IMMIGRATION AND PROTECTION TRIBUNAL NEW ZEALAND **[2012] NZIPT 800091**

AT AUCKLAND

Appellant:	**BG (Fiji)**
Before:	B L Burson (Member)
Counsel for the Appellant:	M Kidd
Counsel for the Respondent:	No Appearance
Dates of Hearing:	20 April 2011 & 18 May 2011
Date of Decision:	20 January 2012

DECISION

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INTRODUCTION

[1] This is an appeal against a decision of a refugee status officer of the Refugee Status Branch (RSB) of the Department of Labour, declining to grant refugee or protected person status to the appellant, a citizen of Fiji. Although the appellant's wife and children are in New Zealand, no claim has been lodged by them and they are not appellants before the Tribunal.

[2] The appellant's case arises from the forcible relocation of Banaban Islanders in 1946 from what was then called Ocean Island in the Gilbert and Ellice Islands (now Kiribati and Tuvalu) to Rabi Island in Fiji to facilitate the continued extraction of phosphate. The appellant claims Banabans in Fiji occupy the lowest rung of the socio-economic ladder because of discrimination. He argues that the conditions he would encounter in Fiji as a Banaban are such as to entitle him to either refugee or protected person status.

[3] As the appellant has been living unlawfully in New Zealand for some time, he is statutorily barred from lodging a humanitarian appeal in respect of his liability for deportation from New Zealand. Consequently, the Tribunal has no statutory power to consider any wider humanitarian concerns raised by the case. If the appellant is entitled to relief from the Tribunal, he must establish that his predicament constitutes being persecuted for a Convention reason, or that he faces a risk of torture, arbitrary deprivation of life, or cruel, inhuman or degrading treatment or punishment.

[4] Of these it has, rightly, not been seriously contested that he faces a risk of torture as defined in the Immigration Act 2009, the arbitrary deprivation of life, or punishment. These matters can be quickly disposed of. However, the appeal does raise issues of some importance to the refugee and protection jurisdictions under the 2009 Act, namely, the extent to which socio-economic deprivation:

(a) entitles a claimant to be recognised as a refugee under the Refugee Convention based on breaches of the International Covenant on Economic Social and Cultural Rights 1966 (ICESCR); and

(b) can found a valid claim for refugee or protected person status on the basis such deprivation constitutes cruel, inhuman or degrading treatment in breach of Article 7 of the International Covenant on Civil and Political Rights 1966 (ICCPR).

[5] Before addressing these issues, however, it is first necessary to contextualise the appellant's claim by setting out country information relating to the displacement of the Banaban population to Rabi Island and to their socio-economic condition in Fiji. The Tribunal will then set out and asses the evidence given in support of the appeal before dealing with the legal issues raised.

COUNTRY INFORMATION

Forced Displacement from Banaba to Rabi Island: An Overview

[6] The forced relocation of the Banabans from Banaba to Rabi Island in Fiji represents one of only three instances of forced international relocation for environmental reasons since territorial boundaries were placed around Pacific Islands during the colonial era, and the only instance where there was the complete relocation of the entire population: J Campbell "Climate Change and Population Movement in Pacific Island Countries" in B Burson (ed) *Climate Change and Migration: South Pacific Perspectives* (Institute of Policy Studies, Wellington, 2010) at p39. Those relocated lived in makeshift accommodation, adjusting as best they could to an alien environment with insufficient foodstuffs and medical provisions. Unsurprisingly, this has led to grievances and a sense of alienation which has had a profound impact upon their sense of identity and culture: see generally, M G Silverman *Disconcerting Issue: Meaning and Struggle in a Resettled Pacific Island community* (University of Chicago Press, Chicago, 1971); K M Teaiwa "Our Sea of Phosphate: the Diaspora of Ocean Island" in

G Harvey and C D Thompson Jnr (eds) *Indigenous Diasporas and Dislocations* (Ashgate Publishing, Aldershot, 2005); Wolfgang Kemp and Elfriede Hermann "Reconfigurations of Place and Ethnicity: Positionings, Performances and Politics of Relocated Banabans in Fiji" (2005) 75 *Oceania* 368.

Political Condition of Banabans in Fiji

[7] A specific legislative regime was established to regulate the internal affairs of the Banabans which, following Fijian independence, has taken the form of the Banaban Lands Act 1970 and Banaban Settlement Act 1970. The former provides for land on Rabi Island to be vested in the Banaban community and held in accordance with Banaban customary law. There is a general prohibition on alienation outside the Banaban community: A Quentin-Baxter *Ethnic Accommodation in the Republic of Fiji Islands* (Waikato University, 1999) at [137] and [153]-[154]. Under the Banaban Settlement Act 1970, the affairs of Rabi Islanders are administered by the Rabi Island Council ("the Council") which is an elected body of Banabans representing each village. The Council possesses regulatory making powers in the areas of health and housing. It can determine issues of development for the island and people and can levy taxes if necessary: T Teaiwa "Peripheral visions? Rabi Island in Fiji's general election" in B V Lal (ed) *Fiji Before the Storm: Elections and the Politics of Development* (Asia-Pacific Press, Australian National University, Canberra, 2000) at pp94-95.

[8] Until a 1990 constitutional reclassification, the Banabans were included in the 'Fijian' electoral rolls. Following the reclassification they are regarded as 'others': J Fraenkel *Minority Rights in Fiji and the Solomon Islands: Reinforcing Constitutional Protections, Establishing Land Rights and Overcoming Poverty* Paper prepared for UN Commission on Human Rights, Working Group on Minorities, 5 May 2003, E/CN.4/Sub.2/AC.5/2003/WP.5 at [2.3].

[9] Rabi Island was already inhabited at the time of the relocation there of the Banaban community. As is common in the Pacific region, the existing inhabitants of Rabi had a visceral connection to 'their' land. Their displacement to nearby Taveuni Island to make way for the Banabans continues to cause tensions over ownership of Rabi Island. Kempf and Hermann, (*op cit*) at pp370-372, chart the developing relationship between the displaced Banabans and their new homeland during the 1960s and 1970s. After noting the financial settlement of legal proceedings against the United Kingdom in the 1970s for compensation and rehabilitation of Banaba, Kempf and Herman state at p372:

> "With the legal and political battles over Banaba and its resources now behind them, in the 1980s the Banabans could put all their energies into improvements to Rabi Island's infrastructure. But soon they found themselves forced to defend against ultra-nationalist Fijians their right to both land and homeland in Fiji. Ownership of the island, which was vested in, and administered as a trust by, the Rabi Council of Leaders on the community's behalf, had been guaranteed the Banabans – initially in the *Banaban Land Ordinance of* 1953; and subsequently, upon Fiji gaining independence in 1970 in the *Banaban Lands Act.* Since the two military coups of 1987, nationalistically minded Fijians pursued, particularly on the regional level, a politics of ethnic exclusion. These individuals gave the Banabans to understand that they were living under Fijian authority on land that was originally Fijian, and that they had no claim whatsoever to ownership of Rabi Island. This despite the fact that Rabi Island, legally speaking, had long been Banaban land."

[10] Other reports point to this being an ongoing issue: see "Relocated Fiji Villagers Want Rabi Island back" *Pacific Island Report* (5 June 2007); "Fijians want Rabi Island Returned*" Fiji Times Online* (5 June 2007). The documentation filed on 1 August 2011 shows that royalties are paid by the Council to local chiefs to enjoy access to fishing grounds in seas around Rabi Island.

Socio-economic Condition of Banabans in Fiji

[11] The first Banaban settlers numbered just over 1,000. By 1995, this population has swelled to over 5,000; see *Core Document Forming Part of the Report of States Parties: Fiji,* 14 March 2007, HRI/CORE/FJI/2006 ("the UN Summary Document") at p12, paragraph [45]. Following the settlement of its legal action in the 1970s, a trust fund totalling FJ$10 million regulated by the Banaban Settlement Act was put in place. According the UN Summary Document at p13, paragraph [49], "because of it access to its own developmental funds, this minority community was largely excluded from the mainstream development process".

[12] Despite the existence of this fund, Rabi Island suffers from underdevelopment. A range of other factors has contributed. G Hindmarsh *One Minority People: a Report on the Banabans* (UNESCO), November 2002 at pp53-54 notes that the group-titled land ownership structure on Rabi Island means that land cannot be used as collateral to support business ventures. He cites a lack of regular shipping or mail services and limited information-technology infrastructures as further barriers to economic development. Vulnerability to natural hazards, in particular, sudden-onset disasters such as cyclones has also had a significant impact on physical infrastructures and livelihoods. See also M Field *Devastated Pacific Island Facing Starvation* (22 March 2010) www.stuff.co.nz.

[13] Kumar *et al*, "Poverty and Deprivation Amongst Ethnic Minorities in Fiji: The case of Ni Solomoni and Rabi Islanders" (2006) 4(1) *Fijian Studies: A Journal of*

Contemporary Fiji at p126, point to a number of factors contributing to poverty rates among Banabans on Rabi Island. Some are factors specific to Rabi itself, such as it geographical isolation. Its limited size and population make it "impossible for the market to function adequately". Others relate to the minority status of Banabans in Fiji. These factors include "lack of political voice and leverage", inadequate representation within the media to raise awareness, and a lack of technical expertise within the community.

[14] J Fraenkel, *(op cit)* at [2.3], also points to a multiplicity of causes for the poverty rates on Rabi Island:

> "Aid dependency and poor financial management have led to deteriorating living standards for the Banaban community on Rabi. After misappropriations of funds in the 1980s and a failure to meet debts in 1992, the Rabi Island Council was briefly dissolved by the Fiji government. Banabans remains one of Fiji's most disadvantaged and politically marginalised communities. Affirmative action programmes for indigenous Fijian and Rotuman communities in the aftermath of the 1987 and 2000 coups have not been targeted at Banaban peoples."

[15] The 1990 constitutional reclassification has also had a negative impact insofar as it shut the Banabans out of anti-poverty programmes which have been predominantly directed at indigenous Fijians and Rotuman Islanders. Fraenkel, (*op cit*) at [2.4], states that these programmes:

> "…had the aim of encouraging greater employment of ethnic Fijians in both the public service and the private sector. Soft loans to indigenous Fijian business enterprises and infrastructural developments targeted at majority indigenous parts of the country have also characterised both post-1987 and post-2000 government policy."

[16] Kumar *et al*, (*op cit*) at p130, point out that ethno-political analysis of poverty in Fiji tends to focus in detail only on the two main groups: indigenous and Indo-Fijians. They argue:

> "The persistent focus on poverty among ethnic Fijian and ethnic Indians has been considerably detrimental to the minorities as regards resource allocation and addressing their problems. While for political reasons, there have been some token responses to the economic plight of the minorities... overall, there has not been any sustained focus on poverty amongst the minority communities, nor has the public been provided with concrete figures on poverty rates."

[17] Fraenkel's observation that Banabans remain "one of Fiji's most disadvantaged and politically marginalised communities" is reflected in the study of Kumar *et al*. The disconnection between the actual incidence of poverty and the focus of government affirmative action programmes has been criticised in *UN Treaty Bodies Summary Report,* 13 November 2009, A/HRC/WG.6/7/FJI/2. It observes, at [15], that a range of policies aimed at alleviating poverty are

contained in the Fiji government's strategic development plan and that the government has a formal plan in relation to indigenous Fijians containing affirmative action policies to improve education and training. Yet the report notes these policies extended to areas where there was very weak, if any, evidence of such an ethnic concentration of socio-economic disadvantage.

[18] The *Concluding Observations of the Committee on the Elimination of Racial Discrimination*, 16 May 2008, *Fiji* CERD/C/FJI/CO/17 record, at [17], concern that special measure programmes in the field of education and employment in Fiji may not be based on a "realistic appraisal of the current situation of the different communities".

[19] The combined effect of these various social, political and geophysical impediments to development has been a serious decline in the social wellbeing of the Banaban community since the 1980s: see UN Summary Document (*op cit*) at [49]. Kumar *et al,* (*op cit*) at pp136-137, note that employment opportunities on the island are limited. The main employer is the Council and the government (30% of household heads) with other employment opportunities limited to subsistence farming and fishing (53%) and small business (7%). A majority (54%) of households are headed by women as a result of male off-island migration in search of employment. They report:

(a) Cash income (excluding value of direct consumption from own production) ranges from no income at all to FJ$500 per month. Taking into account the national price adjusted poverty line for rural settlements, over 90% of Rabi Island households fall below the poverty line;

(b) Most houses are old stock dating from the 1940s and are often dilapidated as families have insufficient money for maintenance work. Also, housing has been left idle after sustaining damage from cyclone Ami in 2003; and

(c) Energy supply is through diesel generators operated for three to four hours per day, paid for by contributions from islanders. Energy needs are supplemented by kerosene.

[20] Nevertheless, some state programmes are being directed toward improving the lives of the Banaban community on Rabi Island. The island suffers from disproportionately high rates of tuberculosis (TB). In response, the population has

been screened by Ministry of Health staff and, in September 2010, a dedicated motorcycle and boat service was dispatched to the island: "TB Fears for Rabi" *Fiji Times Online* (4 November 2009); Fiji Ministry of Health, *Boat and bike to assist in TB prevention on Rabi Island* (18 October 2010). In an affidavit of 22 July 2011, AA and BB confirm this has been received but is used only for emergency access to villages due to break-downs of the island's few vehicles or school buses.

[21] In terms of health services generally, AA and BB state that Rabi Island's health clinic does not have a full-time doctor. The community is serviced by a doctor who travels around Fiji's northern region. The island's clinic does not have the necessary drugs or equipment to treat all patients locally and for serious conditions patients have to travel to Savusavu or Labasa situated 110-250 kilometres away. Most cannot afford the cost and usually only do so in the most urgent cases. The Rabi Island Council has ruled that all first-time mothers must travel to these places or to Suva to have their babies.

[22] AA and BB also refer to the financial mismanagement by former officers of the Council and government appointees to the Banaban Trust Fund Board. They state that an independent audit has revealed that an estimated AUD$4 million is missing; money the Banaban community can ill-afford in the wake of Cyclone Tomas. They confirm that people, including children, have died because of a lack of proper medical attention and lack of clean drinking water.

