IN THE SUPREME COURT OF NEW ZEALAND

SC 7/2015
[2015] NZSC 107

BETWEEN	IOANE TEITIOTA Applicant
AND	THE CHIEF EXECUTIVE OF THE MINISTRY OF BUSINESS, INNOVATION AND EMPLOYMENT Respondent

Hearing:	1 April 2015
Court:	Elias CJ, William Young, Glazebrook, Arnold and O'Regan JJ
Counsel:	M J Kidd for Applicant C A Griffin and M F Clark for Respondent
Judgment:	20 July 2015

JUDGMENT OF THE COURT

A The application for leave to adduce further evidence is granted.

B The application for leave to appeal is dismissed.

C There is no order for costs.

REASONS

Introduction

[1] The applicant, Mr Teitiota, seeks leave to appeal against a decision of the Court of Appeal under s 245 of the Immigration Act 2009 refusing him leave to appeal to the High Court against a decision of the Immigration and Protection Tribunal.[1] The Tribunal had found that Mr Teitiota could not bring himself within

[1] *Teitiota v Chief Executive of the Ministry of Business Innovation and Employment* [2014] NZCA 173, [2014] NZAR 688 (Stevens, Wild and Miller JJ) [*Teitiota* (CA)].

either the Refugee Convention or New Zealand's protected person jurisdiction on the basis that his homeland, Kiribati, was suffering the effects of climate change.[2]

Application for leave to adduce further evidence

[2] The applicant, Mr Teitiota, seeks leave to adduce further evidence, in particular:

(a) The decision of officials of the Ministry of Business, Innovation and Employment on the applications of Mr Teitiota's wife and children for refugee and/or protected person status. Their applications were declined.[3]

(b) The Synthesis Report of the Fifth Assessment Report of the Intergovernmental Panel on Climate Change published in November 2014.

[3] As the material is in the nature of updating evidence, we grant leave for its admission.

Factual background

[4] Mr Teitiota and his wife came to New Zealand from Kiribati in 2007 and remained after their permits expired in October 2010. Accordingly, they are in New Zealand unlawfully. Although their three children were born in New Zealand, none is entitled to New Zealand citizenship.[4]

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

3 Refugee and Protection Status Decision 18 November 2014.

4 Citizenship Act 1977, s 6(1)(b) restricts citizenship by birth in New Zealand to those born in New Zealand before 1 January 2006, so that people born in New Zealand on or after that date (as the applicant's children were) are not entitled to citizenship unless at least one of their parents is a New Zealand citizen or is entitled to reside in New Zealand, the Cook Islands, Niue or Tokelau indefinitely.

[5] After being apprehended following a traffic stop, Mr Teitiota applied for refugee status under s 129 of the Immigration Act 2009[5] and/or protected person status under s 131.[6] No applications were made by his wife and children at that time. The basis for Mr Teitiota's application was that his homeland, Kiribati, is facing steadily rising sea water levels as a result of climate change. The fear is that, over time, the rising sea water levels and the associated environmental degradation will force the inhabitants of Kiribati to leave their islands.

[6] A Refugee and Protection Officer declined Mr Teitiota's application. Mr Teitiota then appealed against the Officer's decision to the Immigration and Protection Tribunal. Although the Tribunal accepted that Mr Teitiota's concerns about Kiribati and its future were justified, it dismissed his appeal, holding that he was neither a refugee within the meaning of the Refugee Convention nor a protected person within the meaning of the International Covenant on Civil and Political Rights (ICCPR).[7] Mr Teitiota then sought leave from the High Court to appeal against the Tribunal's decision on a question of law, identifying six possible questions of law. Priestley J declined that application, holding that none of the six questions raised an arguable question of law of general or public importance.[8] Following that, Mr Teitiota sought leave from the Court of Appeal to appeal to the High Court, again by reference to the six questions (slightly reformulated). That application was also refused, the Court of Appeal finding that none of the six questions was sufficient to justify the grant of leave.[9]

[7] Mr Teitiota now seeks leave to appeal to this Court against the Court of Appeal's decision, again on the basis of the six questions. If leave were granted and

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5 Section 129 invokes the test for a refugee set out in the Refugee Convention, which s 4 of the Act defines as both the Convention relating to the Status of Refugees 189 UNTS 137 (opened for signature 28 July 1951, entered into force 22 April 1954) and the Protocol Relating to the Status of Refugees 606 UNTS 267 (opened for signature 13 January 1967, entered into force 4 October 1967).

6 Section 131 requires that a person be recognised as a protected person under the International Covenant on Civil and Political Rights 999 UNTS 171 (opened for signature 16 December 1966, entered into force 23 March 1976) 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.

