made in the past by the son although their response time has been slow and they have been unable to catch the culprits.

[29] The appellant experienced petty theft of her stove and her curtains and possessions on separate occasions by unknown Arab men. On another occasion, a Muslim man demanded money from her on the pretext her son owed him money. These incidents have not been reported to the police.

[30] The claim will be assessed against this background.

Submission of Counsel on Substantive Merits

[31] In his opening submissions to the Tribunal, Mr Mansouri-Rad pointed to the strong humanitarian concerns raised by the facts of this appeal. He conceded, however, that the appellant is unable to bring a humanitarian appeal because she has effectively been living unlawfully in New Zealand since mid-2008. This concession is well made.

[32] Under section 206(1)(a) of the Act, appeals to the Tribunal against deportation on humanitarian grounds are able to be brought by persons liable for deportation from New Zealand because they are here unlawfully – see section 154. However, section 154(2) of the Act requires any such appeal to be lodged not later than 42 days of their first becoming unlawful in New Zealand. While section 194(6) of the Act directs that humanitarian appeals be filed at the same time as appeals on refugee or protected person grounds, section 194(5)(a) states that this is applicable only to appellants on refugee or protected person grounds who are liable for deportation and who are "entitled to a humanitarian appeal in respect of that liability". The short point in this case is that, by reason of her being unlawful in New Zealand in excess of two years, the appellant is well outside the 42-day time limit imposed under section 154(2). She is no longer entitled to appeal on humanitarian grounds.

[33] Nevertheless, Mr Mansouri-Rad submits that these humanitarian factors are also relevant to the inquiry to be conducted by the Tribunal under its refugee and protected person jurisdictions. He submits in relation to refugee status that the appellant's "general vulnerability" due to her age, ill-health and living conditions were relevant considerations in the assessment of serious harm under the "egg-shell skull principle". Furthermore, citing *Mayeka and Mitunga v Belgium* [2006] ECHR 1170 (12 October 2006) at para [48] Mr Mansouri-Rad submits that the duration of the treatment, its physical and mental effects, the age, sex and state of health of the

victim were all relevant in assessing whether such conduct amounts to cruel treatment as defined in section 131(6) of the Act

[34] Before turning to consider their substantive merits, the submissions require the Tribunal to make some general observations as to the relationship between and functioning of the refugee, protected person and humanitarian provisions of the Act.

THE REFUGEE AND PROTECTION REGIME ESTABLISHED UNDER THE 2009 ACT

General Observations on Statutory Scheme

[35] The meaning to be given to the provisions in the Act establishing the refugee and protection regime must be ascertained in light of the Act's purpose: section 5(1) of the Interpretation Act 1999.

[36] The Act itself has both general and specific purposive provisions. The general purpose of the Act as a whole is set out in section 3 which relevantly provides:

> **"Purpose**
>
> (1) The purpose of this Act is to manage immigration in a way that balances the national interest, as determined by the Crown, and the rights of individuals.
> (2) To achieve this purpose, the Act establishes an immigration system that—
>
> ...
>
> (d) provides a process for implementing specified immigration-related international obligations; and
> ...
>
> (f) establishes a specialist tribunal to consider appeals against decisions made under this Act and to consider humanitarian appeals;"

[37] Also, Part 5 of the Act in which the refugee and protection regime is located has its own specific purposive provision. Section 124 of the Act provides:

> **"Purpose of Part**
>
> The purpose of this Part is to provide a statutory basis for the system by which New Zealand—
>
> (a) determines to whom it has obligations under the United Nations Convention Relating to the Status of Refugees and the Protocol Relating to the Status of Refugees; and
>
> (b) codifies certain obligations, and determines to whom it has these obligations, under—

(i) the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment:

(ii) the International Covenant on Civil and Political Rights."

[38] As will now be discussed in greater detail below, from these purposive statements two basic points follow. First, the statutory scheme under the Act affords clear primacy of the Refugee Convention over protected person status derived from the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984 (CAT) and the relevant articles of the International Covenant on Civil and Political Rights 1966 (ICCPR). It also draws a clear distinction between its protected person jurisdiction and matters of wider humanitarian concern which may operate to prevent removal from New Zealand.

[39] Second, the primacy afforded to the Refugee Convention is not simply a question of the procedural prioritisation of the tasks to be performed by a Refugee and Protection Officer (RPO) and the Tribunal but means that the newly established protected person jurisdiction under the Act should not undermine New Zealand's pre-existing and continuing refugee status determination system, jurisprudence, and processes. In other words, while clearly expanding the statutory protection space from that which existed under the 1987 Immigration Act, Parliament intended protected person status under the Act to operate as subsidiary safety net as opposed to a *competing* protection space to the protection afforded by the Refugee Convention. The provisions of Part 5 must be interpreted in light of this purpose.

The Primacy of the Refugee Convention

[40] Under Part 5 of the Act, the Refugee Convention is given primacy in two senses. The first sense may be termed an *operational* primacy. At this level, Part 5 operates to determine "to whom" New Zealand owes obligations under the Convention. Section 124, in general terms, makes clear the Parliamentary intention to ensure that NZ meets *all* of its Convention obligations. The only question is to whom. Once recognised, the refugee becomes entitled to all the rights set out in the Refugee Convention – see section 124(a). This may be contrasted with the language used in section 124(b) regarding protected person status. Here, Part 5 operates in respect to only *certain* obligations under the ICCPR domesticated in the immigration and protection context under the Act.

[41] Furthermore, the Refugee Convention is a relevant consideration to the operation by immigration officers of their statutory powers. Section 165 of the Act stipulates that an immigration officer must have regard to the text of the Refugee

Convention when carrying out his or her functions under this Act in relation to a claimant, a refugee, or a protected person. There is no equivalent provision in relation to CAT or ICCPR.

[42] Insofar as section 127(2) might appear to be inconsistent with the existence of a general operational primacy, this appears to be a mechanism to render lawful under domestic law, practises which are to some extent controversial under international law having regard to the object and purpose of the Refugee Convention. See, in particular, powers granted to a RPO under section 134 to refuse to consider claims for refugee status in light of international agreements between New Zealand and other countries, or under section 137(4) where some other 'safe' third country is found to exist and discussion regarding 'protection elsewhere' or 'safe third country protection' in *Refugee Appeal No 1/92 Re SA* (30 April 1992); J C Hathaway *The Rights of Refugees Under International Law* (Cambridge University Press, Cambridge, 2005) at pp 331 – 335; G Goodwin-Gill and J McAdam: *The Refugee in International Law* (3rd ed, Oxford University Press, Oxford, 2007) at pp392-396; *The Michigan Guidelines On Protection Elsewhere* Fourth Colloquium on Challenges in International Refugee Law, University of Michigan Law School, 10-12 November, 2006. (Adopted 3 January, 2007); see also Human Rights Committee *General Comment No 31 [80] The Nature of the General Legal Obligation Imposed on States Parties to the Covenant* (26 May 2004) CCPR/C/21/Rev.1/Add.13.

[43] The Refugee Convention is also given a clear *procedural* primacy under the Act. Both RPOs and the Tribunal are statutorily required to first consider entitlement to refugee status before moving on to consider entitlement to protected person status. Section 137 relevantly provides:

> **"Matters to be determined by refugee and protection officer**
>
> (1) For each claim accepted for consideration, a refugee and protection officer must determine, in the following order:
>
> (a) whether to recognise the claimant as a refugee on the ground set out in section 129; and
>
> (b) whether to recognise the claimant as a protected person on the ground set out in section 130; and
>
> (c) whether to recognise the claimant as a protected person on the ground set out in section 131."

[44] Similar directions are given to the Tribunal under section 198 which relevantly provides:

> **"Determination of appeal against declining of claim for recognition, cancellation of recognition, or cessation of recognition**
>
> (1) Where an appeal is brought under section 194(1)(c) or (d), the Tribunal must—
>
> (a) determine the matter de novo; and
>
> (b) determine, in the following order:
>
> (a) a refugee under the Refugee Convention on the ground set out in section 129; and
>
> (b) as a protected person under the Convention Against Torture on the ground set out in section 130; and
>
> (c) as a protected person under the International Covenant on Civil and Political Rights on the ground set out in section 131."