[23] The Council has given permission for the establishment, beginning in August 2011, of an NGO facility on the island, comprising a medical and dental clinic. The same NGO has been asked to install sand-filtration systems to improve water quality at the island's schools: see *Rabi Island Projects* Jabez Humanitarian Foundation (2011). As to this, AA and BB confirm they have spoken to the present Council members who have advised them this project was approved by the previous Council office-holders, and that the present Council has no knowledge as to the project's start date. According to AA, the Council is concerned about out of date medication being 'dumped' on Rabi Island.

Summary of Country Information

[24] The Banaban community was forcibly relocated to Rabi Island in Fiji in the 1940s by the Colonial Administration to facilitate the continued extraction of phosphate from Banaba. Their affairs on Rabi Island have been regulated by specific legislation, now in the form of the Banaban Lands Act 1970 and Banaban Settlement Act 1970. This legislation vests land on Rabi Island in the Banaban

community and is held in accordance with Banaban customary law. Ownership of Rabi Island is contested, however, and the former inhabitants continue to agitate for its return. Local government on Rabi is through the Rabi Island Council, an elected body. Politically, the Banabans remain a marginalised community. From time to time ethnic Fijians prevent them from fishing or steal their crops.

[25] The socio-economic condition of the Banaban community on Rabi Island is poor. Poverty rates are high as are rates of tuberculosis. There are state health and education services but the level of service is basic. There are limited administrative or commercial services. Housing is generally poor. There is limited employment opportunity on Rabi Island. Most Banabans on the island rely on subsistence farming and fishing for their work and food.

[26] This state of affairs has a number of causes – the size of Rabi Island preventing proper functioning of market, geographic isolation and vulnerability to natural hazards, lack of political voice and leverage, and economic mismanagement all play a part. However, the socio-economic position of Banabans has been further negatively affected by discrimination in employment and their reclassification as 'General' voters under the 1990 Constitution which has shut them out of some state-led development programmes.

[27] Having set out the historical background and contemporary situation of Banabans in Fiji, it is now possible to turn to and assess the evidence given in support of the appeal. What follows is a summary of the evidence given. An assessment follows thereafter.

THE APPELLANT'S CASE

The Evidence of the Appellant

[28] The appellant was born in 1966 on Rabi Island and is a citizen of Fiji. He has five siblings of which only one, his eldest sister, remains in Fiji. One sibling lives in Kiribati, and three are here in New Zealand. His father had been displaced to Rabi along with his own family at the conclusion of World War II. The appellant grew up hearing accounts of the myriad of difficulties those displaced encountered when first arriving on Rabi Island. His father found employment as a marine engineer on a cargo vessel belonging to the Council, an occupation he had for 10 years but which he lost when the Council went bankrupt.

[29] In the mid-1970s, the appellant and his family moved to Suva where the appellant attended school for the next 10 years. In his mid-teens, the appellant and his family returned to Rabi Island as they could no longer afford to live in Suva. The appellant attended school for a short time on Rabi Island. He left school because of transportation problems and to help on the family plantation. After two years, the appellant's family had sufficient money to send him to a school in Suva, which admitted students from poorer backgrounds. He completed his education in 1985 and gained a trade certificate in plumbing.

[30] After completing school, the appellant worked for a year in Suva as a self-employed contractor undertaking a variety of manual jobs before returning to Rabi Island. For the next two years he remained on Rabi Island, working on the family land. Following his marriage in 1986, he returned to Suva where he obtained trade-related employment. He stayed in this employment for the next 10 years during which time he was sent to various trade-related courses. He was laid off from this work in the mid-1990s because his employer company reduced its payroll due to declining project orders.

[31] For the next five years, the appellant worked as a casual tradesperson. Obtaining work was difficult. He encountered discrimination from prospective employers who tended to hire from within their own ethnic group. Banabans were always the last to be hired. As a result, the appellant was unemployed for two or three months at a time and, on one occasion, was unemployed for as long as five or six months. During these periods of unemployment, the appellant received financial assistance from his siblings and from his mother.

[32] The appellant and his family lived in a wood and tin dwelling on land leased by his eldest sister. There were three separate dwellings on this land, occupied respectively by the appellant, his sister and another sibling together with their families. His dwelling was rudimentary. It had a concrete floor and consisted of a single room with one light bulb and one tap. Water and electrical systems were connected to his sister's house. There was a stove for cooking. His sister's house had a toilet connected to the sewerage mains. Their dwelling did not have an internal toilet but there was an outdoor pit-toilet available. The appellant's children attended a primary school near to where they were residing or, as their age required, attended school in Suva a few kilometres away.

[33] In 2001, the appellant found settled employment. He left this employment in 2006 because his salary, along with that of all other non-permanent staff, continually decreased to the point where his wages were insufficient to sustain his

family. He talked to his siblings who had emigrated to New Zealand and who encouraged him to do likewise.

[34] The appellant told the Tribunal that, from time to time, he received verbal abuse from ethnic Fijians when going about his daily business. Derogatory remarks were made about Banabans being people who had “drifted” to the land. These comments were sometimes made at his place of work.

[35] On Rabi Island, there were ongoing tensions between the Rabi Island community and the indigenous Fijian community on Taveuni Island, the chief of which held customary authority over Rabi Island. The original inhabitants from Rabi Island had been settled on Taveuni to make way for the Banabans and there had been a simmering resentment ever since. On numerous occasions, ethnic Fijians from Taveuni came to Rabi Island and told the Banabans they were not welcome and that they should go back to the land they came from.

[36] From time to time Banabans were prevented from fishing in the areas between Rabi Island and the other islands even though this was their main source of fishing. Sometimes Banabans were assaulted during such confrontations although this never happened to the appellant. On one occasion, Banabans were harassed by ethnic Fijians who suspected they were fishing in breach of a customary 100-day moratorium imposed following the death of a chief. Money was paid to the chief’s successor to resolve the issue. Claimed breaches of fictitious decrees issued by the chief became a means by which ethnic Fijians tried to extort money from the Banaban community.

[37] On other occasions, ethnic Fijians took their crops. This caused hardship because the plantations were small and, if a boatload was taken, this represented a substantial portion of the crop. Although Rabi Island has two police forces, one tied to the Council and the other part of the national Fijian police force, at no stage were ethnic Fijians arrested for such thefts. Often the perpetrator was gone by the time the police were involved. In any event, the Rabi Island police had no jurisdiction to arrest ethnic Fijians.

[38] The appellant explained that the situation worsened during coups. During the 1987 coup, a number of Rabi Islanders were assaulted by ethnic Fijians. This happened to the appellant on one occasion when he was in Suva to pick up his children from school. Some men shook him and punched him in the back of the head. In the aftermath of the 2006 coup, the appellant witnessed people being beaten. He also saw people being made to lie face down on the ground in a police

compound near to his home, as did his children. Concerned about his safety as a Rabi Islander and not wanting his children to grow up in this environment, the appellant came to New Zealand in 2006.

[39] The appellant does not believe he could live with his children on Rabi Island. There are no employment prospects for him there and the island was ravaged by cyclone Tomas in mid-2010. Palm trees and crops were destroyed and have only just begun to grow. The lack of trees has caused siltification of the rivers as rain has washed the top-soil into the rivers. His parents died some years ago and the family house has fallen into ruin. He has heard that following the cyclone, it has no roof and trees are now growing through the middle of it. There is no drinkable water. Water has to be fetched from the river. There is no electricity system. They would have to rely on diesel generators but he could not afford to run them.

[40] His situation in Suva would be no better. The appellant believes he would struggle to find work. Work tends to be obtained by word-of-mouth through connections and he simply does not have family or friends working in Fiji on whom he could rely. Unemployment is high amongst Rabi Islanders. Even those who have employment are finding it difficult to make ends meet as prices have increased in respect of staple goods such as sugar and rice.

[41] The appellant and his siblings here in New Zealand are in regular contact with his eldest sister in Suva. She has a professional job, but even so is finding it hard to survive. Her wages have fallen by half. She has to look after her own children and grandchildren and would simply not have the financial means to assist the appellant and his family. The dwelling he occupied prior to coming to New Zealand is no longer available to him as it is now occupied by one of his sister’s children who has his own family there.

[42] He has spoken to his sister recently and understands that, as a result of the reduction in her wages, she is encountering difficulties in paying the rent on the land she leases. She has recently received a notification from the Native Land Board demanding that she pay the outstanding money. He understands this notice was received by her at the beginning of 2011. He is also aware from her that Rabi Islanders in Suva are living in fear. Because there is a military-backed government, there is no confidence that the police will investigate any harm visited upon them by ethnic Fijians.

The Evidence of AA

[43] Counsel filed with the Tribunal an affidavit dated April 2011 of AA. It heard oral evidence from her at the reconvened hearing on 18 May 2011. AA confirmed that she has been a regular visitor to Rabi Island since 1992 and that her last visit there was in September 2010.

[44] In her written affidavit, AA sets out details about the history of displacement of her own family from Banaba to Rabi Island. She also sets out in some detail, the profound cultural dislocation experienced by Banaban communities when they were forcibly relocated to Rabi.

[45] AA points out that, under the terms of the Banaban Settlement Act, Banaban affairs are administered by the Fijian Prime Minister who at the time is Commodore Bainimarama. Various aid projects for Rabi Island have been restricted, particularly in relation to development of educational resources for school children on Rabi Island. They do not have adequate educational facilities on Rabi Island, requiring assistance from charities. However, due to the remoteness of Rabi Island and lack of regular services, it can take over 12 months for aid to arrive there.

[46] AA also stated that development on Rabi Island is restricted under Fijian law. Rabi Islanders are not allowed to operate any commercial fishing ventures around Rabi waters despite being skilled fishermen. Similar restrictions exist in terms of the growing of cash crops. More generally, since the Banaban status was downgraded to “other” it makes them a minority people within Fiji and their wages reflect this.

[47] AA emphasised the precarious nature of the Banaban occupation of Rabi Island. The original inhabitants, who were themselves relocated to Taveuni, continue to lobby the government for the return of ‘their’ homeland. According to AA, it is symptomatic of the lack of voice that Banabans have within Fiji that they feel constrained not to go against the wishes of the paramount chief of Taveuni because of residual threats to have them removed from Rabi Island. As a result, Banabans generally try to stay out of politics out of fear of being made to vacate Rabi Island.

[48] AA also emphasised the destruction on Rabi Island as a result of cyclone Ami in January 2003. The cyclone caused substantial damage to buildings, infrastructure and crops. According to AA, the buildings were never properly

rebuilt and had only *ad hoc* repairs undertaken. She believes that international aid was diverted to "political hot spots within Fiji". Nevertheless, Rabi was starting to return to some level of normality when cyclone Tomas hit in March 2010. Cyclone Tomas caused approximately 98 per cent loss of food crops. Surrounding reefs were damaged and fish stock moved away. Trees and crops were damaged by wind and salt-water spray.

[49] As a result of these factors, life on Rabi Island is difficult. Families live in basic accommodation. The roofs are thatched in many cases. Families sleep on the floor. These living conditions contribute to high tuberculosis rates. The Council manages to find employment for some Banabans within its operations but the amount they pay is not sufficient to meet basic needs. There is also a commercial venture on another island which employs 30-50 Banabans.

[50] Although a Banaban trust fund exists, this has never been a fund to which Banabans can apply for financial aid to alleviate hardship. It has in the past provided educational scholarships for Banaban children and covered the costs needed to run the Rabi Island Council. Financial mismanagement has considerably depleted this fund. Scholarships are no longer offered.

[51] AA believes that the appellant's situation in Fiji would be bleak. It would be difficult for him to find employment in Fiji because of the downturn in the economy and because of discrimination against Banabans.

[52] AA also believes the personal safety of Banabans is under increasing threat in Fiji. The morphology of Banabans means that, to indigenous Fijian people, they resemble ethnic Indians. They are often abused on the mistaken assumption they are Indians. She believes that many unemployed Fijian youths are coming to Suva and other urban locations from the villages, making the overall security for Banabans tense.

The Evidence of BB

[53] Counsel filed with the Tribunal an affidavit dated April 2011 of BB. It heard oral evidence from him at the reconvened hearing on 18 May 2011. BB told the Tribunal both in his affidavit and in his oral evidence that he has not been in Fiji as a resident since 1997.

[54] In his affidavit, BB details his own family's displacement from Banaba to Rabi Island and details some of the hardships his family and others faced at the

time. BB emphasises the precarious nature of Banaban land tenure on Rabi Island and the pervading sense of insecurity that comes from knowing that you are inhabiting the land of another people who were forcibly displaced themselves to make way for you.

[55] BB told the Tribunal that there were no shops or supermarkets on Rabi Island and Banabans on the island have to travel to other islands to buy essential needs.

[56] During the coup in 2000, Fijian youths blocked the ports on islands where shops used by the Banabans were located. The youths established roadblocks and Banabans on other islands were not allowed through the roadblocks to travel home. This happened to BB himself during the 2000 coup. During the coup, Banabans on Rabi hid their womenfolk in fear of attacks from Fijian youths who sometimes came to Rabi Island to tell them that the island was not theirs. He has no idea whether similar problems occurred as a result of the 2006 coup.

[57] BB also referred to the destruction that has occurred on Rabi Island as a result of the cyclones Ami and Tomas. The island was devastated but there was very little in the way of aid.

Documents and Submissions

[58] On 8 April 2011, the Tribunal received written submissions from counsel setting out the grounds of appeal. Attached were the affidavits of AA and BB together with a further affidavit sworn by the appellant outlining the history of his own family's displacement to Rabi Island. On 19 April 2011, the Tribunal received from counsel written submissions in support of the appeal together with a compact disc (CD) of supporting materials. During the course of the hearing, the Tribunal was provided with a letter of reference from a former employer of the appellant.

[59] The material on the CD fell within two broad categories:

(a) Documents relating to the historical record of the displacement of the Banaban people from Banaba to Rabi Island. Included were documents relating from as far back as the early 1900s in the form of diplomatic communications and the like; and

(b) Documents relating to the situation of Banabans in Fiji at the present time.