7 *AF (Kiribati)*, above n 2.

8 *Teitiota v The Chief Executive of the Ministry of Business Innovation and Employment* [2013] NZHC 3125, [2014] NZAR 162 (Priestley J) [*Teitiota* (HC)].

9 *Teitiota* (CA), above n 1.

the appeal succeeded, Mr Teitiota would obtain leave to appeal to the High Court against the Tribunal's decision.

Jurisdiction

[8] The application raises an issue as to the Court's jurisdiction to grant leave in terms of the Immigration Act and the Supreme Court Act 2003. The same issue was raised in *Guo v Minister of Immigration*, in which judgment has already been delivered.[10] We heard argument from Mr Kidd on the jurisdiction issue immediately before hearing jurisdiction argument in *Guo*. In the circumstances, we will not repeat all that we said in *Guo* on the topic of jurisdiction, but rather will summarise the position.

[9] In *Guo*, we set out the relevant provisions of the Immigration Act[11] and of the Supreme Court Act. We concluded that there was nothing in s 245 of the Immigration Act which specifically restricted the jurisdiction of the Supreme Court in respect of a decision of the Court of Appeal under that section. Accordingly, s 245 did not fall within the provisions of s 7(a) of the Supreme Court Act.[12]

[10] We also concluded that while s 7(b) of the Supreme Court Act meant that the Court did not have jurisdiction to entertain an appeal from a decision of the Court of Appeal denying leave to appeal to itself, and s 8(b) meant that the Court did not have jurisdiction to hear an appeal from a decision of the High Court refusing leave to appeal to itself or the Court of Appeal, there was no provision which stated explicitly that the Court did not have jurisdiction to hear an appeal from a decision of the Court of Appeal refusing leave to appeal to the High Court.[13] In those circumstances, we concluded that the Court did have jurisdiction. Accordingly, the critical question is whether this is a case in which we should grant leave.

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10 *Guo v Minister of Immigration* [2015] NZSC 76.

11 We note that s 245 of the Immigration Act 2009 has now been amended, effective 7 May 2015, to include a new s 245(1A): "A decision by the Court of Appeal to refuse leave to appeal to the High Court is final." See the Immigration Amendment Act 2015, s 61(1). We will refer to the section as it was when this case was argued.

12 *Guo v Minister of Immigration*, above n 10, at [18].

13 At [19]–[20].

Should leave be granted?

[11] As we have said, Mr Teitiota's application for leave identifies the same six questions of law that were before the High Court and the Court of Appeal. In his written submissions in support of the application for leave, Dr Kidd identifies the key issue as being:

> [W]hether New Zealand's refugee law extends protection to a person who faces environmental displacement and the operation of a number of International Conventions, most importantly relating to the care of his three children under the age of six born in NZ.

He then submits that the proposed appeal raises four points:

(a) Whether as a matter of public international law an "environmental refugee" qualifies for protection under art 1A(2) of the Refugee Convention.

(b) Whether, in the alternative, the manner in which art 1A(2) is incorporated into New Zealand law provides a basis for a broader interpretation of "refugee" in s 129(1) of the Immigration Act.

(c) Whether the United Nations Convention on the Rights of the Child[14] is relevant to the assessment of "harm" for the purposes of the Refugee Convention.

(d) Whether the right to life under the ICCPR includes a right of a people not to be deprived of its means of subsistence.

[12] We agree with the Courts below that, in the particular factual context of this case (even with the addition of the new evidence), the questions identified raise no arguable question of law of general or public importance. In relation to the Refugee Convention, while Kiribati undoubtedly faces challenges, Mr Teitiota does not, if returned, face "serious harm" and there is no evidence that the Government of Kiribati is failing to take steps to protect its citizens from the effects of

[14] Convention on the Rights of the Child, 1577 UNTS 3 (opened for signature 20 November 1989, entered into force 2 September 1990).

environmental degradation to the extent that it can. Nor do we consider that the provisions of the ICCPR relied on have any application on these facts. Finally, we are not persuaded that there is any risk of a substantial miscarriage of justice.

[13] That said, we note that both the Tribunal[15] and the High Court,[16] emphasised their decisions did not mean that environmental degradation resulting from climate change or other natural disasters could never create a pathway into the Refugee Convention or protected person jurisdiction. Our decision in this case should not be taken as ruling out that possibility in an appropriate case.

Decision

[14] The application for leave to appeal is dismissed. Given the circumstances of the application, there is no order for costs.

Solicitors:
Kidd Legal, Auckland for Applicant
Crown Law Office, Wellington for Respondent

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15 *AF (Kiribati)*, above n 2, at [55]–[59] and [64]–[65].
16 *Teitiota* (HC), above n 8, at [27].