[45] The primacy afforded to the Refugee Convention under the Act and, in particular, the requirement on both RPOs and the Tribunal to first consider entitlement of refugee status, means that a person *cannot* be considered for protected person status *unless and until* their predicament is determined not to be one which falls within the scope of the Refugee Convention. The statutory scheme thus directs both counsel and decision-makers to engage in the first instance with refugee law and jurisprudence.

Distinction Between Refugee and Protected Person Jurisdiction and Appeals on Humanitarian Grounds

[46] There is a clear distinction drawn between the refugee and protected person jurisdictions under sections 129, 130 and 131 and matters of wider humanitarian consideration. Section 207 sets out the grounds for a humanitarian appeal against deportation liability. It provides:

> **"Grounds for determining humanitarian appeal**
>
> (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."

[47] Under section 198(4) if the Tribunal allows an appeal and grants refugee or protected person status, it *must* dispense with humanitarian appeal.

[48] There are two relevant points to note in respect of humanitarian appeals by way of comparison to appeals in relation to protected persons status. First, unlike in the protected person context where the jurisdiction is statutorily limited to certain forms of harm, there is no attempt to delineate the range of issues which might constitute qualifying humanitarian circumstances. A potentially wider range of concerns may fall therefore within the ambit of a section 207 appeal. Second, unlike with protected person claims, there is an express public interest consideration which must be weighed. There is no weighting of public interest considerations in the protected person context although the exclusion clauses contained in Article 1F of the Refugee Convention, but occurring nowhere in the ICCPR, have been grafted onto New Zealand's ICCPR derived protected person jurisdiction.

Best Practice Standards in Relation to Refugee and 'Complementary Protection': Some General Observations

[49] The Explanatory Note to the Immigration Bill, at p5, states that the object and purpose of the 'new refugee and protection system' proposed in the Bill was to put in place a regime that:

> "…strengthens New Zealand's already highly regarded refugee determination system and reflects best practice standards internationally."

[50] What follows is a review of selected academic and other writings on 'complementary protection' regimes generally and their relationship to the protection afforded by the Refugee Convention. From this review it will be seen that, consistent with the Parliamentary intention to reflect "best practice standards internationally", the operation of the various jurisdictions should strive to ensure that the Refugee Convention remains the cornerstone of the surrogate protection regime provided for by the Act.

[51] Involuntary population movement, like migration more generally, is a complex and multi-causal phenomenon. This is reflected in UNHCR Executive Committee *Comprehensive and Regional Approaches within a Protection Framework* (1996) No. 80 XLVII which observes:

> "The underlying causes of large-scale involuntary population displacements are complex and interrelated and encompass gross violations of human rights, including in armed conflict, poverty and economic disruption, political conflicts, ethnic and inter-communal tensions and environmental degradation."

[52] Yet, there is only so much the Refugee Convention is designed to do in response. Increased understanding of the existence of a 'protection gap' between

the proper scope of application of the Refugee Convention and the myriad circumstances driving involuntary population movement across international borders has underpinned the development of a broader range of legal and policy mechanisms by which relief from removal or expulsion is granted by a host of receiving states. These various mechanisms have come to be known as 'complementary' forms of protection. As R Mandal *Protection Mechanisms Outside of the 1951 Convention ("Complementary Protection")* Legal and Research Policy Section UNHCR (June 2005) observes, at p2, the term 'complementary protection':

> "4. ...is not a term of art defined in any international instrument...The term 'complementary protection' has emerged over the last decade or so as a description of the increasingly-apparent phenomenon in industrialised countries of relief from removal being granted to asylum seekers who have failed in their claim for 1951 Convention refugee status. It is essentially a generic phrase, with the actual terminology used by states to describe such forms of protection in their territory, including any attached immigration status, varying enormously: 'subsidiary protection', 'humanitarian protection' and 'temporary asylum' to name but a few examples.
>
> 5. What all these initiatives have in common is their complementary relationship with the protection regime established for refugees under the 1951 Convention /1967 Protocol. They are intended to provide protection for persons who cannot benefit from the latter instruments even though they, like Convention refugees, may have sound reasons for not wishing to return to their home country. Despite this common element, the actual criteria adopted by states to delineate the scope of complementary protection in their jurisdictions varies significantly."

[53] Mandal goes on to chart the divergent state practice in terms of granting relief from removal outside of the Refugee Convention. From this study, state practice can be seen to be grounded in an array of considerations ranging from matters of purely humanitarian concern (such as unaccompanied minor status and infirmity in old age); practicality (such as inability to affect removal); regional refugee protection regimes operating on more expansive refugee definitions (as in Central and South America and Africa); and more narrow regimes linked to the principle of *non-refoulement.*

[54] There appears to be some understanding that, of these justifications for non-removal, it is those linked to obligations under international human rights law generally or, more particularly, anchored the principle of *non-refoulement* which properly fall within the concept 'complementary protection'. See, for example, Mandal, (*op cit*), p6 at [12] and studies cited therein; K Röhl *Fleeing Violence and Poverty: Non-refoulement Obligations under the European Convention of Human Rights* New Issues in Refugee Research Working Paper No 111 UNHCR at p4. Similar observations are made by J McAdam *Complementary Protection in International Law* (Oxford University Press, Oxford, 2007) at 21:

> "In legal terms, 'complementary protection' describes protection granted by states on the basis of international protection needs outside the 1951 Convention framework. It may be based on a human rights treaty, or on more general humanitarian principles, such as providing assistance to persons fleeing from generalised violence. In this pure form, as a matter of international law, it is not constrained by exclusion clauses but operates simply as a form of human rights or humanitarian protection triggered by states expanded non-refoulement obligations."

[55] That mechanisms of complementary protection are ones which are grounded in the *non-refoulement* principle is referred to by Goodwin-Gill and McAdam: (*op cit*) at 285:

> "The principle of *non-refoulement* is wider than its expression in Article 33 of the 1951 Refugee Convention. While States have always recognised, to varying degrees, the protection needs of people falling outside the 'refugee definition in article 1A(2) of the Convention, it is only in the last decade that they have consciously sought to articulate such protection as a matter of international law, based on States' voluntarily assumed human rights obligations, rather than as a matter left to the discretion and humanitarian good will of national Governments. The term 'complementary protection' describes states protection obligations arising from international legal instruments and custom that complement - or supplement - the 1951 Refugee Convention. It is, in effect, a shorthand term for the widened scope of *non-refoulement* under international law."

[56] The linkage of complementary protection mechanisms with the Refugee Convention is acknowledged by UNHCR's Executive Committee in *Complementary Forms of Protection: Their Nature and Relationship to the International Protection Regime* (9 June 2000) EC/50/SC/CRP.18. Indeed, an important aspect of this linkage is that many instances of 'complementary protection' involve claims for protection which could – or even should – have been determined to have fallen within the scope of the Refugee Convention. Instead, the underlying claims for refugee status have been wrongly declined because of restrictive asylum procedures and practices or narrow interpretations of the Convention across a range of issues – see Mandal (*op cit*) at p9; Röhl (*op cit*) at pp5-6; J McAdam, *The European Union Proposal on Subsidiary Protection: An Analysis and Assessment,* UNHCR Working Paper No 74 (2002), at pp7-8. It is a view point shared by UNHCR's Executive Committee. In *Providing International Protection including through Complementary Forms of Protection* (2 June 2005) EC/55/SC/CRP.16 the Committee commented:

> "6. According to the 1951 Convention, individuals with a well-founded fear of persecution who fulfil the requisite elements of the refugee definition it contains are entitled to international protection under its regime. Nevertheless, differing State practice in the interpretation of the refugee definition, such as, for example, its application to non-state or gender-related persecution, shortcomings in some asylum procedures and a preference in some States for alternative forms of prolonged stay have resulted in the rejection of applications for refugee status made by asylum-seekers who would have fulfilled the Convention criteria if a full and inclusive approach had been taken. UNHCR advocates that such an inclusive approach be more regularly adopted and is strongly of the view that asylum-seekers who obviously fulfil the refugee definition should be accorded Convention refugee status, not an alternative."