[60] On 19 July 2011, the Tribunal served on counsel further items of country information relating to the status of the Banaban Lands Act and Banaban Settlement Act as well as the general socio-economic conditions of Banabans in Fiji. In response, by letter dated 27 July 2011, counsel enclosed a response to this material by AA and BB. Attached to this was a further CD containing a copy of Kumar *et al* "Poverty and Deprivation Amongst Ethnic Minorities in Fiji: The case of Ni Solomoni and Rabi Islanders" (2006) 4(1) *Fijian Studies: A Journal of Contemporary Fiji*, and a copy of a report into hazardous waste management issues on Tarawa and Banaba. No legal submissions were provided as to the significance of the material served by the Tribunal or the material now submitted in support of the appeal.

[61] On 2 August 2011, the Tribunal received a letter dated 1 August 2011 from counsel enclosing copies of:

(a) "Fijians want Rabi Island Returned" *Fiji Times Online* (5 June 2007);

(b) Letter dated 30 August 2005 from Turaga Tiu Cakau to the Chairman, Rabi Island Council; and

(c) International Bar Association *Dire Straits: a report on the rule of law in Fiji* (March 2009) ("the IBA report").

[62] Again, no legal submissions were provided as to the significance of the material to the appeal, nor were relevant portions of the IBA report – which runs to over 100 pages – identified.

ASSESSMENT OF THE EVIDENCE

Credibility

[63] The appellant impressed the Tribunal as a sincere man regarding his past experiences in Fiji and concerns about returning. The Tribunal accepts him as a credible witness as to his past experiences in Fiji.

[64] As regards the evidence of AA and BB, particularly in affidavit form, it inappropriately bordered on political advocacy referring in places to the "responsibility" of New Zealand for the plight of Banabans. The Tribunal cannot comment on this. However, to the extent they may have been under a misapprehension as to the nature and function of the Tribunal and the statutory

tasks it is required to perform, the Tribunal does not find that their advocacy detracts from their sincerity or credibility as witnesses. Insofar as their evidence related to facts and matters they have witnessed the Tribunal accepts them as credible.

[65] Although counsel sought to portray the appellant as some kind of political activist (indeed, in the appellant's affidavit he describes the appellant, euphemistically, as a 'freedom fighter'), the appellant himself was far more understated. He does not claim to have been politically active in any manner, let alone a manner which would bring him to the adverse attention of the military in Fiji, nor is he inclined to do so in any way. He has not been involved in the Rabi Island Council in any way, nor has he assumed any advocacy position in relation to the plight of Banabans.

Findings of Fact

[66] The Tribunal finds that the appellant is a Fijian citizen of Banaban ethnicity. He is married with five children. He has lived variously on Rabi Island and, more latterly, in Suva for a number of years prior to coming to New Zealand. He received schooling to a secondary level and obtained vocational training as a plumber. Before coming to New Zealand, he lived in Suva in rudimentary accommodation with his wife and children on land leased by his sister who is employed as a teacher. The family home is on Rabi Island and remains in disrepair as a result of cyclone Tomas in 2010. His sister continues to live on the land in Suva but her occupancy is under pressure due to her own financial circumstances.

[67] When living on Rabi Island, the appellant lived a subsistence life. When living in Suva, although intermittently unemployed for small periods of time, he managed to secure regular and lengthy periods of employment related to his trade. He encountered isolated and occasional instances of workplace racism and occasional anti-Banaban discrimination in his endeavours to find work. He also suffered a minor assault on one occasion after the 1987 coup.

THE CLAIM TO REFUGEE STATUS

The Refugee Convention's Inclusion Criteria

[68] 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."

[69] In determining what is meant by "well-founded" in Article 1A(2) of the Convention, the Tribunal adopts the approach in *Chan v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379 (HCA), where it was held that a fear of being persecuted is established as well-founded when there is a real, as opposed to a remote or speculative, chance of it occurring.

[70] In terms of *Refugee Appeal No 70074* (17 September 1996), the principal issues 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?

[71] Before the core of the appellant's claim for refugee status can be properly considered, it is first necessary to address various submissions made as to the proper approach to be taken to the interpretation of the Refugee Convention itself.

Preliminary Matters

The role and function of refugee status determination

[72] The first point to be addressed arises from assertions that New Zealand possesses obligations under international law "to provide redress for past policy wrongs" and that, by necessary implication, the Refugee Convention is an appropriate vehicle for seeking this redress. In support, reference has been made in the submissions to the right to self-determination under Article 1 of the ICCPR. Historical documentation relating to a number of grievances has been submitted.

[73] The relocation of the Banaban population from Banaba to Rabi Island to facilitate continued extraction of phosphate from Banaba, has been described as "one of the worst instances of colonial exploitation in the South Pacific": see UN Summary Document (*op cit*) at p12, paragraph [46]. Nevertheless, the question of

redress arising from "past historical wrongs" in the context of these proceedings misunderstands the specific function the Tribunal has under the Immigration Act 2009. It also misunderstands the function of refugee protection in general. It is not a forum for addressing 'past policy wrongs' or a mechanism to cast 'blame': *Refugee Appeal No 74665* [2005] NZAR 60; [2005] INLR 68 at [75] and *Refugee Appeal 72635/01* (6 September 2002) at [171]. While palliative in nature, it is solely concerned with the assessment of a prospective risk of serious harm *to the individual claimant*.

'Being persecuted' objectively defined

[74] The grounds of appeal also assert that the decision of the RSB is flawed because the refugee and protection officer "mistakenly formats" the test for being persecuted as an objective one. It is submitted this is an error when the Refugee Convention itself fails to define persecution 'due to its inherently subjective nature'. This submission is unsustainable. There are two aspects to this. First, New Zealand refugee law rejects any requirement that the appellant's subjective fear is relevant to whether a well-founded fear of being persecuted is established. For the purposes of refugee status determination, "being persecuted" has been defined as the sustained or systemic violation of core human rights, demonstrative of a failure of state protection: *Refugee Appeal No 74665/03* (7 July 2004) at [36]-[90]. Put another way, persecution can be seen as the infliction of serious harm, coupled with the failure of state protection: *Refugee Appeal No 71427* (16 August 2000), at [67]. The test is an objective one: *Refugee Appeal No 70074/96* [1998] NZAR 252, 260; *Refugee Appeal No 71404/99* (29 October 1999); *Refugee Appeal No 72668/01* [2002] NZAR 649 at [132]-[140]; *Refugee Appeal No 76592* (3 March 2006) at [76]-[83] and *Refugee Appeal No 76044* (11 September 2008) at [57].

[75] Second, while it is true that Article 1A(2) of the Refugee Convention does not define 'being persecuted', the Convention is not silent as to its meaning. Interpretation of the Convention's inclusion clause must take specific account of the object and purpose of the Convention as set out in its preamble: *Attorney General (Canada) v Ward* [1993] 2 SCR 689, 733 per La Forest J. This provides:

> "Considering that the Charter of the United Nations and Universal Declarations of Human Rights approved on 10 December 1948 by the General Assembly have affirmed the principle that human beings shall enjoy fundamental rights and freedoms without discrimination."

La Forest J emphasises that "this theme outlines the boundaries of the objectives

sought to be achieved and consented to by the delegates" and "sets the boundaries for many of the elements of the definition of 'Convention Refugee'".

[76] Forms of harm falling within the ambit of being persecuted are not derived from the claimant's subjective perceptions of harm. It is through the prism of international human rights law that forms of serious harm are identified and the question of whether there has been a failure of state protection analysed: see generally, J C Hathaway *The Law of Refugee Status* (Butterworths, Toronto, 1991) pp104-105 and *Refugee Appeal No 74665* [2005] NZAR 60; [2005] INLR 68.

Statelessness and refugee status

[77] It was also submitted that the appellant is a stateless person. However, the appellant has a valid Fijian passport, a copy of which is on the file and which records his status as a citizen of the Republic of Fiji. Counsel submits that the appellant is nevertheless effectively stateless. Although nominally a Fijian citizen, he is denied all of the privileges of citizenship because of his ethnicity.

[78] The most widely accepted definition of statelessness is that contained in Article 1 of the Convention Relating to the Status of Stateless Persons 1954 which provides that a "stateless person" means a person who is not considered as a national by any State under the operation of its law. In *Refugee Appeal No 72635* (6 September 2002) at [80], the Refugee Status Appeals Authority (RSAA) observed there is a multitude of ways in which statelessness can arise. Causes range from the conflict of nationality laws through to administrative practises. While it is accepted that the discriminatory denial of nationality in respect of persons who can establish a legitimate link with a country may constitute a cause of statelessness, discrimination in the enjoyment of rights between groups of citizens does not of itself render members of the disadvantaged group stateless under international law.

[79] The appellant is recognised by Fiji, the country where he was born and lived, as a citizen. He cannot be regarded as stateless. It is therefore generally unhelpful to frame the issues relating to the appellant's case in terms of statelessness. If complaint is made that privileges of citizenship are being denied, it is to international human rights law and not the law of statelessness that one must look. Moreover, insofar as the submissions equate the existence of statelessness with an automatic entitlement to refugee status, they are misconceived. A stateless person must still establish a well-founded fear of being

persecuted for a Convention reason to be entitled to refugee status: see *Refugee Appeal No 72635* at [65]-[68].

[80] Having cleared away any confusion arising from these submissions, the appellant's claim reduces to two main concerns. First, that he will be the victim of violence and be denied his civil and political rights in Fiji. Second, that as a Banaban he faces substantial discrimination in the socio-economic sphere. Cumulatively, these are argued to amount to a well-founded fear of being persecuted. The first can be dealt with briefly. The second raises complex issues which will need to be examined in some length thereafter.

The Claim Based on Breaches of Civil and Political Rights

Assessment

[81] Counsel points to a general deterioration in the enjoyment of civil and political rights following the 2006 coup culminating in the abrogation of the constitution in 2009. The Tribunal accepts that these and other events have had a negative impact on the rule of law in Fiji: see International Bar Association *Dire Straits: a report on the rule of law in Fiji* (March 2009). Like all Fijian citizens, the appellant is affected by this in a general sense. However, it has never been clearly argued how the impact of these general conditions in the civil and political sphere causes this appellant to have a real chance of being persecuted. Reference is made by counsel to the inability of the population to bring legal claims against the military regime. This may be the case but how that relates to this particular appellant is unclear. He is not politically active and has never claimed to have been so at any time, even during periods of civilian government in Fiji. Nor is there any evidence of the appellant being involved in legal proceedings against the Fijian state in the past. He has not been and is not a community activist.

[82] While no particular negative impact on the appellant has been identified, the Tribunal accepts that the 2006 coup has not led to an improvement in the political condition of the Banabans generally. They remain a politically marginalised community. Nevertheless, while the constitution has been abrogated, the *Fiji Existing Laws Decree 2009* Government of Fiji Decree No 3 (10 April 2009) stipulates that all laws in place prior to the 2009 abrogation of the constitution remain in force and are to be read with all necessary modifications, adaptations, qualifications and exceptions. There is no country information to suggest that

provisions relating to the Banaban Land Act or Banaban Settlement Act have been adversely affected by the abrogation of the Constitution. The Council continues to exist and carry out its functions: see “Rabi council pays off FNPF debt” *Fiji Times Online* (28 July 2010); “Rabi prepares for the polls” *Fiji Times Online* (17 June 2010); “Rabi Council to restore Ocean Island” *Pacific Business Online* (18 June 2009).

[83] As to the risk of violence to the appellant, this can be quickly dealt with. No country information has been filed to establish that Banabans generally, or Banaban adult males more specifically, are subjected to levels of physical harm anywhere in Fiji of a kind to be categorised as being persecuted at the real chance level. The appellant has been the past victim of occasional harassment and intimidation by ethnic Fijians both on Rabi Island and in Suva. On one occasion, he suffered a minor assault in Suva in the immediate aftermath of the 1987 coup. The Tribunal accepts that the appellant may be subjected to the same level of random harassment as in the past. However, this was extremely low-level and occasional. The risk that he may suffer harassment or physical violence amounting to his being persecuted if returned to Fiji is remote and speculative. It does not reach the real chance threshold. As for living in fear of such assaults, quite simply, his subjective fear of assault is not objectively well-founded.

[84] Although the appellant has not been involved in political life in the past, even assuming he will become so involved if returned, there is no country information before the Tribunal to establish that being involved in Banaban political life exposes a person to a real chance of being persecuted.

The Claim Based on Socio-Economic Deprivation

Submissions of counsel

[85] The main thrust of the case is set out in the grounds of appeal which assert:

> “The Banabans in Fiji face ‘severe disadvantage’ and live in fear on a number of levels.”

[86] This argument is amplified in counsel’s written submissions which, at p11, refer to the “discriminatory and exclusive” nature of Fiji’s “politico-administrative system”. Counsel submits race and gender constitute bases upon which differential treatment of some Fijian citizens occurs, including great inequality in access to economic resources and income. Counsel also refers to Banaban and other minority groups suffering large-scale unemployment, lack of secure access

to land and resources and a lack of meaningful voice on the national stage. Finally, counsel argues that Fiji has failed to discharge its obligation under a variety of international instruments including the International Covenant on the Elimination of All Forms of Racial Discrimination 1965 (CERD).

[87] In dealing with these submissions, the Tribunal will first examine the extent to which economic deprivation qualifies as a basis for recognition as a refugee based on breaches of the International Covenant on Economic Social and Cultural Rights 1966 (ICESCR). It will then consider the extent to which socio-economic deprivation can constitute a breach of Articles 6 and 7 of the International Covenant on Civil and Political Rights 1966 (ICCPR).

Economic hardship and 'being persecuted' distinguished

[88] There is a well-established distinction drawn in international refugee law between economic hardship and 'being persecuted'. As Hathaway, (*op cit*) at p117, explains:

> "Because economic hardship is not necessarily a contravention of human rights norms, it is correct to exclude from refugee protection, persons whose sole motivation for migration is the desire to leave generalised, but difficult economic conditions, or who only wish to build a more economically secure life. Such persons are economic migrants, not refugees."

[89] The fundamental question is how the dividing line between economic deprivation and being persecuted is to be drawn. In terms of the boundary of refugee protection, 'the human rights approach to being persecuted' adopted in New Zealand uses core international human rights treaties as the basis for determining its extent. For a detailed exposition of this approach see *Refugee Appeal No 74665* [2005] NZAR 60 at [36]-[125] per Haines QC.

