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THE GREAT CLIMATE MIGRATION: A CRITIQUE OF GLOBAL LEGAL STANDARDS OF CLIMATE CHANGE-CAUSED HARM

by *Mariah Stephens**

Approximately 2.4 billion people, or about forty percent of the global population, live within sixty miles (one-hundred kilometers) of a coastline.¹ The United Nations (“U.N.”) determined that “a sea level rise of half a meter could displace 1.2 million people from low-lying islands in the Caribbean Sea and the Indian and Pacific Oceans, with that number almost doubling if the sea level rises by two metres.”² The U.N. also reports that “sudden weather-related hazards” have internally displaced an annual average of 21.5 million people since 2008.³ Within the next few decades, this number is likely to continue to increase. As sea levels rise and weather events become more frequent and severe, ecosystems will begin to collapse,⁴ clean water and fresh food will be harder to find, coasts and islands will be engulfed by the sea, shelters will be damaged by storms and fires, and biodiversity will suffer. Though many individuals will rebuild in hopes of preserving their homes and families, their determination to stay could result in dangerous conditions and political turmoil; others will have no choice but to abandon their homes in search of a safer future, a phenomenon that has come to be known as “The Great Climate Migration.”⁵

The Teitiota family is an example of a family who tried to anticipate the challenges ahead and moved before it was too late. In 2007, Ioane Teitiota and his wife moved from their home in Tarawa, Kiribati, an island nation in Oceania, to New Zealand to start a family and build a safer life.⁶ Although they failed to renew their work visas when they expired in 2010, Teitiota and his wife stayed until 2012 when they filed to be recognized as refugees/protected persons.⁷ Their request was first denied by New Zealand’s Immigration and Protection Tribunal (“IPT”), and, despite appealing the case all the way to the New Zealand Supreme Court, the denial was never reversed.⁸ When Teitiota and his family were deported back to Kiribati in 2015, he submitted a complaint to the U.N. Human Rights Committee (“HRC”)⁹ claiming that New Zealand both violated his right to life and deprived him of his life as provided to him under the International Covenant on Civil and Political Rights when they failed to adequately assess the risk he and his family would face.¹⁰

Teitiota and his wife made the tough choice to leave their home country in 2007 when they realized, based on news reports and weather conditions, that Kiribati had no future.¹¹ The fresh water supply and crops were continuously ruined by saltwater, and the coasts were eroding during high tides. Additionally,

Tarawa, the main island, became more crowded as residents of outlying islands moved inland to avoid harsh storms and be closer to resources including hospitals and other government services.¹² These struggles demonstrate a changing climate and rising sea levels, and they have taken a toll on the health and safety of not only the Teitiota family, but also the other 125,000 people who call the island of Kiribati home.¹³ Climate change and rising seas in Kiribati have resulted in malnutrition and vitamin deficiencies due to the inability to maintain crop production, increased chance of diarrhea and dehydration due to the poor quality of drinking water, heightened risk of children drowning due to flooding seawater, and a housing crisis and land disputes due to overcrowding.

Even though Teitiota and his family feared they would suffer the consequences described above if they were deported and forced to return to Kiribati, the IPT denied their request for asylum on the grounds that the family did not have enough evidence to prove they faced “an imminent risk of being arbitrarily deprived of life,”¹⁴ nor that their situation was substantially different from the other citizens of the island.¹⁵ Teitiota argued to HRC that he and his family should qualify as “refugees” as defined by the Convention Relating to the Status of Refugees (“Refugee Convention”).¹⁶ Article one of the Convention describes a “refugee” as:

[one] . . . 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.¹⁷

While the IPT did not eliminate the possibility that environmental degradation could “create pathways into the Refugee Convention or protected person jurisdiction,”¹⁸ they determined that Teitiota and his family did not qualify as “refugees” under this definition.

The IPT’s ruling in this case was largely due to its determination that Teitiota failed to meet the threshold of imminence¹⁹ because there was not “a sufficient degree of risk to his life.”²⁰ While he could list all of the potential disasters and dangers that

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could affect his family resulting from a changing climate, the court defines “imminence” as risk to life that is “at least likely to occur,”²¹ and Teitiota could not specifically say with certainty which harms were likely to occur and when.²² This situation is strikingly similar to *Massachusetts v. Environmental Protection Agency* (“EPA”),²³ a landmark case in the United States where the U.S. Supreme Court grappled with the issue of standing. Specifically, the Court considered whether or not the harm from greenhouse gasses created enough causation to prove an injury that could be remedied by a court.²⁴ The U.S. Supreme Court in *Massachusetts v. EPA* ultimately held that Massachusetts had standing to challenge the EPA’s denial of their petition.²⁵ The court determined that, while the risk was remote, it was nevertheless real.²⁶ Alternatively, in Teitiota’s case, HRC determined that “a person [could] only claim to be a victim [of a human rights violation] . . . if he or she [was] actually affected.”²⁷ While the decision of *Massachusetts v. EPA* demonstrates a legal acceptance of climate change-related harms and proves that courts can influence significant remedies, Teitiota’s case reveals the continuing limitations on remedying the slow, atypical nature of these types of harms. The restriction of the language “an actual, imminent harm” makes it extremely difficult for people, such as Teitiota and his family, to plan ahead in an effort to avoid suffering.