[57] It is therefore unsurprising that much of the jurisprudence of the Committee Against Torture (the CAT Committee), in relation to Article 3 of CAT which prohibits *refoulement* where there are substantial grounds for believing that the complainant would be in danger of being subjected to torture, largely involve cases where there is an evident concern that the complainant has been wrongly denied refugee status by national authorities – see Mandel (*op cit*) p22 at [58]. For a recent example of this largely 'curative' aspect to the jurisprudence of the CAT Committee see *Guclu v Sweden* 349/2008 (16 December 2010) C/45/D/349/2008.

[58] Finally, it is also worth having regard to United Nations General Assembly Resolution 49/169 (23 December 1994). While not specifically dealing with the issue of complementary protection, the resolution is notable for the emphasis placed by the General Assembly on ensuring that state practice in meeting the many challenges posed by large scale population displacement should not diminish the protection afforded by the Refugee Convention. After noting reports by UNHCR's Executive Committee and a speech to the General Assembly by the then United Nations High Commissioner for Refugees discussing the challenges, the General Assembly resolution refers, *inter alia*, to:

> "The importance of ensuring access, for all persons seeking international protection, to fair and efficient procedures for the determination of refugee status, or as appropriate, to other mechanisms to ensure that persons in need of international protection are identified and granted such protection, while not diminishing the protection afforded to refugees under the terms of the 1951 Convention, the 1967 Protocol and relevant regional instruments."

Implications for Interpretation and Application of Refugee and Protected Person Jurisdictions of Act

[59] From this review, a number of important and interrelated points of broad significance in the interpretation and application of the refugee and protected person jurisdictions under the Act emerge.

[60] First, primacy afforded to the Refugee Convention under the Act extends beyond consideration of entitlement to refugee status first. Beyond this statutory procedural imperative, the operation of the protected person jurisdiction under section 130 and 131 of the Act should not come at the expense of protection under the refugee protection jurisdiction under section 129. Therefore, approaches to the operation of the protected person jurisdiction which have or could have the effect of diminishing or undermining the relevance of the Refugee Convention as the cornerstone of the protection regime under the Act are to be avoided. J McAdam *"The European Union Qualification Directive: The Creation of a Subsidiary Protection*

Regime" 17 IJRL (2005) 461, 470 points out the concern that bypassing the Refugee Convention can have negative consequences for the individual claimant and lead to the stultification of refugee law:

> "Subsidiary protection is only applicable to a person 'who does not qualify as a refugee'. This emphasises that subsidiary protection is only to be granted if a person does not qualify for refugee status, and stems from the rationale that the Convention is to be given full and inclusive interpretation. This is of particular importance in a regime that differentiates between protection needs based on the type of harm feared, since the result of wrongly classifying a claim has serious consequences for status. It also has theoretical significance, since characterising an individual as a subsidiary protection beneficiary without fully considering the application of the Convention may have the effect of stultifying that instrument's development."

[61] See also in this context UNHCR, *Asylum in the European Union: A Study of the Implementation of the Qualification Directive* (November 2007) at pp83 and 86; *UNHCR Statement on Subsidiary Protection under the EC Qualification Directive for People Threatened by Indiscriminate Violence,* UNHCR Geneva, (January 2008) where UNHCR has expressed concerns that recognition under the Refugee Convention is being impermissibly bypassed in favour of subsidiary protection status under the European Union (EU) Qualification Directive.

[62] Second, refugee status must be granted where the Refugee Convention is properly applicable. It is important that the Refugee Convention should not be applied in an improperly or overly restrictive manner. It is widely recognised and accepted that the object and purpose of the Refugee Convention is to ensure the enjoyment of basic human rights without discrimination – see *Canada (Attorney General) v Ward* [1993] 2 SCR 689, 733 (SC:Can) per LaForest J; *R v Immigration Appeal Tribunal; Ex Parte Shah* [1999] 2 AC 629, 638-639 (HL) per Lord Steyn; 650-651 per Lord Hoffman; *Applicant A v Minister for Immigration and Ethnic Affairs* [1998] INLR 1, 5-6 per Brennan CJ. As an international instrument with the object and purpose of the protection of fundamental human rights, the Refugee Convention is to be given a purposive and dynamic interpretation – see *Sepet v Secretary of State for the Home Department*; [2003] 3 All ER 304 (HL) at [6]. Lord Bingham (with whom Lords Steyn, Hutton and Rodger agreed) stated:

> "It is also, I think, plain that the Convention must be seen as a living instrument in the sense that while its meaning does not change over time its application will. I would agree with the observation of Sedley J in *R v Immigration Appeal Tribunal, Ex p Shah* [1997] Imm AR 145, 152: "Unless it [the Convention] is seen as a living thing, adopted by civilised countries for a humanitarian end which is constant in motive but mutable in form, the Convention will eventually become an anachronism". I would also endorse the observation of Laws LJ in *R v Secretary of State for the Home Department, Ex p Adan* [2001] 2 AC 477, 500:
>
> > "It is clear that the signatory states intended that the Convention should afford continuing protection for refugees in the changing circumstances of the present and future world. In our view the Convention has to be regarded as a living instrument: just

> as, by the Strasbourg jurisprudence, the European Convention on Human Rights is so regarded"."

[63] This is an approach which has been adopted in New Zealand – see *Refugee Appeal No 74665* [2005] NZAR 60; [2005] INLR 68 at [56] (RSAA) per Haines QC.

[64] This is not to say that the application of the Refugee Convention to situations of even serious harm is without limits. As pointed out by J C Hathaway *The Law of Refugee Status* (Butterworths, Toronto, 1991) at pp103-104, the intention of the drafters was not to protect persons against any and all forms of serious harm. Rather:

> "As a holistic reading of the refugee definition demonstrates, the drafters were not concerned to respond to certain forms of harm *per se*, but were rather motivated to intervene only where the maltreatment anticipated was demonstrative of a breakdown of national protection."

[65] Furthermore, the purposive approach to the interpretation of the Refugee Convention has limits. In *R (European Roma Rights Centre and Others) v Immigration Officer at Prague Airport and Another* [2005] INLR 182, the House of Lords was unanimous in holding that the express reference in Article 1A(2) to a person being "outside" their country of nationality or former habitual residence meant that Convention protection cannot be claimed in anticipation of alienage while the prospective claimant remained inside their country of nationality – see [15]-[20] per Lord Bingham (Lord Steyn, Lord Hope, Lord Carswell and Baroness Hale agreeing). In reaching this conclusion, Lord Bingham, p 186 at [18] stated:

> "[Counsel], for the appellants, did not seek to advance what would have been an impossible contention, that the appellants were covered by the express provisions of the 1951 Convention. Plainly they were not, for they had at no stage been outside the country of their nationality nor within this country and the procedures adopted by the British authorities at Prague airport did not involve expelling or returning them to the frontiers of the Czech Republic, a state they had never left. Instead, Lord Lester urged that the Convention should be given a generous and purposive interpretation, bearing in mind its humanitarian objects and purpose clearly stated in the preamble quoted in full in para 6 above. This is, in my opinion, a correct approach to interpretation of a convention such as this and it gains support, if support be needed, from article 31(1) of the Vienna Convention on the Law of Treaties which, reflecting principles of customary international law, requires a treaty to be interpreted in the light of its object and purpose. But I would make an important caveat. However generous and purposive its approach to interpretation, the court's task remains one of interpreting the written document to which the contracting states have committed themselves. It must interpret what they have agreed. It has no warrant to give effect to what they might, or in an ideal world would, have agreed."