The relevance of economic, social and cultural rights confirmed

[90] In *Refugee Appeal Nos 75221 and 75225* (23 September 2005) at [80], the RSAA noted that New Zealand refugee law recognised the relevance of ICESCR rights to the 'being persecuted' inquiry. The Tribunal reaffirms this proposition. It accepts that breaches of rights under the ICESCR may, in principle, be relied on to found a refugee claim as rights *in themselves*. The RSAA rejected, as does the Tribunal, the notion that international human rights law is to be approached from a hierarchical perspective in which civil and political rights take precedence over, or are a superior form of rights, to their economic, social and cultural counterparts.

[91] Courts in other jurisdictions also accept that discrimination encountered in the socio-economic sphere may, in certain circumstances, found a valid claim for refugee status although the extent to which the ICESCR is engaged with is highly variable. See, for example: (Australia) *Chan v Minister of Immigration and Ethnic Affairs* 169 CLR 379, 429-431 per McHugh J; *Prahastono v Minister of Immigration and Multicultural Affairs* [1997] FCA 586 per Hill J; (Canada) *Liang v Minister v Minister of Citizenship and Ethnic Affairs* (2008) FC 450 and (United Kingdom) *R v Secretary of State for the Home Department, ex parte Adam* [2006] AC 396 at [55].

[92] Nevertheless, the Refugee Convention is not a vehicle for ameliorating all human suffering, much less suffering caused by conditions of general poverty and underdevelopment: see *Refugee Appeal Nos 75221 and 75225* at [135]; *Canada (Attorney General) v Ward* [1993] 2 SCR 689, 732; *Applicant A and Anor v Minister of Immigration and Ethnic Affairs and Anor* (1997) 142 ALR 331, 345 and *Horvath v Secretary of State for the Home Department* [2001] AC 489, 494. It serves as a mechanism to provide surrogate international protection only in situations where serious harm arises from denial of fundamental human rights in circumstances demonstrative of a failure of state protection: see Hathaway (*op cit*) at p104.

'Being persecuted' and socio-economic deprivation: the role of minimum core obligations and attributes

[93] While it is accepted that non-enjoyment of socio-economic rights can, in principle, comprise the serious harm underpinning a valid claim for refugee status, determining whether any particular non-enjoyment constitutes 'being persecuted' can be a complex task. The human rights approach to being persecuted developed by the RSAA seeks to provide both a principled approach to the interpretation of the Refugee Convention, grounded in the very international human rights treaties to which the Convention itself refers, and workable framework by which to determine the boundaries of the legal state of 'being persecuted'. Less clearly articulated, however, has been any methodology to assist determining where the boundary between discrimination and 'being persecuted' may lie in any particular case involving non-enjoyment of socio-economic rights.

[94] In *Refugee Appeal Nos 75221 and 75225*, the RSAA, at [96], referred to the United Nations Committee on Economic Social and Cultural Rights (ESCR Committee) *General Comment 3* which states:

> "10. On the basis of the extensive experience gained by the Committee, as well as by the body that preceded it, over a period of more than a decade of examining States parties' reports the Committee is of the view **that a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every State party.** Thus, for example, a State party in which any significant number of individuals is deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic form of education is, prima facie, failing to discharge its obligations under the Covenant. If the Covenant were to be read in such a way as not to establish such a minimum core obligation, it would be largely deprived of its raison d'être." (Emphasis added)

[95] In subsequent General Comments, the ESCR Committee has given greater specificity to the substantive content of ICESCR rights. For example, in *General Comment No 4: The Right to Adequate Housing* (Art 11(1) of the Covenant) 13 December 1991 E/1992/33 at [8], the ESCR Committee list a number of attributes of housing which are relevant to determining whether particular forms of shelter constitute 'adequate housing' for the purpose of Article 11 ICESCR. These attributes include legal security of tenure; availability of facilities essential for health, security, comfort and nutrition; and affordability and habitability. Similar attributes are set out in relation to other rights including the right to adequate food: *General Comment No 12: The Right to Adequate Food (Art 11 of the Covenant)* 12 May 1999 E/C.12/199/5; the right to water: *General Comment No 15: The Right to Water (Arts 11 and 12 of the Covenant)* 20 January 2003 E/C.12/2002/11, and the right to work: *General Comment No 18: The Right to Work (Art 6 of the Covenant)* 6 February 2006 E/C.12/GC/18.

[96] The Tribunal acknowledges that articulation by the ESCR Committee of the existence of a minimum core obligation and identification of what it considers to be the essential attributes of various ICESCR rights is not specifically aimed at refugee status determination. Nor is the jurisprudence of treaty-monitoring bodies binding on the Tribunal although, plainly, it is a source of persuasive authority: see *Refugee Appeal No 74665* [2005] NZAR 60 at [73] and cases cited therein. Nevertheless, taking the well-known shorthand formulation of "persecution = serious harm + failure of state protection" expressed in *R v Immigration Appeal Tribunal; Ex Parte Shah* [1999] 2 AC 629, 653F (HL) as a starting point, this framework allows for a principled analysis of a claimant's socio-economic predicament for purposes of refugee status determination.

[97] For example, in circumstances where even basic manifestations across a

range of attributes identified in any relevant General Comment are not being enjoyed, it may be that much easier to find on the facts that a real risk of serious harm exists. Whether it does or not will depend on a global appraisal of the claimant's situation rather than the simplistic identification of an attribute that is not, or not fully, enjoyed.

[98] The failure of the state in the past to take any steps whatsoever will be a powerful pointer to any future prospects of enjoyment. Where steps to secure enjoyment of socio-economic rights have been taken by the state and the identified attributes of rights are enjoyed to some extent, but levels of enjoyment are uneven across society, the task will be less straightforward. After all, inequality features in all societies to some extent and has a multiplicity of causes, some of which may create pathways into the Refugee Convention, some of which may not. A relevant factor to consider is the extent to which differential levels of enjoyment result from deliberately retrogressive legislative or policy steps taken by the state on a discriminatory basis, or whether societal discrimination prevents fuller levels of enjoyment by disadvantaged groups.

[99] Even so, where discrimination is established on the evidence as contributing to the socio-economic deprivation of the claimant, for the claimant's predicament to constitute 'being persecuted', something more than discrimination must be established. It is a settled principle of refugee law that evidence of discrimination in the enjoyment of human rights is not, in itself, sufficient. Not every breach of a refugee claimant's human rights constitutes 'being persecuted': Hathaway (*op cit*) at pp103-104; UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status*, para 54; *Refugee Appeal No 71404/99* (29 October 1999) at [66]-[67] and *Refugee Appeal No 71427/99* [2000] NZAR 545; [2000] INLR 608 at [54]. No special rules exist in this regard in relation to the enjoyment of socio-economic rights. While international refugee law has at its heart a concern with the enjoyment of human rights on a non-discriminatory basis, insofar as discrimination in the enjoyment of rights may *itself* constitute a breach of fundamental international human rights law, it will not necessarily constitute 'being persecuted'. To this extent, international refugee law as understood and applied in New Zealand, while existing in close relationship with international human rights law, is not coextensive with it.

[100] Hathaway, (*op cit*) at pp119-120, distinguishes between discrimination not affecting "the heart of the right as elaborated in international law", and "a serious risk to core human rights" which justifies a finding of being persecuted. In other

words, the closer that the discrimination brings the claimant to a situation where there is a real chance that most or all of the attributes identified as forming the core content of the right will be denied, the closer the claimant's predicament may amount to serious harm and justify a finding of 'being persecuted'.

[101] Where such a situation is sufficiently linked to a Convention ground, refugee status may be warranted. Hathaway, (*op cit*) at p118, observes:

> "Economic deprivation which is discriminatory in the sense that it is directed against or experienced by only a minority within a state can be demonstrative of persecution…where economic suffering has a political, racial or otherwise disenfranchising impact, its victims may qualify as refugees."

[102] It also needs to be borne in mind that persecution can arise by reason of the cumulative effect of individual breaches which, in themselves, would not amount to being persecuted: see *Refugee Appeal No 71427/99* [2000] NZAR 545; [2000] INLR 608 at [53]. It will therefore be relevant to consider:

(a) whether only one or a multiplicity of socio-economic rights are affected; and

(b) the extent to which the identified attributes are enjoyed across the range of affected rights;

[103] Turning to how the concept of a minimum core obligation informs the failure of state protection limb of the 'being persecuted' inquiry, in *Refugee Appeal Nos 75221 and 75225* (23 September 2005), the RSAA recognised that the ICESCR was not an 'obligation-free' zone. Rather, it creates two obligations of *immediate* application. First, to begin taking steps to progressively realise the rights (see [85]-[88]) and, second, to do so in a non-discriminatory fashion (see [89]-[90]). For a recent and detailed account of this obligation in context of ICESCR, see ESCR Committee *General Comment No 20: Non-discrimination in Economic, Social and Cultural Rights (Art 2, para 2 of the ICESCR)* 10 June 2009 E/C.12/GC/20.

[104] A minimum core obligation describes "what things [states] must do to immediately realise the right": A Chapman and S Russell (eds) *Core Obligations: Building a Framework for Economic Social and Cultural Rights* (Intersentia, Antwerp, 2002) at p9. The significance of a minimum core obligation to the being persecuted analysis is that it indicates there is a point at which a failure by the state to ensure even basic manifestations of these attributes will constitute a breach of the right. Indeed, in its more recent General Comments, the ESCR Committee set out what it considers to be not only the general obligations arising

in respect of the right, but also the state's minimum core obligations arising: see, for example, *General Comment No 15* at [37] and *General Comment No 18* at [31].

[105] Where the evidence establishes a failure to discharge a minimum core obligation, this may more readily indicate a failure of state protection. It must, however, be recognised that ICESCR rights are subject to progressive realisation. The fact that a claimant can point to a lower standard of living in their country of nationality than they enjoy in New Zealand does not itself evidence a failure of state protection. Nevertheless, where the standard of living in the country of nationality reflects failure by the state to fulfil the minimum core obligation to ensure even basic levels of enjoyment, a finding of a failure of state protection may well be warranted. Equally, where the state causes the economic deprivation of the claimant though discriminatory policies and practices in breach of its obligations under Article 2(2) of the ICESCR, a finding of a failure of state protection may also be warranted.

[106] The Tribunal acknowledges that the concept of a 'minimum core' is neither universally accepted nor finally settled. The conceptual validity of a minimum core of ICESCR rights has been challenged. For an overview of the main objections, see Katherine G Young "The Minimum Core of Economic and Social Rights: a Concept in Search of a Content" (2008) *33 Yale Journal of International Law* 113. Young, at p164, argues that a multiplicity of approaches to a 'minimum core' belies its limitations as a useful mechanism for promoting enjoyment of economic, social and cultural rights and argues for the rejection of the minimum core concept altogether. In contrast, Chapman and Russell, (*op cit*) at p14, observe that the concepts of 'core content' and 'core obligation' "represent different sides of the same coin" and that the concept of a 'minimum core' is a useful aid.

[107] The Tribunal agrees with Chapman and Russell that the notion of a minimum core obligation provides a useful aid. In the context of refugee status determination, this utility is recognised by M Foster *International Refugee Law and Socio-Economic Rights: Refuge From Deprivation* (Cambridge University Press, Cambridge, 2007) at p200:

> "Another advantage of this approach is that it obviates the concerns of those who question the appropriateness of referencing human rights (particularly economic and social rights) in the persecution inquiry on the basis that this approach is overly expansive, in that it provides a principled method of distinguishing between fundamental or key breaches and less serious violations.

> Perhaps most important, this approach provides a broad framework or 'markers' to guide decision-makers, but does not purport to provide a definitive model, as it allows for evolution as the composition of the core of different rights develops. ...
>
> One potential problem with the core/periphery approach is that it may introduce a layer of complexity, in that refugee decision-makers are required to undertake the difficult task of ascertaining the core and periphery of a range of rights. However, it is important to note that this approach does not require the construction of a categorical list of those violations falling within the core, or the delineation of a 'bright line' between those cases that will always amount to persecution and those which will not. As explained above, the persecution inquiry cannot be reduced to a simple reference to a categorical list. Rather, this operates as a method of providing analytical structure to what decision-makers are already effectively doing in respect of more traditional claims. While the assessment of claims and interpretation of the Refugee Convention will continue to take place on an incremental basis, reference to core obligations provides much-needed guidance in the most cutting-edge and developing area – socio-economic rights."

[108] As to where the boundary may lie in any particular case, there is no easy answer. Ultimately, however, the question is the same: it will depend on whether it can be said that there is a real chance of serious harm arising to the individual demonstrative of a failure of state protection.

[109] Refugee status determination has been acknowledged as one of the most challenging tasks in the legal world: see *Kacaj v Secretary of State for the Home Department* [2002] EWCA Civ 314 (14 March 2002) per Schiemann LJ. In adopting a human rights approach to being persecuted, the RSAA acknowledged that the content of international human rights law is far from perfect. Many gaps and problems exist: *Refugee Appeal No 74665* [2005] NZAR 60 at [79]. The Tribunal endorses these observations. Nevertheless, in the Tribunal's view, the notion of a minimum core obligation, taken with the identification of essential attributes of particular rights in various General Comments, provides a readily understandable language of analysis and an objective yardstick around which levels of enjoyment of rights in any given case can be assessed. It moves refugee status determination in this potentially complex area away from the inherently variable subjective notions of individual decision-makers as to what level of deprivation he/she considers the claimant can be 'reasonably' expected to tolerate before surrogate international protection is extended, towards an objective and principled assessment.