The juxtaposition between Teitiota’s case and *Massachusetts v. EPA* brings up a very important and controversial question: how do we prove and measure harms that result from climate change? Climate change causes harm in unusual and unexpected ways. There is often not a direct effect with clear causation, thus making it harder for the courts to adjudicate injuries caused by climate change.²⁸ Additionally, what makes Teitiota’s harm unique?²⁹ Granting Teitiota’s request for refugee status in New Zealand could be the start of a slippery slope, opening the door for relief to the other 50,000 people who also live in South Tarawa³⁰ and are suffering from similar hardships. The IPT justified their decision to deny Teitiota’s request of refugee status because, in addition to the lack of evidence that he would not be able to grow food or obtain potable water, “he had not

been subjected to any land dispute in the past and there was no evidence that he faced a real chance of suffering serious physical harm from violence linked to housing, land, or property in the future.”³¹ The fact that the IPT partially defines “real risk”³² as human conflict—something that would distinguish Teitiota’s harm and suffering from the other island residents—is significant. The IPT seems to oppose classifying Teitiota and his family as “refugees” because the environmental harm has not yet resulted in human conflict. This standard will make it much harder to prove risk and harm in future climate migration cases.

When Teitiota and his family returned to Kiribati, members did, in fact, suffer from significant health issues. For example, one of his children contracted a serious blood poisoning that caused their body to break out in boils.³³ While the Tribunal and the Committee did not view risks such as this as “imminent” or a result of human conflict,³⁴ the resulting harm caused Teitiota and his family immense suffering.³⁵ Consequently, Teitiota’s case demonstrates how challenging it can be to adjudicate issues resulting from climate change migration, even in a case where subsequent deportation ultimately proves the imminence of actual harm. Courts are hesitant to grant applicants asylum in safer neighboring nations due to a lack of significant, imminent risk as evidenced by the denial of asylum petitions by Teitiota and others who are experiencing climate change in real and quantifiable ways.

As more people begin to participate in the Great Climate Migration,³⁶ Teitiota’s case demonstrates the harsh realities of the current international legal system. While the Teitiota case might be a setback for climate migrants in Oceania who have been forced out of their homes by unsafe conditions and rising tides, some courts, such as the U.S. Supreme Court, are beginning to utilize a new lens to view climate change-related harms. It is now more important than ever to continue to contemplate the impacts of our current legal frameworks and adjust the traditional legal concepts of standing, imminence, and human-based conflict accordingly to reflect the emerging threats to lives and livelihoods posed by climate change.



ENDNOTES

¹ 2017 U.N. Ocean Conference, *Factsheet: People and Oceans*, 1, (June 5–9, 2017), <https://www.un.org/sustainabledevelopment/wp-content/uploads/2017/05/Ocean-fact-sheet-package.pdf>.

² *Id.*

³ *Id.*

⁴ *Climate Change FAQs*, THE NATURE CONSERVANCY (Dec. 9, 2018), <https://www.nature.org/en-us/what-we-do/our-priorities/tackle-climate-change/climate-change-stories/climate-change-frequently-asked-questions/#threats>.

⁵ Abraham Lustgarten, *The Great Climate Migration*, N.Y. TIMES MAG. (July 23, 2020), <https://www.nytimes.com/interactive/2020/07/23/magazine/climate-migration.html>.

⁶ U.N. Human Rights Committee (“HRC”), *Views Adopted by the Committee Under Article 5(a) of the Optional Protocol, Concerning Communication No. 2728/2016*, U.N. Doc. C/127/2728, paras. 2.7, 4.1 (Oct. 24, 2019) [hereinafter *Teitiota*].

⁷ *Teitiota*, *supra* note 6, at paras. 4.1–4.2; Simon Behrman and Avidan Kent, *The Teitiota Case and the Limitations of the Human Rights Framework*, 75 QUESTIONS OF INT’L L. 25, 26 (2020); *see also Applying for a Work Visa*, N. Z. GOV’T, <https://www.govt.nz/browse/immigration-and-visas/get-a-visa-to-work-in-nz/applying-for-a-work-visa/> (last visited Apr. 2, 2023) (explaining that New Zealand offers a number of work visa options for non-residents who either have a job offer or a specific work-related purpose, among other things); *Total Number of Work Visas Granted in New Zealand from Financial Year 2013 to 2022*, STATISTA (Jan. 3, 2023), <https://www.statista.com/statistics/1350278/new-zealand-number-of-work-visas-granted/> (showing that in 2013 New Zealand granted 157,180 work visas).

⁸ *Teitiota*, *supra* note 6, at para. 4.3.

⁹ *Teitiota*, *supra* note 6, at paras. 3, 4.4.

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