[66] While bearing these caveats firmly in mind, a dynamic and purposive approach to the interpretation of the Refugee Convention in the context of determining section 129 claims, based on an understanding that the Convention is underpinned by a commitment by the international community to assure the

enjoyment of fundamental human rights without discrimination, nevertheless ensures that the protection afforded by the Act can be adapted as required to meet evolving and changing protection needs over time.

[67] A third point is that the protected person jurisdiction under the Act, while underpinned by a broad concern to secure the enjoyment of fundamental human rights, is not an unlimited humanitarian free-for-all. It is a bounded protection regime and one which must be distinguished from the broader range of humanitarian factors identified by Mandel as informing decision by states not to remove persons from their territory as a matter of discretionary policy. Goodwin-Gill and McAdam (*op cit*) p 286 make the relevant point succinctly:

> "'Complementary Protection' is thus a legal concept that must be distinguished from protection granted solely on compassionate grounds, such as age, health, for family connections unrelated to international protection need, or for practical reasons, such as the inability to obtain travel documents. Even though this type of protection is humanitarian in nature, it is not based on international protection and therefore does not come within the boundaries of 'complementary protection'."

[68] Similar observations are made by UNHCR's Executive Committee *Complementary Forms of Protection: Their nature and Relationship to the International protection* regime (9 June 2000) EC/50/SC/CRP 18 at [4]:

> "A review of the categories of persons who benefit from permission to stay for a prolonged period reveals that it is granted by States for a whole range of reasons, of which only some are related to a need for international protection. The reasons can be roughly categorised as follows: a) those which are purely compassionate, or based on practical considerations, and b) those which are related to international protection needs and may thus qualify as complementary forms of protection."

[69] Expanding on this basic distinction, UNHCR's Executive Committee goes on to state at [5]:

> "States may decide to allow prolonged stay solely for compassionate reasons, such as age, medical condition, or family connections. In cases where removal is not possible, either because transportation is not feasible, or if travel documents are unavailable or cannot be obtained, continued presence may be allowed for practical reasons. The persons concerned are normally not asylum-seekers or, having sought asylum, have had their applications properly rejected and were found not to be in need of international protection. These cases must be clearly distinguished from cases where international protection needs and an obligation to respect the fundamental principle of *non-refoulement* are present, and which are thus of direct concern to UNHCR."

THE RELATIONSHIP BETWEEN THE REFUGEE AND PROTECTED PERSON JURISDICTIONS

A Common Framework for Analysis of Qualifying Harm

[70] New Zealand refugee law has consistently and unambiguously adopted a purposive approach to the interpretation of the Convention which places the question of whether there has been a sustained or systemic violation of core human rights at the heart of the inquiry as to whether the claimant faces a well-founded fear of being persecuted. This is reflected in what has come to be known as 'the human rights approach to being persecuted'. This approach, grounded in human rights norms derived from treaties of wide state acceptance (if inconsistent observance in practice), seeks to shift refugee status determination away from the vagaries and uncertainties of approaches grounded in dictionary meanings or the subjective perceptions of individual decision makers as to what constitutes acceptable levels of harm which the claimant can be 'reasonably expected' to tolerate. Instead, it embraces a normative framework which, while far from providing easy answers in all cases, nevertheless provides a principled and objective basis to determine the boundaries of refugee protection. This approach is most fully articulated in *Refugee Appeal No 74665* [2005] NZAR 60 at [36] – [125] per Haines QC. For present purposes, the Tribunal emphasises the following passages from this decision:

> "[58] The consistently held view of the Authority has been that the principled approach of *Ward* to the interpretation of the "being persecuted" element of the refugee definition is to be preferred to the "dictionary" approach. The Authority has accordingly followed the example of the Supreme Court of Canada and adopted the formulation articulated by Professor Hathaway in his seminal text, *The Law of Refugee Status* (Butterworths, 1991) at 104 & 108, namely that refugee law ought to concern itself with actions which deny human dignity in any key way and that the sustained or systemic denial of core human rights is the appropriate standard. In other words, core norms of international human rights law are relied on to define forms of serious harm within the scope of "being persecuted."

and:

> "[90] While it is essential that the nature and extent of the relevant fundamental right be investigated and identified, a note of caution is appropriate. In the context of refugee determination it is important not to be seduced by complexity and sophisticated over-analysis: *Horvath v Secretary of State for the Home Department* [2001] 1 AC 489, 508F (HL) (Lord Clyde). The gaze of the refugee decision-maker is fixed firmly on the question whether the anticipated denial of human rights in the country of origin meets the "being persecuted" standard, not on mechanically identifying breaches of human rights standards. For the purpose of refugee determination the focus must be on the minimum core entitlement conferred by the relevant right. Under a human rights approach, a prohibition on the exercise of a core entitlement is to be regarded as within the ambit of a risk of "being persecuted". Under this approach, where the risk is only that activity at the margin of a protected interest is prohibited, it is not logically encompassed by the notion of "being persecuted".

[71] This approach, by its very definition, *already includes* in its analytical framework the prohibition under international human rights law on exposure to torture, arbitrary deprivation of life, and cruel, inhuman or degrading treatment of punishment which lie at the heart of New Zealand's protected person jurisdiction.

[72] Both the prohibition on the arbitrary deprivation of life (Article 6 ICCPR) and the prohibition on torture and cruel, inhuman, or degrading treatment or punishment (Article 7 ICCPR) are absolute in their nature. Unlike most other fundamental human rights set out in the ICCPR, they are not qualified or limited in any way. States cannot justify interference with them on the basis that such interference is 'necessary' to pursue some legitimate state aim such as the protection of public safety, order, morals or the protection of the fundamental rights and freedoms of others – compare, for example, Articles 12(3); 18(3); 19(3); 21; 22(2) ICCPR in relation, respectively, to freedom of movement, religion, expression, peaceful assembly and association. Nor is it possible for states to derogate from the prohibition on torture, the arbitrary deprivation of life, or cruel, inhuman, or degrading treatment or punishment "in time of public emergency which threatens the life of the nation and the existence of which is publicly proclaimed" – see Article 4(1) and (2) ICCPR.

[73] Human rights are now widely regarded as being universal, indivisible, interdependent and interrelated and not subject to any hierarchical ordering – see United Nations *Vienna Declaration and Programme of Action* (12 July 1993) A/CONF 157/23 at [5]. Nevertheless, the peremptory nature of the prohibition on torture and cruel, inhuman, or degrading treatment or punishment, and the arbitrary deprivation of life mean that a finding that a claimant faces a real chance of being exposed to these forms of harm resonates loudly within the human rights approach to being persecuted.

[74] As Hathaway *The Law of Refugee Status* (*op cit*) at 108 observes:

> "Failure to ensure these rights under any circumstances is thus appropriately categorised to be tantamount to persecution."

Reference here can also be made to Hathaway *The Rights of Refugees under International Law* (Cambridge University Press, Cambridge, 2005) at p305, where Professor Hathaway again observed in relation to arguments surrounding a 'broad reading' of the Refugee Convention's *non-refoulement* obligation, that:

> "...the threats noted in (b) [torture or cruel, inhuman, or degrading treatment or punishment] and (c) [threats to life, physical integrity, or liberty] are likely to fall within modern understandings of being persecuted."

[75] In Refugee *Appeal No 74665* at [84], the RSAA accepted that the question of whether the right in question was non-derogable was relevant to the being persecuted enquiry.

[76] It follows that if it is established on the evidence before the Tribunal that the anticipated harm faced by the claimant constitutes torture, the arbitrary deprivation of life or is of sufficient seriousness or severity to constitute cruel, inhuman or degrading treatment or punishment, it is difficult to see how this would not constitute serious harm for the purposes of the 'being persecuted' inquiry under section 129 of the Act.