The relevant standard of protection

[110] *Refugee Appeal Nos 75221 and 75225* gave some account of the nature of States parties' duties under the ICESCR. After reviewing relevant literature, the RSAA concluded:

> "[108] ...States parties are under an obligation to respect, protect and fulfil ICESCR rights. This involves obligations of negative and positive conduct (respect and protect) and result (fulfil). In practical terms, the obligation of a State party under the ICESCR is to undertake an ongoing, coordinated and coherent programme of action so as to ensure that a minimum core level of each of the ICESCR rights are enjoyed by the widest possible population, having regard to the resource constraints of the country as a whole. The programme must be designed to lead over time to the full realisation by all of their ICESCR rights. It must be sufficiently flexible so as to deal with any situations of urgent need.
>
> [109] This obligation will require, where needed, immediate legislative measures to rectify existing de jure discrimination in the enjoyment of ICESCR rights. Such measures, however, in no way themselves constitute sufficient action so as to meet the basic positive duties owed by States to ensure the progressive realisation of the Part III ICESCR rights. Rather, it is to be seen as the first of an ongoing series of coherent and integrated steps, that States parties are required to take to ensure, at the very least, that core minimum standards are enjoyed as widely as possible."

[111] Neither the observations in *Refugee Appeal Nos 75221 and 75225* as to the nature of the state's legal duties under the ICESCR or the Tribunal's endorsement of the minimum core concept in the context of refugee status determination should be interpreted as embracing the 'due diligence' approach to the relevant standard of state protection. Under this approach, there exists no failure of state protection provided the state is doing what it reasonably can to prevent the future risk of harm (see the decision in *Horvath v Secretary of State for the Home Department* [2001] AC 489). This approach has been expressly rejected as being inconsistent with the Refugee Convention itself*:* see *Refugee Appeal No 71427/99* [2000] NZAR 545; [2000] INLR 608:

> "[63] With the greatest of respect, this interpretation of the Refugee Convention is at odds with the fundamental obligation of non-refoulement. Article 33(1) is explicit in prohibiting return in any manner to a country where the life or freedom of the refugee would be threatened for a Convention reason. This obligation cannot be avoided by a process of interpretation which measures the sufficiency of state protection not against the absence of a real risk of persecution, but against the availability of a system for the protection of the citizen and a reasonable willingness by the state to operate that system. The point which emerges from *Ward* is that the refugee inquiry is not an inquiry into blame. Rather the purpose of refugee law is to identify those who have a well-founded fear of persecution for a Convention reason. If the net result of a state's "reasonable willingness" to operate a system for the protection of the citizen is that it is incapable of preventing a real chance of persecution of a particular individual, refugee status cannot be denied that individual. The persecuted clearly do not enjoy the protection of their country of origin."

[112] The 'due diligence' approach is also criticised in Penelope Mathew, Michelle Foster and James Hathaway "The Role of State Protection in Refugee Analysis" (2003) 15(3) *International Journal of Refugee Law*, pp448-453.

[113] In order for state protection to be effective protection, it must reduce the risk of serious harm to below the real chance threshold: *Refugee Appeal No 71427/99*

at [66]-[67]. This requires the decision-maker to look at not only the available mechanisms of protection, but also at their *substantive effects* in relation to the particular risk faced by the refugee claimant. The fundamental point is that the same principles apply in relation to claims derived from the ICESCR as apply in relation to the ICCPR. In the context of ICESCR-grounded refugee claims, any state programme of action must reduce the risk of serious harm arising from non-enjoyment of an ICESCR right to below the real chance threshold.

[114] The Tribunal does not overlook that the Optional Protocol to the ICESCR (OP-ICESCR), adopted by General Assembly Resolution A/RES/63/117 in December 2008, provides for a reasonableness standard of review in respect of individual complaints lodged once the OP-ICESCR enters into force. However, the ESCR Committee has made clear in statements that its approach to the assessment of the reasonableness standard in Article 8(4) OP-ICESCR will be consistent with its past observations on the nature of state obligations under the ICESCR. In "*Statement by the Committee: An evaluation of the obligation to take steps to the "maximum of available resources" under an Optional Protocol to the Covenant,* 10 May 2007, E/C.12/2007/1 at [10], the ESCR Committee set out factors it may take into account in considering a complaint of an alleged failure by a state to take steps to the maximum of available resources. The factors included consideration "of the severity of the alleged breach, in particular, whether the situation concerned the enjoyment of the minimum core content of the Covenant": see [10.b]. As Brian Griffey "The 'Reasonableness' Test: Assessing Violations of State Obligations Under the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights" (2011) 11(2) *Human Rights Law Review* p322 observes:

> "While the inclusion of a 'reasonableness' standard of review has provided an opportunity to elucidate on the breadth of States' discretion in their implementation of Covenant rights (and, conversely, the appropriate precision of the Committee's recommendations, it has not changed the obligations imposed by the Covenant."

[115] Nor does the Tribunal overlook that in the context of the South African constitutional guarantees of socio-economic rights, the South African Constitutional Court has also adopted and developed a reasonableness standard: see *South Africa v Grootboom 2001 (1) SA 46; Minster of Health v Treatment Action Campaign and others* 2002 (10) BCLR 1033; *Khosa and Others v Minister of Social Development* (2004) 6 BCLR 569 and *Lindiwe Mazibuko v City of Johannesburg* (2009) ZACC 28. The jurisprudence of the Inter-American Court of Human Rights in relation to the general obligations clause of the 1969 American Convention on Human Rights also frames their content in terms of a context

dependent duty of reasonableness or due diligence: see Tara J. Mellish "Rethinking the 'Less as More' Thesis: Supranational Litigation of Economic Social and Cultural Rights in the Americas" (2006) 39 *New York Journal of International Law and Politics* at pp233-236.

[116] Whatever the merits of a reasonableness standard in the treaty monitoring context or in the enforcement of constitutional guarantees of a socio-economic nature by domestic judicial bodies, in the refugee status determination context it is inappropriate. As observed in *Canada (Attorney General) v Ward* [1993] 2 SCR 689, 724 per La Forest J:

> "Most states would be willing to attempt to protect when an objective assessment established that they are not able to do this effectively. Moreover, it would seem to defeat the purpose of international protection if a claimant would be required to risk his or her life seeking ineffective protection of a state, merely to demonstrate that ineffectiveness."

[117] The Tribunal is not a treaty supervisory body. It performs a fundamentally different function. It does not offer states guidance on the good faith discharge of treaty obligations. Nor is its task to apportion blame or to hold the relevant state accountable under international law for breaches of the claimant's fundamental rights. Refugee status determination is concerned with answering a fundamentally different question, namely, whether the appellants' predicament constitutes the international law status of 'being persecuted', thereby requiring surrogate international protection. Where this status arises because serious harm is anticipated to arise due to a failure of state protection, the fact that the state has done what it reasonably could to avoid that situation provides no answer to the claimant's predicament. It is precisely because either agents of the state are the cause of the anticipated serious harm, or are simply unable despite the good faith discharge of their obligations to provide effective protection from serious harm inflicted by non-state agents, that international protection may be required.

Socio-economic harm and nexus to a Convention ground

[118] In order to qualify as a refugee, the claimant must establish that his/her predicament is linked to one of the five Convention grounds. In *Refugee Appeal No 71427* [2000] NZAR 545; [2000] INLR 608 at [112], the RSAA recognised that such linkage can arise either through the serious harm or failure of state protection limbs of 'being persecuted'. As to the relevant standard, *Refugee Appeal No 76235* (6 September 2002) held, at [173]:

> "...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."

[119] Socio-economic policy varies across all societies. Most countries face hard choices about the allocation of scarce public resources, levels of which are highly variable internationally. Where the socio-economic condition of the claimant arises as a result of general policy choices, it may be difficult to establish that their civil and political status as specified in the enumerated Convention grounds is anything other than a remote cause for their predicament. The well-founded element cannot be founded on mere conjecture or surmise: see *Refugee Appeal No 72668: Ruling on Legal Issues* (5 April 2002) at [131]; Minister *for Immigration and Ethnic Affairs v Guo* (1997) 191 CLR 559, 572. The same applies to the nexus requirement. Cogent evidence must be presented to establish the causal nexus to the required degree.

Application to the facts

[120] In terms of the rights under the ICESCR, as noted, the poor socio-economic conditions of the Banaban community on Rabi Island has multiple causes. While lack of political voice and leverage plays a part, significant other causes are geographic isolation and limited size, economic mismanagement, and vulnerability to natural hazards. However, the Tribunal accepts the socio-economic position of Banabans in a general sense has been further negatively affected by discrimination in employment and their reclassification under the 1990 Constitution.

[121] The Tribunal further notes that disaggregation between the targeting development policy on ethnic grounds and the actual current incidence of poverty as referred to in the country information, constitutes a form of discrimination. As noted in *Refugee Appeal No 76512* (22 June 2010) at [47], there is some doubt as to whether Fiji fully complies with is obligations under CERD. Given that the principle of non-discrimination is a fundamental component of international human rights law, it is an important consideration to factor into the assessment. However, the existence of this discrimination against the Banabans as a whole is not determinative as regards the individual predicament of the appellant. The question is whether this discrimination and any other forms of discrimination he may encounter give rise to a real chance that the appellant will suffer socio-economic deprivation such as to amount to his being persecuted in the future.

[122] The Tribunal observes that much evidence was devoted to the educational facilities on Rabi Island for the appellant's children. The short point is that none of the appellant's children are appellants in themselves. There is no question of the appellant being denied education. He was educated in Fiji. Similarly, the appellant told the Tribunal that although he had a health problem while in New Zealand, this has now been resolved and he has no current health issue. The principal issues for consideration lie in the areas of housing and employment.

[123] In terms of housing, the ESCR Committee in *General Comment No 4: The Right to Adequate Housing* at [8], identified legal security of tenure and, in particular, protection against forced eviction, harassment and other threats as core attributes of the right to adequate housing. Other attributes identified are sustainable access to facilities essential for health, security, comfort and nutrition; access to common resources; safe drinking water and energy for cooking, heating, lighting and sanitation. According to the ESCR Committee, housing should be affordable and habitable. It must also give access to schools and employment. In *General Comment No 7: The Right to Adequate Housing (Art 11.1): Forced Evictions* 20 May 1997 E/1998/22 the ESCR Committee again emphasise the right to be free from forced eviction.

[124] As to these attributes of adequate housing, the appellant has not been denied housing by the Fiji state. His previous accommodation in Suva, while basic, was adequate by reference to these attributes. It was affordable, secure and habitable. There is no evidence before the Tribunal to establish that it posed a threat to the health of the appellant or his family. It gave the appellant access to employment and his children access to education. As for Rabi Island, that housing, while basic, was in the past adequate by these measures. The Tribunal accepts that a feeling of general insecurity exists on Rabi Island and that tensions over land ownership exist. This can be expected to continue. Nevertheless, there is no evidence that Rabi Islanders are suffering forced evictions or under threat of being so. Nor is the appellant required to return to Rabi Island.

[125] On this basis, the Tribunal finds that the appellant has not been denied the core of his right to adequate housing in the past and that his enjoyment of the various attributed comprising adequate housing exceeded minimum or basic levels, although not by a significant amount in all areas. His level of housing did not give rise to serious harm in the past. There is no evidence that it will do so in the future to a 'real chance' level.

[126] In terms of employment, the ESCR Committee in *General Comment No 18:*

The Right to Work (Art 6 of the Covenant) 6 February 2006 E/C.12/GC/18 emphasised the importance of assuring the individual's right to freely chosen decent work as a fundamental aspect of individual dignity. It also emphasised the importance of work not only for professional development, but also for social and economic inclusion. Importantly for present purposes, work must be available without discrimination on a prohibited basis such as race.

[127] The Tribunal accepts that the appellant has suffered discrimination in his employment in the past. Nevertheless, he has not been denied the core of his right to work. Indeed, he has enjoyed it to a substantial level. Throughout his time in Fiji, he managed to find and maintain lengthy periods of stable employment related to his trade, including settled employment in the same job for a number of years after both the first coup in 1987 and the 1990 constitutional reclassification. He received vocational and technical training. It must also be recalled that the appellant chose to leave his last employment to seek economic betterment in New Zealand because of declining wages. The minor discrimination he encountered did not deny him substantial enjoyment of the various attributes which make up the right to work in the past.

[128] However, the Refugee Convention requires a forward-looking assessment of risk. The appellant says the position has changed for the worse. The Tribunal accepts that the appellant would not have adequate housing available to him on Rabi Island, which remains substantially affected by the effects of cyclone Tomas. His former family home is in dilapidated condition because of this naturally occurring event and lack of occupancy. Current housing conditions on Rabi Island are contributing to high rates of tuberculosis. In order to have sufficient funds to repair his house, the appellant would need to find work of a kind not readily available on Rabi Island itself and, in the short-term at least, would likely be forced to live in Suva or another urban centre.

[129] The Tribunal accepts that, in seeking to find work off Rabi Island, there is a real chance he may encounter discrimination in employment similar to that he encountered before he left for New Zealand. The Tribunal also accepts that the 1990 constitutional reclassification of the Banabans has shut the Banaban community out of targeted development programmes aimed at increasing labour demand through the promotion of small business. This, combined with employment-related discrimination, can be expected to have some negative impact on his employment options. However, in the past, *when the same conditions existed*, the appellant managed to find work related to his trade. While

the appellant believes he will encounter difficulty finding work because it is often obtained on a 'word-of mouth' basis and he has been absent from Fiji for some time, the appellant is not without networks or community links in Fiji. These can be used by him to look for work in the future. That the appellant's own sister also continues to work in her profession, albeit with reduced wages, underscores the point that work, while difficult to come by, is neither legally nor practically unobtainable for Banabans. While life is no doubt more difficult for his sister, there is no evidence before the Tribunal establishing that his sister's predicament is causing her or her family serious harm.

[130] Although the appellant points to difficulties in getting work, the risk that he will suffer serious harm because he will not be able to find work is purely speculative. Speculation has no part to play in the assessment of whether a well-founded fear of being persecuted exists: see *Refugee Appeal No 72668: Ruling on Legal Issues* (5 April 2002) at [131]; *Minister for Immigration and Ethnic Affairs v Guo* (1997) 191 CLR 559, 572.

[131] Similarly, despite the discrimination he encountered in the past, the appellant managed to find housing which, although rudimentary compared to New Zealand, facilitated his access to employment, health services and schooling for his children. It provided access to food and potable water. It had an electricity supply and access to sanitation facilities. It may well be that the house he occupied is no longer available, but the risk that he will not be able to find accommodation of a similar kind elsewhere in Fiji is speculative.