[77] A fundamental point this raises in terms of the relationship between the refugee and protected person jurisdictions under the Act is that, given both jurisdictions use the *same* rights to determine eligibility for protection, it is wrong to approach the protected person jurisdiction as establishing some autonomous notion of cruel inhuman or degrading treatment or punishment or arbitrary deprivation of life which is different to that which operates under the refugee jurisdiction. In other words, the concepts of arbitrary deprivation of life, cruel, inhuman, and degrading treatment or punishment have the same meaning in the protected person context as they do in the refugee context.

[78] If the anticipated harm arising from the facts as found cannot be appropriately categorised as cruel, inhuman, or degrading treatment or punishment for the purposes of determining a claim for refugee status, it cannot be so characterised for purposes of determining a claim for protected person status arising from the same facts on the basis that a *lower threshold* of harm is involved.

[79] Given it is, in one sense, already easier to establish protected person status in that there is no requirement to establish a nexus between the harm feared and any civil or political status, it is difficult to envisage a more direct way of undermining the primacy of the Refugee Convention. An approach which requires a lesser level of harm to suffice for establishing cruel, inhuman, or degrading treatment or punishment in protected person claims than is required in the refugee context would inevitably lead over time to the weakening of New Zealand's refugee status determination jurisdiction. Such a result is therefore clearly inconsistent with the purpose of Part 5 of the Act, which reflects the clear Parliamentary intention to strengthen New Zealand's refugee status determination system.

[80] For harm amounting to cruel, inhuman, or degrading treatment or punishment to have any traction under section 131 independent of a claim for protection as a

refugee under section 129, the claim must fall outside the scope of refugee protection for some *other* reason such as a lack of nexus to a Convention ground or exclusion under Article 1F, and not because of some differential requirement in the level of harm necessary to constitute cruel, inhuman, or degrading treatment or punishment depending on whether refugee or protected person status is claimed.

Qualifying Harm: The Need for a Sufficient Level of Severity or Seriousness of Harm

[81] As to the level of harm required to constitute cruel, inhuman, or degrading treatment or punishment for the purpose of the refugee or protected person inquiry, it is impossible to draw any bright-line test. Much, if not all, will depend on the particular background to the claim and the unique circumstances and characteristics of the individual claimant.

[82] That said, it is important to bear in mind that the level of harm required to constitute cruel, inhuman, or degrading treatment or punishment, whether for the purposes of the being persecuted analysis or as a stand-alone issue in the protected person jurisdiction, is a relatively high one. There is a broad acceptance in international jurisprudence and academic commentary that, whatever else may be required, the anticipated harm must be of sufficient severity or seriousness to bring it within the range of harm proscribed by the prohibition against cruel, inhuman, or degrading treatment or punishment. See generally, M Nowak and E McArthur *The United Nations Convention Against Torture: A Commentary* (Oxford University Press, Oxford, 2010) at p558; W Kalin and J Kunzli *The Law Of International Human Rights Protection* (Oxford University Press, Oxford, 2010) at pp 320-333; K Wouters *International Legal Standards for Protection From Refoulement* (Intersentia, Antwerp, 2009) at pp 381-391.

[83] The underlying rationale is identified by Kalin and Kunzli *(op cit)* at 329 -330:

> "Not every case of infliction of pain or suffering violates the prohibition of torture and inhuman or degrading treatment or punishment. The ill-treatment must reach a certain threshold of severity, ie a minimum degree of intensity, to be covered by the prohibition. As reflected in the jurisprudence of the treaty bodies and regional human rights courts, this threshold cannot be determined in the abstract but is heavily dependent on the circumstances involved. ...
>
> The need to determine where the threshold lies between conduct not covered by the prohibition on torture and inhuman or degrading treatment that falls within the substantive scope of the prohibition does not mean that exceptions could be justified with arguments that a certain treatment is proportional. Rather, the absolute nature of the prohibition means that any infringement above the threshold automatically constitutes a violation. It follows that one should be careful in not setting the threshold of applicability of this fundamental human right too low a level that trivialises

> and ultimately undermines the concept of torture. In our view, it is more appropriate to assess compatibility of a comparatively minor infringements with human rights law in the light of the right to privacy which is subject to certain limitations."

[84] This caution against trivialisation signals the inherent relationship under international law between the prohibition of torture and the prohibition of cruel, inhuman, or degrading treatment or punishment. Both concern ill-treatment of a serious kind as to which there is an absolute prohibition. Although for the purpose of ensuring *domestic* compliance with *international* obligations, sections 137 and 198 of the Act separate out as a matter of procedure consideration of risk of exposure to torture (section 130) from risk of exposure to cruel, inhuman, or degrading treatment or punishment (section 131), this does not affect the inherent relationship between these forms of ill-treatment. Although under section 130(5) the Act takes its definition of torture not from the ICCPR but from CAT, the function of section 131 is to give effect to certain obligations under the ICCPR. Yet Article 7 ICCPR, which section 131 is designed to give domestic effect to in the immigration context, prohibits both *torture and cruel, inhuman, or degrading treatment or punishment.* It reads:

> "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation."

[85] Although Parliament clearly intended the CAT definition of torture to apply in relation to claims under section 130 of Act, this does not mean that torture is magically airbrushed out of Article 7 for the purposes of interpreting that article's scope of prohibited harm for the purposes of claims under section 131. Reflecting customary international law, Article 31(1) of the Vienna Convention on the Law of Treaties 1969 requires that the Article 7 is to be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. The context in which cruel inhuman or degrading treatment punishment appears under Article 7 is in association with torture. This association gives hue to the words "cruel, inhuman or degrading treatment or punishment" and points towards there being some particularly reprehensible quality to treatment or punishment in question. This underlying and conceptually unifying concern with serious forms of ill-treatment is reflected in the illustrative specific prohibition of non-consensual scientific or medical experimentation.

[86] While in *Taunoa v Attorney General* [2008] 1 NZLR 429 Elias CJ and the majority (Blanchard, Tipping, McGrath, Henry JJ) disagreed as to whether there were 'degrees of reprehensibility' or 'sliding scales of intensity of harm' embedded

between the concepts of cruel, inhuman, or degrading treatment or punishment (as expressed in its domestic analogue under section 9 of the New Zealand Bill of Rights Act 1990), the Supreme Court was unanimous that to fall *within the scope of the right as a whole,* the ill-treatment or harm must be of a serious kind – see [91] – [92] per Elias CJ; [170]-[171] per Blanchard J; [278] per Tipping J; [338] per McGrath J; [383] per Henry J. For a similar approach in context of proceedings under the Extradition Act 1999 see *Bujak v Minister of Justice* [2009] NZCA 570 at [43] per Arnold J.

Refugee and Protected Person Jurisdictions Not Identical

[87] Although the refugee and protected person jurisdictions under the Act share a common framework of analysis, it would be a mistake to regard them as essentially identical. There are important differences which contribute to a highly textured protection landscape under the Act as a whole.

[88] First, in relation to exposure to torture, the human rights approach to being persecuted applicable to the determination of refugee claims under section 129 potentially admits a far wider range of conduct into its ambit. Unlike claims under section 130, the definition of torture used in the refugee status analysis is not expressly limited by the statute to the definition of torture in Article 1 of CAT – section 130(5). See in this context, discussion in Nowak and MacArthur (*op cit*) pp78-79 at [117]-[119]; Kalin and Kunzli (*op cit*) at p321; Wouters (*op cit*) at pp382, 445 in relation to the requirement of involvement or acquiescence of 'public officials' in acts of torture.

[89] Second, unlike in the refugee jurisdiction which is statutorily tied to the Refugee Convention's Article 1A(2) definition, there is no requirement in the protected person jurisdiction that the claimant establish a nexus between the harm they fear and their civil or political status. It is sufficient that the qualifying harm exists. While subject to certain statutory limitations relating to 'lawful sanctions' and the 'inability' of a country to provide health or medical care (section 131(5)), the lack of any requirement of a nexus to a civil or political status nevertheless potentially admits a far wider range of persons into the protected person jurisdiction than can occur in the refugee jurisdiction.