[132] In conclusion, on the ICESCR derived rights, the Tribunal finds that, while the appellant may encounter discrimination, the effects will be limited to his right to work. As to that, there is no compelling evidence before the Tribunal to establish that any discrimination he may face in accessing employment will have such a detrimental effect on his right to work that he will be effectively denied the right or denied it to any substantial extent. Nor is there any evidence that accommodation of a kind he had in the past (which, while rudimentary, constituted sufficiently adequate housing) will not be available to him elsewhere. Whether viewed individually or cumulatively, the chance that the appellant will suffer serious harm from breaches of his rights under the ICESCR does not rise to the real chance level.

[133] These findings do not dispose of this aspect of the appeal. It is necessary to consider the extent to which socio-economic deprivation can constitute a breach of Articles 6 and 7 of the ICCPR which relate to the right to life and the prohibition

on cruel, inhuman or degrading treatment. The content and bounds of these rights is the same in both the refugee and protected jurisdictions: see generally *AC (Syria) [2011]* NZIPT 800035 (27 May 2011) at [70]-[80]. What follows therefore applies to both the refugee and protected person jurisdictions.

Socio-Economic Harm and the Arbitrary Deprivation of Life

[134] While the ICESCR undoubtedly protects access to basic necessities of life, the question of the extent to which the right to life under Article 6 ICCPR, *as a distinct human right*, embraces socio-economic determinants necessary to enhance the protection of life, as opposed to prohibiting the taking of life in arbitrary circumstances, is unsettled. It is more developed in some jurisdictions but less so in others. For example of more developed jurisprudence, see Inter-American Court of Human Rights *Yakye Axa Indigenous Community v Paraguay* (17 June 2005) at pp84, [162] regarding Article 4 of the American Convention on Human Rights, the regional analogue to Article 6 ICCPR.

[135] It is not, however, necessary to reach a conclusion on this matter here. It has not been argued that the condition of the appellant if returned to Fiji means there are substantial grounds for believing the appellants right to life itself in threatened.

Socio-Economic Harm as Cruel, Inhuman or Degrading Treatment

The general position

[136] Article 7 ICCPR provides:

> "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."

[137] It is not argued that the appellant is at risk of suffering proscribed punishment. The issue is whether his predicament can constitute a proscribed treatment under Article 7 ICCPR. While living in absolute poverty can readily be accepted as being a degrading *condition of existence*, the question of whether a state's refusal to provide services can constitute cruel, inhuman or degrading *treatment* is largely unresolved: see W Kalin and J Kunzli *The Law of International Human Rights Protection* (Oxford University Press, Oxford, 2010) at p336.

[138] It is nevertheless clear that the drafters of the post-World War II

international human rights architecture did not intend that poverty *per se* should constitute degrading *treatment* for the purposes of Article 7 of the ICCPR. This was made explicit in *Annotations on the Text of the Draft International Covenants on Human Rights,* 1 July 1955, A/2929 ("the UNSG Annotations"). Responding in this document to a formal request by the General Assembly, the UN Secretary General outlined the drafting history of the ICCPR and ICESCR and summarised the debates by Member States.

[139] At p31, the UNSG Annotations deal with (then) draft Article 7, recording:

> "11. The purpose of article 7 is to protect bodily integrity and human dignity.
>
> INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT
>
> 12. The first clause reproduces the text of article 5 of the Universal Declaration on Human Rights. The opening words of article 5 of the Declaration "No one shall be subjected" were chosen in preference to "It shall be unlawful to subject" to emphasize the right of the individual rather than the obligation of States.
>
> 13. The word "torture" in this article was understood to mean both mental and physical torture. The clause prohibits not only "inhuman" but also "degrading" treatment or punishment. **It was generally agreed that the word "treatment" was broader in scope than the word "punishment"; however, it was observed that the word "treatment" should not apply to degrading situations which might be due to general economic and social factors.**" (Emphasis added)

See also M Bossuyt *Guide to the "Travaux Preparatoires" of the International Covenant on Civil and Political Rights* (Martinus Nijhoff Publishers, Dortrecht, 1987) at p150.

[140] Understanding of human rights has, of course, developed since the 1950s. Despite the bifurcation of rights into the ICCPR and the ICESCR in the 1960s, human rights are now rightly 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]. However, notwithstanding this development in understanding, more recent commentary refers to the drafter's position without adverse criticism: see M Nowak *UN Covenant on Civil and Political Rights: CCPR Commentary* (2nd Rev ed, NP Engel, Kiehl, 2005) at pp159-160, who states:

> "It is also clear from the discussions in the [Human Rights Commission] that ... the term "treatment", although broader than punishment, did not cover degrading situations arising `from socio-economic conditions. This means that "*treatment"* represents an act or omission of an individual or one that can at least be attributed to him or her".

See also, K Wouters *International Legal Standards for Protection From Refoulement* (Intersentia, Antwerp, 2009) at p388.

[141] Reflecting the contemporary understanding of human rights, an "integrated approach" has developed in more recent decades by which economic, social and cultural rights are given protection through treaties on civil and political rights. Yet the "integrated approach" has not been applied in a manner establishing that economic and social rights may *generally* be protected though the application of Article 7 ICCPR or its analogue in regional human rights instruments. See M Scheinin "Economic and Social Rights as Legal Rights" in A Eide, C Krause and A Rosas (Eds) *Economic Social and Cultural Rights: A Textbook* (2001, 2nd Rev ed, Martinus Nijhoff, Dortrecht) at pp32-42.

[142] The jurisprudence in relation to Article 3 of the ECHR, the European analogue to Article 7 ICCPR, acknowledges that many of that instrument's civil and political rights have a socio-economic dimension: see *Airey v Ireland* (1979) 2 EHRR 305 at [26]. However, in *Pancenko v Latvia* Application No 40772/98 (28 October 1999) at p6, the ECtHR (European Court of Human Rights), albeit in a short admissibility decision, noted the limited scope of ECHR protection to situations of general socio-economic deprivation. It stated:

> "The Court recalls first that the Convention does not guarantee, as such, socio-economic rights, including the right to charge-free dwelling, the right to work, the right to free medical assistance, or the right to claim financial assistance from a State to maintain a certain level of living."

[143] More particularly, the ECtHR has refrained from reading into Article 3 *general* obligations of a socio-economic nature. This has most recently been set out in *MSS v Belgium and Greece* Application No 30696/09 (21 January 2011). At [249] the ECtHR held that Article 3:

> "…cannot be interpreted as obliging the High Contracting Parties to provide everyone in their jurisdiction with a home."

[144] At [252], the ECtHR did however state that, despite the lack of a general obligation, it "must determine whether a situation of extreme material poverty can raise an issue under Article 3". It continued:

> "253. The Court reiterates that it has not excluded "the possibility that the responsibility of the State may be engaged [under Article 3] in respect of treatment where an applicant, **who was wholly dependent on State support, found herself faced with official indifference** in a situation of serious deprivation or want incompatible with human dignity." (Emphasis added)

[145] A similar position had been taken in *Budina v Russia* Application No 45603/05 (18 June 2009). The qualifiers of being "wholly dependent on the state" and "official indifference" indicate that the ECtHR understand the scope of Article 3 to potentially embrace something other than a situation of serious

deprivation *per se*. In *MSS v Belgium and Greece*, far from taking the opportunity to assert a general proposition that living in 'extreme poverty' could itself constitute a breach of Article 3 of the ECHR, a breach was found on a more narrow basis linked to the particular vulnerability of the claimant as an asylum seeker and the failure by Greece to discharge the positive obligations it owed to the claimant under regional arrangements for the reception of asylum seekers. See also in this context the recent decision in *NS and others v Secretary of State for the Home Department* Application No C-411/10 (21 December 2011).

[146] The limited projection of Article 3 protection into the socio-economic sphere is confirmed in other ECtHR judgments: see *O'Rourke v United Kingdom* Application No 39022/97 (26 June 2001) regarding housing; *Budina v Russia* regarding the level of state pensions; *Nitecki v Poland* Application No 65653/01 (21 March 2002) regarding the failure by the state to refund the full price of a life-saving drug. A similar position has been adopted by the ECtHR in relation to housing and the private life guarantees under article 8 of the ECHR: see *Chapman v United Kingdom* 33 EHRR 18 at [99].

[147] In *R v Secretary of State for the Home Department, ex parte Adam, Limbuela and Tesema* [2005] UKHL 66, the House of Lords took a similar position. Lord Bingham stated, at [8], that "a general public duty to house the homeless or provide for the destitute cannot be fashioned out of article 3". See also [99] per Lord Brown.

The need for qualifying 'treatment'

[148] By definition, in order to fall within Article 7, there must be some 'treatment'. Given that no *general* duty to provide against socio-economic deprivation can be fashioned out of the prohibition on cruel, inhuman or degrading treatment, in context of socio-economic deprivation, any qualifying 'treatment' must transcend failure of the state's general economic policies to provide for an adequate standard of living: see *R v Secretary of State for the Home Department, ex parte Adam, Limbuela and Tesema* at [66] per Lord Scott:

> "It was submitted by…counsel for the Secretary of State, that a failure by the state to provide an individual within its jurisdiction with accommodation and the wherewithal to acquire food and the other necessities of life could not by itself constitute "treatment" for article 3 purposes. I agree with that submission, whether the individual in question is an asylum seeker or anyone else. It is not the function of article 3 to prescribe a minimum standard of social support for those in need...That is a matter for the social legislation of each signatory state. If individuals find themselves destitute to a degree apt to be described as degrading the state's failure to give them the minimum support necessary to avoid that

> degradation may well be a shameful reproach to the humanity of the state and its institutions but, in my opinion, does not without more engage article 3. Just as there is no ECHR right to be provided by the state with a home, so too there is no ECHR right to be provided by the state with a minimum standard of living: "treatment" requires something more than mere failure."

[149] Nevertheless, international jurisprudence establishes that socio-economic deprivation can fall within the scope of Article 7 of the ICCPR where there is a *specific treatment for which the state can be held accountable*. Such 'treatment' can arise from either a positive act or an omission to act: see Nowak (*op cit*) at p160 and Kalin and Kunzli (*op cit*) at p324.

[150] An obvious example of specific treatment is where there has been the deliberate infliction of socio-economic harm against an individual. Socio-economic deprivation caused by the destruction of property by state agents during a time of armed conflict is capable of amounting to 'treatment', particularly when the state fails to take any steps to assist those deprived of their homes and livelihoods as a result: see *Selcuk and Asker v Turkey* Application Nos 23184/94, 23185/94 (24 April 1998) at [77]-[79]; *Dulas v Turkey* Application No 25801/94 (30 January 2001) at [54].

[151] The Committee Against Torture ("the CAT Committee") has also held that, when conducted with overtones of racial discrimination, the destruction of property by private individuals of which state agents were aware, but did nothing to prevent, can constitute a breach of Article 16(1) of 1984 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), which is analogous to Article 7 ICCPR – see *Dzemajil et al v Yugoslavia* CAT/C/29/D/ 161/2000 (2 December 2002) at [9.2]. A similar position has been taken by the ECtHR in *Moldovan and Ors v Romania* Application Nos 41138/98, 64320/01 (12 July 2005) where, after the destruction of their home and property in an anti-Roma riot, a Roma family had to endure over 10 years of living in severely overcrowded and unsanitary conditions with a detrimental effect on the applicants' health. This occurred against a background of racist attitudes of some authorities dealing with the applicants' grievances.

[152] These cases demonstrate two important points:

(a) 'treatment' in this context can include a failure to act by agents of the state to prevent the action of non-state actors; and

(b) state failure to act in response to situations of sufficiently severe socio-economic deprivation is more likely to constitute a 'treatment'

> where the state has the clear ability to remedy the situation without difficulty but chooses not to: see here Kalin and Kunzli (op *cit*) at p336.

[153] Although the deliberate infliction of harm is the clearest example of 'treatment', it is not a prerequisite to qualify an act or omission by the state as a relevant 'treatment'. The creation by the state of special rules which disentitle the claimant to socio-economic benefits to which he or she would otherwise be entitled, can also constitute 'treatment' for the purposes of Article 7. An example can be found in *R v SSHD, ex parte Adam, Limbuela and Tesema*. Under the relevant immigration rules, asylum seekers in the United Kingdom were unable to enter into employment or engage in any business or profession for the first 12 months while their claim was processed but, thereafter, could apply for permission to take up employment only. A particular statutory regime was subsequently established which, notwithstanding the general prohibition on employment in the first 12 months, now also denied any state support to those asylum seekers who failed to lodge a claim as soon as they arrived in the country. Just as the House of Lords unanimously held that no general duty to house the homeless or destitute could be extrapolated from Article 3, all agreed that, even if not deliberately inflicted, where destitution arose as a result of a particular action of the state directed towards a particular sector of society, the prohibition on inhuman or degrading treatment could, in principle, be engaged: see [7] and [9], per Lord Bingham; [48], per Lord Hope; [67], per Lord Scott; [77], per Baroness Hale. Lord Bingham stated at [7]:

> "…Treatment is inhuman or degrading if, to a seriously detrimental extent, it denies the most basic needs of any human being. As in all article 3 cases, the treatment, to be proscribed, must achieve a minimum standard of severity, and I would accept that in a context such as this, not involving the deliberate infliction of pain or suffering, the threshold is a high one. …But I have no doubt that the threshold may be crossed if a late applicant with no means and no alternative means of support, unable to support himself, is, **by the deliberate action of the state**, denied shelter, food or the most basic necessities of life." (Emphasis added)

[154] Lord Brown put the matter thus:

> "[99] It seems to me one thing to say, as the ECtHR did in *Chapman*, that within the states there are unfortunately many homeless people and whether to provide funds for them is a political, not a judicial issue; quite another for comparatively rich... country like the UK to single out a particular group to be left utterly destitute on the streets as a matter of policy....
>
> [101] ...more important to my mind is that the policy's necessary consequence is that some asylum seekers *will* be reduced to street penury. This consequence must therefore be regarded as intended, in which case it can readily be characterised as involving degrading treatment... or unintended, involving hardship to a degree recognised as disproportionate to the policy's intended aims. Either

> way, in my opinion, street homelessness would cross the threshold into article 3 degrading treatment."