[90] Similarly, although it is true that Parliament has chosen to tack on to its ICCPR derived protected person jurisdiction the Refugee Convention's Article 1F exclusion clauses, unlike with the Refugee Convention, the application of the exclusion clause to a particular claimant in the protected person context does not

effectively lock them out of the jurisdiction. Whereas, if applied in the refugee context, the Refugee Convention cannot apply to them, if applied in the protected person context, they are still able to be recognised as a protection person. While under section 139 of the Act their immigration status is a matter to be determined by the Minister of Immigration, the fundamental point is that the overall protection space under the Act is enlarged by means of the protected person jurisdiction to include this further category of persons simply not able to be brought within the refugee jurisdiction.

HUMAN RIGHTS, THE PROTECTED PERSON JURISDICTION AND HUMANITARIAN APPEALS

General Observations

[91] The Tribunal has already remarked at [48] that a potentially broader range of issues are able to be relied on in the context of humanitarian appeals than in the protected person jurisdiction. It must be recognised that New Zealand's protected person jurisdiction, although derived from the ICCPR, does not embrace all of the rights contained in the ICCPR. The scope of New Zealand's protected person jurisdiction under sections 130 and 131 of the Act is expressly limited to relate only to exposure to torture, arbitrary deprivation of life or 'cruel treatment'. Under section 131(6) cruel treatment is defined to include cruel, inhuman or degrading treatment or punishment.

[92] The express wording of sections 130 and 131 of the Act mean that cases involving interference with other fundamental human rights *in circumstances not also giving rise to substantial grounds for believing the claimant would be in danger of torture, the arbitrary deprivation of life or cruel, inhuman, or degrading treatment or punishment* will simply fall outside the scope of New Zealand's protected person jurisdiction.

[93] This is not to insist that human rights are divisible in nature. They are not. As mentioned, human rights are now widely regarded as being universal, indivisible, interdependent and interrelated and not subject to any hierarchical ordering. Nevertheless, whatever the general position under international human rights law, the statutory scheme under the Act is clear. To paraphrase Lord Bingham's observations in *R (European Roma Rights Centre and Others) v Immigration Officer at Prague Airport and Anor* [2005] INLR 182, the interpretation and application of the

protected person jurisdiction must be directed at interpreting what the legislature has agreed to, not to give effect to what they might, or in an ideal world, have enacted.

Human Rights and the Statutory Scheme

[94] Under this scheme, if relief from removal is to be granted in cases which are determined to fall outside the scope of the Refugee Convention, the facts must raise issues relating to the rights not to be tortured, to be arbitrarily deprived of life or to suffer cruel, inhuman or degrading treatment or punishment. *Relief from harm arising from breaches of human rights falling outside this band must occur, if at all, in the context of a section 207 humanitarian appeal*.

[95] Having said that, the Tribunal recognises that the enjoyment of different human rights is not always demarcated by clearly defined boundaries. In certain circumstances, lines between rights become blurred and no doubt hard cases will arise for determination as to which side of the line the particular case falls.

[96] Having set out these preliminary observations on the correct approach to the functioning of New Zealand's 'complementary protection' regime under sections 130 and 131 of the Act, the Tribunal turns to consider the appellant's claims for refugee or protected person status.

ASSESSMENT OF THE APPELLANT'S CLAIM FOR REFUGEE STATUS

Persuasive Nature of RSAA Jurisprudence Generally

[97] Because this appeal raises a number of fundamental issues of refugee law, it is necessary to say something about the principles to be applied. As mentioned, the Immigration Bill makes clear that the parliamentary intention behind enacting what is now Part 5 of the Act was to strengthen New Zealand's *already highly regarded* refugee determination system. Central to this has been the development of refugee law by the RSAA. Established over two decades ago, the RSAA was, prior to the establishment of the Tribunal, *the* specialist body in New Zealand dealing with matters arising out of the Refugee Convention. It had an established international reputation as an expert tribunal in the field of refugee law. Its jurisprudence, while not binding on the Tribunal, is therefore of high persuasive value. Accordingly, unless the circumstances of the case or developments within the wider body of international refugee law requires further examination of RSAA jurisprudence, it

should be regarded as settling the particular issue arising in respect of claims for recognition as a refugee under the Act.

The Refugee Convention: The Issues

[98] The Inclusion Clause in Article 1A(2) of the Refugee Convention provides that a refugee is a person who:

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

[99] As explained by *Refugee Appeal No 70074/96* (17 September 1996), the fundamental questions to be examined in the context of a claim in relation to entitlement to refugee status are:

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

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

These continue to be the fundamental questions in respect of entitlement to refugee status under section129 of the Act.

[100] As will be seen from the following analysis, there are three reasons why this case does not fall within the ambit of section 129. Taken together, they highlight the difficulties in attempting to squeeze what may otherwise be a strong, but non-actionable humanitarian claim before the Tribunal into a refugee and protection claim.

Objectively, On the Facts as Found, Is there a Real Chance of the Appellant Being Persecuted if Returned to the Country of Nationality?

Anticipated harm does not constitute being persecuted

[101] Mr Mansouri-Rad submits that the age, health and living circumstances must be taken into account when assessing the risk of serious harm to the appellant. Mr Mansouri-Rad submits that, although the problems she faces are in the main issues of petty crime, the appellant's particular characteristics made her vulnerable to suffering serious harm. She lived on her own, is elderly and had a number of

medical conditions as outlined in the letter of 10 February 2011 from her doctor. These include diabetes, hypertension, osteoarthritis in the knee and atrial fibrillation. She fears serious injury and even death if subjected to ongoing harassment from Muslim criminal gangs or thieves. In this context, Mr Mansouri-Rad refers to the 'egg-shell skull' principle.

[102] At the outset, the Tribunal notes it is generally unhelpful to import into the refugee status inquiry notions and concepts drawn from tort law, particularly concepts which are surrounded by theoretical complications – see here observations of Richmond J in *Stephenson v Waite Tileman Ltd* [1973] 1 NZLR 152, 165 (NZCA). It is also unnecessary. Under the 'human rights approach' to the interpretation of the 'being persecuted' element of the refugee definition, Article 7 ICCPR is a mechanism to identify forms of serious harm. Issues such as the age, gender and standard of health of a claimant are thus already factored into the refugee status inquiry as such personal characteristics are relevant to assessing whether treatment amounts to a breach of Article 7 ICCPR – see Human Rights Committee in *Vuolanne v Finland* (265/87) (7 April 1989) at [9.2]; see also in this context, Kalin and Kunzli (*op cit*) at p329. Reference can also be had to jurisprudence of the European Court of Human Rights in *Ireland v United Kingdom* (1978) 2 EHRR 25 at [162] and subsequent cases regarding the ECHR analogue to Article 7 of the ICCPR; *Taunoa v Attorney General* at [91] per Elias CJ and [153] per Blanchard J.

[103] As mentioned, in order for the anticipated treatment to constitute cruel treatment for the purposes of the Act, it must be of a sufficient seriousness or severity. While it is impossible to lay down any bright-line test, the Tribunal is clear that simply being an elderly and frail victim of petty crime on an occasional basis does not come anywhere near the seriousness required to bring the appellant's predicament within the scope of Article 7 ICCPR. The Tribunal accepts that for a person of her age and frailty, incidents of theft and unfounded demands for money would be inherently distressing. However, there is no evidence before the Tribunal that she has suffered any particular humiliation or debasement as a result of the past incidents of this kind. The Tribunal does not overlook the fact that during one incident she fell down and hurt her head. The Tribunal further observes that this event took place when she was already quite old and frail. There is no evidence to establish that she suffered any lasting physical or mental harm as a result of this or another of the incidents which took place in the past.