[155] Further examples of qualifying 'treatment' emerge in situations where there is a failure by the state to discharge positive obligations owed to vulnerable persons who are wholly dependent on the state for their socio-economic wellbeing. In *MSS v Greece and Belgium*, Greece was held to have subjected the applicant to degrading 'treatment' on the basis of its failure to discharge positive obligations owed to the complainant under regional arrangements as to the minimum standards for the reception of asylum seekers which guaranteed certain conditions including accommodation, food and clothing: see [263]. While asylum seekers were notionally able to apply for and be issued with a temporary work permit, limitations on eligibility for employment and "major bureaucratic obstacles" meant providing for oneself was not a realistic alternative to seeking state support which, in turn, was not forthcoming: see [171] and [261]-[263]. As a result, the complainant was forced to live on the street for several months without resources or access to sanitary facilities, and without any means of providing for his essential dignity.

[156] Other examples of the specific treatment of persons wholly dependent on the state concern detainees. Under the control of the state by reason of their loss of liberty, detainees' particular vulnerability derives from their being entirely dependent on the state to provide for their sustenance and wellbeing. Unsurprisingly, in a number of cases the Human Rights Committee ("the Committee") has found that failure by the state to provide medical care and attention to a detainee resulting in sufficiently severe pain and suffering has constituted a breach of Article 7 of the ICCPR: see, for example, *Rouse v Philippines* CCPR/C/84/D/1089/2002 (5 August 2005); *Smith and Stewart v Jamaica* CCPR/C/65/D/668/1995 (12 May 1999).

[157] In other cases, issues such as access to food and disability status have been instrumental in a finding that cruel, inhuman or degrading treatment has occurred. In *Miha v Equataorial Guinea* CCPR/C/51/D/414/1990 (10 August 1994), the Committee held that the deprivation of food and water for several days during detention constituted inhuman treatment. The failure by prison authorities to provide a battery charger for a disabled inmate's wheelchair and her having to sleep in her wheelchair was found by the ECtHR to constitute degrading treatment: see *Price v United Kingdom* Application No 5493/72, ECHR 2001-VII. There is a similar approach under the Inter-American system: see, Harris and Livingstone (*op cit*) at pp226-231.

[158] For *domestic* purposes, section 131(5)(a) of the Act directs that "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". This does not, however, affect the underlying point that *international law* recognises that, being wholly dependent on the state, detainees are in a situation of particular vulnerability as to the basic wellbeing and that, in some circumstances, failure to ensure their wellbeing may constitute a breach of Article 7 of the ICCPR. The extent to which the domestic statutory exception limits what would otherwise be a breach of Article 7 does not, however, fall for determination in this appeal and is left open.

[159] It is important to add that not all specific 'treatment' will amount to a breach of Article 7. Whether it does will depend on whether it can, in context, be considered cruel, inhuman or degrading. Plainly, not all variable impacts of state activity amounting to a specific treatment will be so. The level of deprivation resulting from any specific treatment must also be of sufficient severity to fall within the scope of Article 7 ICCPR. As observed in *AC (Syria)* [2011] (27 May 2011) at [82]:

> "...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."

These observations apply just as equally to claims grounded in socio-economic deprivation.

Application to the facts

[160] In terms of Article 7 of the ICCPR, there has been no deliberate socio-economic deprivation of the appellant in the past. While, from time to time, his ability to fish has been impinged and crops stolen by ethnic Fijians while on Rabi Island, the appellant has not been deprived of livelihood or home to the extent in cases such as *Dzemajil* or by any deliberate policy of socio-economic marginalisation.

[161] It is accepted that a particular regime has been applied to the appellant as a Banaban in the form of the Banaban Lands Act and Banaban Settlement Act. These constitute a special regime due to their status as environmental migrants. The 1990 constitutional reclassification can also be seen as a specific treatment insofar as it denies to Banabans entitlements they would otherwise have enjoyed. The effects, however, are mixed. The former have been beneficial in terms of preserving what is a contentious occupancy of the freehold land on Rabi Island. The latter has had a negative impact in that it has shut the Banaban community out of development assistance programmes and, alongside other causes, has contributed to a high incidence of poverty among the Banaban community. The Banaban community is discriminated against by the Fijian state in terms of development policies insofar as anti-poverty programmes are ethically based and bear no adequate connection to the actual incidence of poverty. However, for the reasons already given, the effects of this regime *on this appellant* have not reached a sufficient level of harm so as to bring him within the scope of Article 7 in the past, military coups notwithstanding. There is no evidence before the Tribunal to establish that it would be any different in the future.

[162] For the above reasons, the Tribunal finds that the appellant has not established that he faces a well-founded fear of being persecuted.

Nexus to a Convention Reason

[163] In light of the finding that the appellant does not have a well-founded fear of being persecuted, the need to consider whether there is a nexus to a Convention reason does not arise.

PROTECTED PERSON STATUS: THE CONVENTION AGAINST TORTURE

The Issues

[164] 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."

[165] 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 of Claim under Convention Against Torture

[166] The appellant has raised no evidence establishing he faces a risk of torture as defined under Article 1 of CAT. Accordingly, there are no substantial grounds for believing that he would be in danger of being subjected to torture if deported from New Zealand.

PROTECTED PERSON STATUS: THE ICCPR

The Issues

[167] Under section 198 of the Act, having rejected his claim for recognition as a refugee, and found not to be at risk of torture, the Tribunal must consider his entitlement to be recognised a protected person under section 131 of the Act which 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."

[168] Under 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.

No Risk of Arbitrary Deprivation of Life or Cruel Treatment in Fiji

[169] The question of whether the appellant is at risk of cruel, inhuman or degrading treatment or arbitrary deprivation of his life has been considered already in the context of the claim for refugee status.

[170] As noted at [83] and [135] above, there is no risk to the appellant's life from physical violence and, rightly, it has not been argued that his anticipated socio-economic condition is such as to raise an issue under Article 6 ICCPR. For the reasons explained in *AC Syria* [2011] NZIPT 800035 (27 May 2011), no lower threshold of harm exists for establishing cruel, inhuman or degrading treatment in the protected person context than exists in the refugee context. It has the same meaning in terms of protection under the ICCPR as it does under the Refugee Convention.

[171] The Tribunal has found that the risk of a breach of Articles 6 and 7 of the ICCPR does not reach the real chance threshold. No matters additional to those matters relied on in the refugee claim have been advanced to establish the claim under section 131. Therefore, for the reasons given in relation to the assessment of the claim for refugee status, there are no substantial grounds for believing that the appellant would be arbitrarily deprived of his life or suffer cruel, inhuman or degrading treatment or punishment in Fiji.

Deportation Not Qualifying Treatment under 2009 Act

[172] Because of developments in the ECtHR in which the very act of deportation has been held to be the qualifying 'treatment' in itself, it is necessary to consider whether, for the purposes of claims under section 131 of the 2009 Act, a similar principle is to apply and, if so, in what circumstances.

[173] For the reasons that now follow, the Tribunal finds that such a principle is not to apply under the 2009 Act.

Article 7 of the ICCPR: The approach of the Human Rights Committee

[174] The Committee has dealt with the scope of Article 7 of the ICCPR in relation to expulsion in a number of individual complaints. In the main, the cases concern the risk the punishment to be imposed upon the complainant in the form of:

(a) the imposition of the death penalty; see *Kindler v Canada*

CCPR/C/48/D/470/1991 (18 November 2003) and *Ng v Canada* CCPR/C/49/D/469/1991 (7 January 1994); or

(b) corporal punishment; see *GT v Australia* CCPR/C/61/D/706/1996 (4 December 2007) and *ARJ v Australia* CCPR/C/60/D/692/1996 (11 August 1997).

[175] As far as the Tribunal is aware, at no time has the CCPR ever considered a complaint that removal breaches Article 7 on the basis of the socio-economic deprivation *per se*. Summarising the approach of the CCPR on *non-refoulement* generally, Wouters *(op cit)* at 422 states:

> "The prohibition on refoulement developed under the Covenant protects people from being subjected to arbitrary deprivation of life, in certain circumstances from facing the death penalty, and from torture and other forms of cruel, inhuman or degrading treatment or punishment…The exact scope of the harm from which a person is protected under the Covenant remains unclear. **For example, where Article 6 of the Convention includes obligations on States to improve socio-economic conditions, no individual cases have been accepted, let alone has it been accepted by the Human Rights Committee that people may not be returned to a country which is in a poor socio-economic state**." (Emphasis added)

[176] The most relevant complaint considered by the Committee appears to be *C v Australia* (900/99) CCPR/C/76/D/900/1999 (13 November 2002) in which the availability in the receiving state of a prescription medicine necessary to treat the complainant's depression was relevant to a finding that Article 7 would be breached. However, while relevant, it was far from dispositive and other concerns, including a finding by the Committee that the risks upon which the complainant had been recognised as a refugee on political grounds by Australia had not dissipated, arguably played the more determinative role: see [8.5].

[177] In *Kindler v Canada* CCPR/C/48/D/470/1991 (18 November 1993) at [6.2], the Committee explained the basis upon which a state may be in breach of Article 7 ICCPR by removing a person from its territory. It stated:

> "Article 2 of the Covenant requires States parties to guarantee the rights of persons within their jurisdiction. If a person is lawfully expelled or extradited, the State party concerned will not generally have responsibility under the Covenant for any violations of that person's rights that may later occur in the other jurisdiction. In that sense a State party clearly is not required to guarantee the rights of persons within another jurisdiction. **However, if a State party takes a decision relating to a person within its jurisdiction, and the necessary and foreseeable consequence is that that person's rights under the Covenant will be violated in another jurisdiction, the State party itself may be in violation of the Covenant**. That follows from the fact that a State party's duty under article 2 of the Covenant would be negated by the handing over of a person to another State (whether a State party to the Covenant or not) where treatment contrary to the Covenant is certain or is the very purpose of the handing over. For example, a

> State party would itself be in violation of the Covenant if it handed over a person to another State in circumstances in which it was foreseeable that torture would take place. The foreseeability of the consequence would mean that there was a present violation by the State party, even though the consequence would not occur until later on." (Emphasis added)

In *ARJ v Australia* CCPR/C/60/D/692/1996 (11 August 1997), the Committee reiterated this general position.

[178] That there must be some treatment *in the receiving state* is reflected in the Committee's General Comments. In *General Comment No 20: Replaces General Comment 7 Concerning Prohibition of Torture and Cruel Treatment or Punishment,* 10 March 1992, the Committee state:

> "9. In the view of the Committee, States parties must not expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment **upon return to another country** by way of their extradition, expulsion or refoulement. States parties should indicate in their reports what measures they have adopted to that end." (Emphasis added)

[179] In General Comment No 31: *Nature of the General Legal Obligation Imposed on States Parties to the Covenant,* 26 May 2004 CCPR/C/21/Rev.1/Add.13, the Committee set out developments in its understanding on the general obligation under Article 2 ICCPR to guarantee the rights of persons within their jurisdiction since its earlier, brief, General Comment No 3 issued in 1981. Again, the Committee adopt the same position. At [12], the Committee state that the obligation under Article 2:

> "…entails an obligation not to extradite, deport, expel, or otherwise remove a person from their territory, where there are substantial grounds for believing that there is a real risk of irreparable harm, such as that contemplated by articles 6 and 7 of the Covenant, **either in the country to which removal is to be effected or in any country to which that person may subsequently be removed**." (Emphasis added)

The approach of the European Court of Human Rights (ECtHR): Expulsion as qualifying treatment

[180] That the responsibility of an expelling state is engaged where there is a foreseeable exposure to proscribed treatment in the receiving state *in addition* to any 'treatment' of the individual concerned by the host state by the proposed act of expulsion is also reflected in the ECtHR jurisprudence: see, *Soering v United Kingdom* (1989) 11 EHRR 439, at [87]-[91]. This general principle is firmly established in the ECtHR case law; see M Symes and P Jorro *Asylum Law and Practice* (Bloomsbury Professional, London 2010) at pp576-579; N Mole and

C Meredith *Asylum and the European Convention on Human Rights* (Council of Europe Publishing, Strasbourg, 2010) at pp38-39.

[181] However, in a significant modification to this orthodox position, the ECtHR has accepted that, in certain fact circumstances, Article 3 protection extends to situations where harm arises, not from any qualifying treatment in the receiving state, but where sufficiently intense pain and suffering resulting from naturally occurring illness or disease is the foreseeable consequence of the 'treatment' by the host state in deporting or removing the individual; D *v United Kingdom* (1997) 24 EHRR 423, 447 at [53], *Pretty v United Kingdom* (2002) 35 EHRR at [52] and *N v United Kingdom* [2008] INLR 335 at [29] and [42]-[45]. Under this approach, the act of expulsion in itself constitutes the qualifying treatment without any need for a further treatment of the individual in the receiving state that qualifies as cruel, inhuman or degrading. These cases have typically concerned removal of persons who suffer from serious illness such as HIV who will be unable to obtain in the receiving state the medical care or treatment they presently enjoy in the expelling state and whose life expectancy and attendant suffering will considerably worsen as a result.

[182] In the recent case of *Sufi and Elmi v United Kingdom* Application Nos 8319/07 and 11449/07 (28 June 2011), the ECtHR revisited the issue and arguably went further by extending the reasoning in the medical cases into the socio-economic sphere, at least in the context of an alternative protection analysis. Having found that the level of indiscriminate violence in Mogadishu meant that removal there would constitute a breach of Article 3 (see [240]), the ECtHR considered whether the humanitarian conditions in refugee and IDP camps in Kenya and Somalia themselves constituted a breach of Article 3 in the context of an assessment as to whether the complainants had viable alternative protection available to them. The ECtHR found that conditions in the camps breached Article 3: see [291]-[292].