[104] The Tribunal acknowledges that the CAT committee has held that, when conducted with overtones of racial discrimination, the destruction of property can, in

certain circumstances, of itself constitute a breach of article 7 – see *Dzemajil et al v Yugoslavia* (CAT/C/29/D/ 161/2000). But we are a long way from that situation in this case. The evidence before the Tribunal establishes that the appellant was still able to live in her house. Despite the theft of her stove and curtains, there is no evidence of any racial motivation behind these incidents or of serious consequences befalling her. There is no suggestion by her that the police stood by while these events occurred or failed to respond to a complaint she made because of her ethno-religious identity as an Assyrian.

[105] At best, the appellant has suffered isolated breaches of her rights under Article 17 of the ICCPR which provides:

> "1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.
>
> 2. Everyone has the right to the protection of the law against such interference or attacks."

[106] Any distress caused by the occasional breach of her right to privacy or interference with her home falls well-short of the harm required to establish a breach of Article 7 of the ICCPR and does not constitute her being persecuted for the purposes of the Refugee Convention. New Zealand's protection obligations under section 129 are not engaged on this basis.

[107] As for the risk of her being killed during such an incident, the Tribunal accepts that the scope of the right not to be arbitrarily deprived of life extends to risks to life from private individuals – see Human Rights Committee *The Right to Life* General Comment No 6 (30 April 1982) at [3]; Joseph, Schultz and Castan (*op cit*) at pp183-184. Kalin and Kunzli (*op cit*) at 103, commenting on the general obligation on states to respect, protect and fulfil human rights note:

> "The treaty monitoring bodies now recognise that human rights can be threatened not only by the state but also by private actors… In such cases respect alone is inadequate to ensure the enjoyment of human rights. Indeed, states must be compelled to protect private actors from violations of their human rights in such cases. The general obligations 'to respect and ensure to all individuals' their human rights, or ' to secure to everyone' such rights under core human rights treaties cannot be fulfilled if the rights of private actors are not protected against breaches by third parties."

[108] States must therefore take all reasonable actions within their lawful power to prevent real and immediate danger to life of which they are or ought to have been aware – see here *Osman v United Kingdom* Reports (2009) 29 EHRR 245 at [115]-[116]. For similar observation on the duty of states 'to organise the government apparatus' to prevent, investigate and punish *any* violation of rights within the inter-

American system of human rights – see *Velasquez-Rodriguez v Honduras* Series C, No 4 (1988) at [166].

[109] The Tribunal also reminds itself that the fact Syria may have a criminal justice system which punishes acts of violence by private individuals and a willingness to operate that system does not mean that there is necessarily an adequacy of state protection for the purposes of assessing whether the appellant faces 'being persecuted' if returned there. If, despite the operation of the criminal justice system, a real risk of serious harm arising from breaches of core human rights is established on the evidence, a finding of being persecuted is warranted – see *Refugee Appeal No 71427/99* (16 August 2000) at [66]:

> "In our view the proper approach to the question of state protection is to inquire whether the protection available from the state will reduce the risk of serious harm to below the level of well-foundedness, or, as it is understood in New Zealand, to below the level of a real chance of serious harm. The duty of the state is not, however, to eliminate ***all*** risk of harm. This is the point made by Professor Hathaway in *The Law of Refugee Status* (1991) at 105 where he observes that we live in a highly imperfect world and that hardship and suffering remains very much part of the human condition for perhaps the majority of humankind."

[110] However, there must be a real risk and it is here where the appellant's claim to be at risk of death as a result of these incidents runs into major difficulties. It is also an alternative reason why her claim to be in danger of suffering cruel, inhuman or degrading treatment must fail.

No real chance of harm eventuating in any event

[111] The question of whether the risk to the appellant reaches the real chance threshold is a related but separate issue altogether from whether the predicament of the appellant is to be categorised as 'being persecuted' – see *Refugee Appeal No 74665* [2005] NZAR 60 at [83]. Having said that, the Tribunal reminds itself of the pertinent observations of Sedley LJ in *Karanakaran v SSHD* [2000] Imm AR 271, 304:

> "While, for reasons considered earlier, it may well be necessary to approach the convention questions themselves in discrete order, how they are approached and evaluated should henceforward be regarded not as an assault course on which hurdles of varying heights are encountered by the asylum seeker with the decision-maker acting as umpire, nor as a forum in which the improbable is magically endowed with the status of certainty, but as a unitary process of evaluation of evidential material of many kinds and qualities against the convention's criteria of eligibility for asylum."

[112] The degree of risk of serious harm that must be established by the appellant on the evidence is no more than she faces a real chance of being persecuted. As

the RSAA noted in *Refugee Appeal No 72668: Ruling on Legal Issues* (5 April 2002), at [116] per Haines QC, a real chance of being persecuted may exist when there is less than a 50 per cent chance of the persecution occurring. Nevertheless, the chance must be substantial as distinct from a remote chance. The RSAA, at [131], agreed with the statement in *Minister for Immigration and Ethnic Affairs v Guo* (1997) 191 CLR 559, 572 (HCA) that:

> "Conjecture or surmise has no part to play in determining whether a fear is well-founded. A fear is well-founded "when there is a real substantial basis for it". As Chan shows a substantial basis for a fear may exist even though there is far less than a 50 per cent chance that the object of the fear will eventuate. But no fear can be well-founded for the purpose of the Convention unless the evidence indicates a real ground for believing that the applicant for refugee status is at risk of persecution. A fear of persecution is not well-founded if it is merely assumed or if it is mere speculation."

[113] Citing *Chan v Minister of Multicultural Affairs* (1989) 169 CLR 379, 429 per McHugh J (HCA) he further submits that a single isolated incident may, in appropriate circumstances, constitute persecution. Again, this broad proposition is uncontroversial and can in general be accepted. However, considered in the context of the judgment of the Court in *Chan* as a whole, McHugh J's observation does not mean that the real chance threshold is somehow lessened where the personal characteristics of the claimant increase their vulnerability to the anticipated harm. These principles continue to apply in the context of section 194(1)(c) appeals.

[114] What has emerged from the disjointed and confusing evidence is a picture of an elderly woman living on her own in an isolated rural village being subjected to petty crime on a very occasional basis. This is consistent with available country information. No country information has been filed by Mr Mansouri-Rad to establish that Assyrian Christian communities are being generally targeted for theft and harassment by other religious groups. Rather that the United States Department of State *International Religious Freedom Report: Syria* (17 November 2010) at section 3 observes that:

> "There were occasional reports of minor tensions between religious groups, mainly attributed to economic rivalries rather than religious affiliation."

[115] The appellant had been living on her own for seven or eight years prior to coming to New Zealand. In all that time she has suffered only two credible instances of theft and one further instance when an unknown man demanded money from her. There is no reliable evidence of any other incidents. Although she was unable to give any sense of the timing of these events, the statement filed by the appellant in support of her appeal states that the incidents in which her curtains and stove were stolen occurred in June and September 2006. The relative closeness in time of

these events, and the absence of similar events in the years before and after their occurrence, only serve to highlight their truly remote and isolated nature. The date of the incident involving the demand for money is unclear. She could not recall when this happened in her evidence to the Tribunal but in her RSB interview stated this took place after the theft of her stove and curtains. If so, it represents the only incident in the 15 months or so prior to her departure for New Zealand.

[116] There is nothing before the Tribunal to indicate that the likelihood of such events occurring in the future is any greater than that which occurred in the past. The Tribunal finds that, even when factoring into its assessment an increased vulnerability due to her age and various medical conditions, the risk of the appellant being subjected to further incidents capable of giving rise to a risk of cruel, inhuman or degrading treatment, or the arbitrary deprivation of her life is, at its core, a remote and speculative risk. It does not rise to the real chance threshold. It is not well-founded.

[117] The first principal issue identified in [99] above is answered in the negative.

Is There a Nexus to a Convention Reason?