[183] The Court cited *N v United Kingdom* where the ECtHR considered it necessary to retain "sufficient flexibility" to intervene in "very exceptional cases where the humanitarian grounds against removal were compelling". On this basis, the Court in *Sufi and Elmi* made the following distinction:

> "[281] The Court recalls that *N v the United Kingdom* concerned the removal of an HIV positive applicant to Uganda, where her lifespan was likely to be reduced on account of the fact that the treatment facilities there were inferior to those available in the United Kingdom. In reaching its conclusions, the Court noted the alleged future harm would emanate not from the intentional acts or omissions of public authorities or non-state bodies but from naturally occurring illness and the

> lack of sufficient resources to deal with it. The court therefore relied on the fact that neither the applicant's illness nor the inferior medical facilities were caused by an act or omission of the receiving State or any of the non-State actors within the receiving state.
>
> [282] **If the dire humanitarian conditions in Somalia were solely or even predominantly attributable to poverty or the State's lack of resources to deal with naturally occurring phenomenon, such as a drought, the test in *N v the United Kingdom* may well have been considered to be the appropriate one.** However, it is clear that while drought has contributed to the humanitarian crisis, that crisis is predominantly due to the direct and indirect actions of the parties to the conflict. The reports indicate that all parties to the conflict have employed indiscriminate methods of warfare in densely populated urban areas with no regard to the safety of the civilian population....This fact alone has caused widespread displacement and the breakdown of social, political and economic infrastructures. Moreover, the situation has been greatly exacerbated by al-Shabbab's refusal to permit international aid agencies to operate in areas under its control, despite the fact that between a third and a half of all Somalis are living in a situation of serious deprivation.
>
> [283] Consequently, the Court does not consider the approach adopted in *N v the United Kingdom* to be appropriate in the circumstances of the present case. Rather, it prefers the approach adopted in *M.S.S v Belgium and Greece*, which requires it to have regard to an applicant's ability to cater for his most basic needs, such as food, hygiene and shelter, his vulnerability to ill-treatment and the prospect of his situation improving within a reasonable time-frame." (Emphasis added)

[184] The ECtHR clearly recognise that some significance attaches to the question of whether there is qualifying 'treatment' in the receiving state. However, far from treating the existence of treatment in the receiving state as a necessary requirement to engage responsibility of the expelling state under Article 3, the ECtHR accept that socio-economic deprivation arising from illness or general poverty, and not from any qualifying treatment in the receiving state, could, in principle, fall within Article 3. The ECtHR seeks to limit the potentially broad application of this principle by stressing that it is likely to be successful only in "very exceptional cases" where it is established that humanitarian circumstances are "compelling": see [278]. A similar position has been adopted by the United Kingdom Asylum and Immigration Tribunal (AIT) in *HS (returning asylum seekers) Zimbabwe CG* [2007] UKAIT 00094 (29 November 2004) at [59]-[62] and *RN (Returnees) Zimbabwe CG* [2008] UKAIT 000083 (19 November 2008) at [255].

[185] The scope of application of this modified approach is uncertain. Although, in theory, intervention in such cases is regarded as exceptional and then only in 'extreme' cases (see ECtHR in *N v United Kingdom* at [42]-[43]), in no case since *D v United Kingdom* has the ECtHR ever found that expulsion breached Article 3 on the basis of ill-health: see M Symes and P Jorro (*op cit*) at pp616-618 and N Mole and C Meredith (*op cit*) at pp40-42. Furthermore, the extent to which the modification in approach applies to socio-economic deprivation not linked to an

underlying medical complaint is unsettled in ECtHR jurisprudence. In *MSS v Greece and Belgium,* the Court relied on its more established jurisprudence in which exposure to proscribed harm *in the receiving state* being the foreseeable consequence of expulsion is the critical question: see [365].

ECtHR approach impermissible under section 131 of 2009 Act

[186] Although in the *domestic* context section 135(5)(b) of the Act directs that the impact on a claimant 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 cruel treatment, the Act is silent as to whether there is scope for the 'expulsion as treatment' principle to apply in cases not involving access to health or medical services.

[187] Nevertheless, the Tribunal declines to follow the modified approach of the ECtHR for the purposes of cases arising under section 131 on the basis such an approach is inconsistent with the clear wording of the Act. Section 131(1) relevantly provides:

> "**131 Recognition as protected person under Covenant on Civil and Political Rights**
>
> (1) 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**.
>
> (2) Despite subsection (1), a person **must not be recognised as a protected person in New Zealand** under the Covenant on Civil and Political Rights **if he or she is able to access meaningful domestic protection in his or her country or countries of nationality or former habitual residence.**
>
> (3) For the purposes of determining whether there are substantial grounds for belief under subsection (1), the refugee and protection officer concerned must take into account all relevant considerations, including, if applicable**, the existence in the country concerned of a consistent pattern of gross, flagrant, or mass violations of human rights**." (Emphasis added)

[188] The words emphasised make clear that it was the legislative intention to reflect the orthodox position under international law requiring qualifying treatment to exist in the receiving state before the Act's protected person jurisdiction is engaged. Section 131(1) is couched in contingent terms. The task is to assess the risk of qualifying harm "if" the person "is deported" from New Zealand. This wording clearly identifies the analysis as being of risk of cruel treatment occurring *after* the act of deportation takes place. This interpretation is reinforced by the words emphasised in section 131(3) which make the existence of gross or mass

violations of human rights "in the country concerned" a mandatory relevant consideration in applicable cases.

[189] That the function of the Tribunal under in the protected person jurisdiction is to assess the risk of qualifying harm arising in the receiving state is further reflected in statutory direction in section 131(2) to dismiss the appeal and deny protection *in New Zealand* if the appellant is able to obtain effective domestic protection in "any country or countries of nationality or former habitual residence". The statutory language unambiguously contrasts protection in New Zealand with the availability of domestic protection elsewhere. The country to which the issue of domestic protection is concerned is a country other than New Zealand which can provide 'domestic' protection from the qualifying treatment under its own national law. If the qualifying treatment were able in some cases to comprise nothing more than the proposal to execute the deportation of a person by service of a deportation liability notice, this would render section 131(2) otiose in those instances. The country of nationality or former habitual residence concerned could never provide 'domestic' protection from this 'treatment'. At best, the country could seek to apply diplomatic pressure on New Zealand as to the application of New Zealand's domestic law, but that is a matter of international relations not the claimant's country of nationality's own 'domestic' protection law and mechanisms.

[190] It is settled law that the removal powers under immigration legislation should be interpreted consistently with New Zealand's international obligations: see *Ye v Minister of Immigration* [2010] 1 NZLR 104 and *Puli'ueva v Removal Review Authority* (1996) 14 FRNZ 322. The issue is what international obligations are relevant in the context of section 131 and what they entail. Section 124 sets out the purpose of the part of the 2009 Act in which New Zealand's protected person jurisdiction sits. Section 124 relevantly provides:

> "**124 Purpose of Part**
>
> The purpose of this Part is to provide a statutory basis for the system by which New Zealand—
>
> ...
>
> (b) codifies certain obligations, and determines to whom it has these obligations, under—
>
> ...
>
> (ii) the International Covenant on Civil and Political Rights."

[191] The clear Parliamentary intention in establishing this jurisdiction was to domesticate *some of the obligations under the ICCPR*. Section 131 must be interpreted by giving its words their ordinary meaning in light of this express

purpose. While understanding of the scope of application of Article 7 ICCPR can be shaped by approaches taken to its regional analogues, there is no established international law consensus that the prohibition on cruel, inhuman and degrading treatment can be interpreted in the manner the ECtHR has done in *D v United Kingdom* and related cases.

[192] It is unlikely that the Human Rights Committee would have been unaware of the ECtHR jurisprudence in *D v United Kingdom.* Yet, in the subsequent *General Comment No 31*: *Nature of the General Legal Obligation Imposed on States Parties to the Covenant,* 26 May 2004 CCPR/C/21/Rev.1/Add.13, the Committee, when dealing specifically with expulsion in the context of the nature of the general legal obligation imposed on States Parties to the ICCPR, do not endorse the proposition that expulsion can constitute the relevant treatment in certain circumstances. The Tribunal further notes that the Committee on the Rights of the Child has adopted a similar view to the Human Rights Committee in relation to the removal of non-citizen children: see *General Comment No 6 (2005): Treatment of Unaccompanied and Separated Children Outside Their Country of Origin,* 1 September 2005, CRC/GC/2005/6 at [27].

[193] The lack of wider jurisprudential support for the 'expulsion as qualifying treatment' principle in the wider international jurisprudence relating to Article 7 of the ICCPR means that proper interpretation of section 131 as to the scope of protection is that contained in the more orthodox approach. The approach taken in the ECtHR regarding 'expulsion as qualifying treatment' amounts to an impermissible interpretation of section 131 of the 2009 Act. For section 131 to have any application there must, in addition to the 'treatment' of the individual by the proposed deportation, be some qualifying treatment in the receiving state.

[194] The Tribunal does not overlook that in *Puli'ueva*, at p334, Keith J turned to the applicability of section 9 of the New Zealand Bill of Rights Act 1990 (NZBORA) in a removal context. Keith J appears to accept that, in principle, section 9 NZBORA could apply but dismissed the argument on the point that the disruption to family life fell far short of the level of severity required to engage section 9. The issue, however, is only briefly referred to and not considered in any detail: see here, observations in A Butler and P Butler *The New Zealand Bill of Rights Act: A Commentary* (LexisNexis, Wellington 2005) at [10.9.2]. In *Chief Executive of Department of Labour v Taito* (2006) 8 HRNZ 71, 81-82, the Court of Appeal referred to the observations of Keith J in *Puli'ueva* but similarly found on the facts that the high threshold required was not met.

[195] However, both *Puli'ueva* and *Taito* concerned the proper approach to humanitarian appeals under the Immigration Act 1987. The 2009 Act is significantly different from its predecessor. It provides for a protected person mechanism which the statutory scheme clearly distinguishes from both protection under the Refugee Convention and relief from expulsion on the basis of humanitarian considerations: see *AC (Syria)* [2011] NZIPT 800035 (27 May 2011) at [59]-[69] and [87]-[96]. The difference in statutory context means neither *Puli'ueva* nor *Taito* provide binding authority for the proposition that expulsion can in appropriate fact circumstances be considered the qualifying treatment for the purposes of section 131 of the 2009 Act. Furthermore, in neither *Puli'ueva* nor *Taito* was the international jurisprudence relating to the scope of the non-refoulement obligations inherent in Article 7 ICCPR cited to or considered by the court.

[196] This is not to say that the act of deportation could never itself amount to cruel, inhuman or degrading treatment, for example, in the way it is carried out. In such circumstances, however, the claimant's remedy lies, if at all, in proceedings before the Courts under section 9 of NZBORA. Equally, it may be possible for any wider humanitarian factors such as the impact of deportation on the person subject to the deportation liability or their family members to be considered by the Tribunal in the context of a humanitarian appeal under section 206 of the 2009 Act in cases where such right of appeal exists. What the person subject to the deportation liability cannot do is such instances, however, is claim relief from expulsion from New Zealand by bringing proceedings under the section 131 of the 2009 Act, the statutory gaze of which is clearly directed to treatment (or punishment) occurring in the receiving state.

Summary of Conclusions on Socio-economic Deprivation and Protected Persons Status

[197] In claims involving expulsion and situations of socio-economic deprivation under the 2009 Act the following principles are therefore to be applied:

(a) The proposed act of expulsion as a result of a deportation liability arising under the 2009 Act does not constitute the qualifying 'treatment' for the purposes of Article 7 of the ICCPR and section 131 of the Act. To fall within the scope of section 131(1) of the Act, there must be substantial grounds for believing that qualifying treatment or punishment will occur *in the receiving state*;

(b) *As a general rule,* socio-economic deprivation arising from general policy and conditions in the receiving state is not to be regarded as a breach of Article 7 of the ICCPR as there is no relevant 'treatment' (it may, however, in the refugee jurisdiction amount to a breach of a relevant ICESCR right);

(c) However, where there *is a specific treatment* of the individual for which the state can be held responsible, this can engage Article 7 of the ICCPR. In such cases, the level of deprivation resulting from the specific treatment must be of sufficient severity to fall within the scope of Article 7.

Humanitarian Appeals under the Act Provide Further Scope for Relief

[198] While one cannot question the humanitarian impulse the extension of Article 3 protection by the ECtHR reflects, the 'expulsion as qualifying treatment' approach in the ECtHR jurisprudence is not replicated in the approach of treaty monitoring bodies and for that reason has been rejected in the context of the protected person jurisdiction of the 2009 Act. Nevertheless, as already noted, humanitarian factors arising from deportation liability may still have a remedy under the Act. In *AC (Syria)* [2011] (27 May 2011) at [94], the Tribunal observed that relief from anticipated breaches of rights falling outside the scope of the Refugee Convention and not falling within the protected person jurisdiction can, in principle, be considered in the context of a section 206 humanitarian appeal. Section 207 sets out the grounds upon which humanitarian factors may justify relief from liability for deportation. It provides:

> "(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."

[199] The decision of the ECtHR in *N v United Kingdom* is notable for its resemblance to a humanitarian appeal. The Court was motivated by a concern to retain 'sufficient flexibility' to intervene in "very exceptional cases where the humanitarian grounds against removal were compelling". The similarity to the test under section 207 is clear. Furthermore, in common with humanitarian appeals, there was an express weighing of public interests factors by the ECtHR. Having

widened the scope of application of the prohibition on exposure to cruel, inhuman or degrading treatment or punishment in *D's* case, in *N v the United Kingdom,* the majority ECtHR felt some retrenchment was required on public policy grounds, a matter of no small consternation to the minority given the absolute nature of the prohibition under international law.

[200] It is important to note, however, that in the context of humanitarian appeals, something more than exposure by deportation to a lower standard of living than is being enjoyed in New Zealand must be shown: see *Ronberg v Chief Executive of the Department of Labour* [1995] NZAR 509; *Rahman v Minister of Immigration* (AP56/99 High Court Wellington, 26 September 2000) at p19. It is, of course, impossible to lay down any bright-line test. The test is highly fact and context specific, to be determined by the interplay between factors existing at a national, community and household level, with factors existing at an individual level.

[201] In this case, there is no humanitarian appeal before the Tribunal. It is unable to consider any wider humanitarian circumstances arising from the facts.

CONCLUSION ON APPEAL

[202] 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.

[203] The appeal is dismissed.

"B L Burson"

B L Burson
Member

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B L Burson
Member