No nexus established

[118] The RSAA has persuasively recognised that the "for reasons of" element in the refugee definition can be satisfied either by the reason for the serious harm or by the reason of failure of state protection, or by both – see *Refugee Appeal No 71427/99* [2000] NZAR 545.The RSAA stated:

> "[112] Accepting as we do that Persecution = Serious Harm + The Failure of State Protection, the nexus between the Convention reason and the persecution can be provided ***either*** by the serious harm limb ***or*** by the failure of the state protection limb. This means that if a refugee claimant is at real risk of serious harm at the hands of a non-state agent (eg husband, partner or other non-state agent) for reasons unrelated to any of the Convention grounds, but the failure of state protection is for reason of a Convention ground, the nexus requirement is satisfied. Conversely, if the risk of harm by the non-state agent is Convention related, but the failure of state protection is not, the nexus requirement is still satisfied. In either case the persecution is for reason of the admitted Convention reason. This is because "persecution" is a construct of two separate but essential elements, namely risk of serious harm and failure of protection. Logically, if either of the two constitutive elements is "for reason of" a Convention ground, the summative construct is itself for reason of a Convention ground. See *Shah* 646C-D, 648C, 653E-G and 654D."

[119] Furthermore, the jurisprudence of the RSAA makes clear the standard for establishing causation is a low one. In *Refugee Appeal No 72635* (6 September 2002) the RSAA held:

> "[173] We are of the view that it is sufficient for the refugee claimant to establish that the Convention ground is a ***contributing*** cause to the risk of "being persecuted". It is not necessary for that cause to be the sole cause, main cause, direct cause, indirect cause or "but for" cause. It is enough that a Convention ground can be identified as being relevant to the cause of the risk of being persecuted. However, if the Convention ground is remote to the point of irrelevance, causation has not been established."

[120] Counsel submits that there is a sufficient nexus to the Convention ground of religion in that the thieves and gangs would know that, as Assyrians, the appellant and her community are vulnerable to their criminal activity. As Assyrians, the community in general and the appellant in particular did not have what counsel described as the "invisible shield of protection" that Arab communities enjoyed. Thieves knew that if they stole from Arab communities there would be cultural impetus to try and restore family honour by seeking revenge on the perpetrators of the crime.

[121] The Tribunal rejects this submission. The Tribunal is fully satisfied that the age, gender and religious characteristics of the appellant play only a remote part in her predicament.

[122] Although Mr Mansouri-Rad suggests that criminal gangs were targeting the Assyrians generally (and by implication the appellant) because they knew Assyrian Christians were disenfranchised and devoid of the "invisible shield of protection" of a tribal affiliation, this is a matter of pure speculation on his part. It is unsupported by any country information. The Tribunal has no doubt that it is the isolated rural nature of these communities rather than their religious identity which is rendering them susceptible to petty crime of this nature. Similarly, there is no credible evidence before the Tribunal to establish that the police are failing to respond because they are Assyrians. The evidence is that the police have responded albeit slowly in some instances, to complaints made by the appellant's son in respect of theft and intervened in respect of the drunken and disorderly conduct of youths. The evidence establishes no more than that the police resource is spread very thinly and that, as with other police forces, petty theft by unknown and unidentified persons does not appear to be a significant operational priority.

[123] There is no nexus to a Convention ground in this case. The appellant's predicament can thus be readily distinguished from that in *Refugee Appeal No 75787 (31 October 2006)* where there was direct corroborative evidence of a failure of local police to take action to known incidents involving problems faced by another Assyrian community with their Muslim co-inhabitants .

[124] The second principal issue set out in [99] is also therefore answered in the negative.

Conclusion on claim to refugee status

[125] For the above reasons the appellant is not entitled to be recognised as a refugee under section 129 of the Act.

ASSESSMENT OF THE APPELLANT'S CLAIM UNDER CONVENTION AGAINST TORTURE

The issues

[126] Section 130(1) of the Act provides that:

> "A person must be recognised as a protected person in New Zealand under the Convention Against Torture if there are substantial grounds for believing that he or she would be in danger of being subjected to torture if deported from New Zealand."

[127] 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."

Assessment and conclusion

[128] Mr Mansouri-Rad accepts in his written submissions that the appellant's case does "not appear to invoke the CAT grounds". This concession is well made. There are no substantial grounds for believing that the appellant, if returned to Syria, faces substantial risk of being tortured as defined under Article 1 of the Convention Against Torture.

ASSESSMENT OF THE APPELLANT'S CLAIM UNDER INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

The issues

[129] Section 131(1) of the Act provides that:

> "A person must be recognised as a protected person in New Zealand under the Covenant on Civil and Political Rights if there are substantial grounds for believing that he or she would be in danger of being subjected to arbitrary deprivation of life or cruel treatment if deported from New Zealand."

[130] Pursuant to section 131(6) of the Act "cruel treatment" means cruel, inhuman or degrading treatment or punishment but, 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; and

(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.

Assessment

[131] The question of whether the appellant is at risk of cruel, inhuman, or degrading treatment or punishment or arbitrary deprivation of her life has been considered already in the context of the claim for refugee status. For the reasons explained above, no lower threshold of harm exists for establishing cruel, inhuman, or degrading treatment or punishment in the protected person context than exists in the refugee context. For reason already given, there are no substantial grounds for believing the appellant is in danger of suffering cruel treatment as defined under the Act.

[132] Furthermore, the Tribunal has found that the risk of this occurring, even factoring in her age, various medical conditions and living circumstances, does not reach the real chance threshold. The real chance standard applicable in relation to section 129 is, of course, expressed in different terms to section 131. In his written submissions, Mr Mansouri-Rad notes that different interpretations of the 'standard of proof' implied by the words 'substantial grounds for believing would be in danger' set out in sections 130 and 131 have been taken in overseas jurisdictions. He points to

Canadian jurisprudence where this test had been interpreted as requiring proof on the balance of probabilities, a higher standard of proof than that required to establish entitlement to refugee status under section 129. In the United Kingdom a standard broadly similar to the real chance test had been adopted. Mr Mansouri-Rad submits that the approach the Tribunal should take to the standard of proof to be applied in protected persons claims should be that taken in the United Kingdom for consistency and practicality.

[133] Mr Mansouri-Rad's submissions on what is loosely, if inaccurately in the refugee and protection context, termed the 'standard of proof' does not need to be resolved in this case. Even if it were to be accepted that the real chance 'standard' were to apply in cases under section 131, no matters additional to those matters relied on in the refugee claim have been advanced to establish the claim under section 131. Counsel, rightly, does not contend that a *lower* 'standard' applies in protected person claims than exists in refugee claims. Therefore, for the reasons given in relation to the assessment of the claim for refugee status, even if it were to be accepted that the real chance standard applied, there is no real chance that the appellant would be arbitrarily deprived of her life or suffer cruel, inhuman or degrading treatment or punishment.

Conclusion

[134] It has not been established that there are substantial grounds for believing that the appellant would be in danger of being subjected to cruel, inhuman, or degrading treatment or punishment or the arbitrary deprivation of her life. She is not entitled to protected person status under section 131 of the Act.

OBSERVATIONS ON HUMANITARIAN CIRCUMSTANCES

[135] As indicated at the outset, despite the strong humanitarian factors in this case, the Tribunal has been unable to give them any examination because the appellant is statutorily barred from lodging a humanitarian appeal. Apart from anything else, the letter of 10 February 2011 from her doctor states that she is unable to fly as this gives rise to a risk of a clot moving from her heart leading to a stroke. Quite simply if the appellant is unable to board a plane to return to Syria there is no practicable way of her leaving New Zealand.

[136] However, given the Tribunal is unable to consider a humanitarian appeal, the appellant will need to look elsewhere for such relief as she may be entitled.

CONCLUSION

[137] For the foregoing reasons, the Tribunal finds that the appellant:

(a) Is not a refugee within the meaning of the Refugee Convention;

(b) Is not a protected person within the meaning of the Convention Against Torture;

(c) Is not a protected person within the meaning of the Covenant on Civil and Political Rights.

[138] The appeal is dismissed.

"B L Burson"

B L Burson
Member

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B L Burson
Member