

0902194 [2009] RRTA 553 (22 June 2009)

DECISION RECORD

RRT CASE NUMBER: 0902194

DIAC REFERENCE(S): CLF2008/144562

COUNTRY OF REFERENCE: Pakistan

TRIBUNAL MEMBER: Paul Fisher

DATE: 22 June 2009

PLACE OF DECISION: Melbourne

DECISION: The Tribunal remits the matter for reconsideration with the direction that the applicant satisfies s.36(2)(a) of the Migration Act, being a person to whom Australia has protection obligations under the Refugees Convention.

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Immigration and Citizenship to refuse to grant the applicant a Protection (Class XA) visa under s.65 of the *Migration Act 1958* (the Act).
2. The applicant, who claims to be a citizen of Pakistan, arrived in Australia [in] September 2008, and applied to the Department of Immigration and Citizenship for a Protection (Class XA) visa [in] October 2008. The delegate decided to refuse to grant the visa [in] March 2009 and notified the applicant of the decision and his review rights by letter [on the same date].
3. The delegate refused the visa application on the basis that the applicant is not a person to whom Australia has protection obligations under the Refugees Convention.
4. The applicant applied to the Tribunal [in] March 2009 for review of the delegate's decision.
5. The Tribunal finds that the delegate's decision is an RRT-reviewable decision under s.411(1)(c) of the Act. The Tribunal finds that the applicant has made a valid application for review under s.412 of the Act.

RELEVANT LAW

6. Under s.65(1) a visa may be granted only if the decision maker is satisfied that the prescribed criteria for the visa have been satisfied. In general, the relevant criteria for the grant of a protection visa are those in force when the visa application was lodged although some statutory qualifications enacted since then may also be relevant.
7. Section 36(2)(a) of the Act provides that a criterion for a protection visa is that the applicant for the visa is a non-citizen in Australia to whom the Minister is satisfied Australia has protection obligations under the 1951 Convention Relating to the Status of Refugees as amended by the 1967 Protocol Relating to the Status of Refugees (together, the Refugees Convention, or the Convention).
8. Further criteria for the grant of a Protection (Class XA) visa are set out in Part 866 of Schedule 2 to the Migration Regulations 1994.

Definition of 'refugee'

9. Australia is a party to the Refugees Convention and generally speaking, has protection obligations to people who are refugees as defined in Article 1 of the Convention. Article 1A(2) relevantly defines a refugee as any 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, is unable or, owing to such fear, is unwilling to return to it.

10. The High Court has considered this definition in a number of cases, notably *Chan Yee Kin v MIEA* (1989) 169 CLR 379, *Applicant A v MIEA* (1997) 190 CLR 225, *MIEA v Guo* (1997) 191 CLR 559, *Chen Shi Hai v MIMA* (2000) 201 CLR 293, *MIMA v Haji Ibrahim* (2000) 204 CLR 1, *MIMA v Khawar* (2002) 210 CLR 1, *MIMA v Respondents S152/2003* (2004) 222 CLR 1 and *Applicant S v MIMA* (2004) 217 CLR 387.
11. Sections 91R and 91S of the Act qualify some aspects of Article 1A(2) for the purposes of the application of the Act and the regulations to a particular person.
12. There are four key elements to the Convention definition. First, an applicant must be outside his or her country.
13. Second, an applicant must fear persecution. Under s.91R(1) of the Act persecution must involve “serious harm” to the applicant (s.91R(1)(b)), and systematic and discriminatory conduct (s.91R(1)(c)). The expression “serious harm” includes, for example, a threat to life or liberty, significant physical harassment or ill-treatment, or significant economic hardship or denial of access to basic services or denial of capacity to earn a livelihood, where such hardship or denial threatens the applicant’s capacity to subsist: s.91R(2) of the Act. The High Court has explained that persecution may be directed against a person as an individual or as a member of a group. The persecution must have an official quality, in the sense that it is official, or officially tolerated or uncontrollable by the authorities of the country of nationality. However, the threat of harm need not be the product of government policy; it may be enough that the government has failed or is unable to protect the applicant from persecution.
14. Further, persecution implies an element of motivation on the part of those who persecute for the infliction of harm. People are persecuted for something perceived about them or attributed to them by their persecutors. However the motivation need not be one of enmity, malignity or other antipathy towards the victim on the part of the persecutor.
15. Third, the persecution which the applicant fears must be for one or more of the reasons enumerated in the Convention definition - race, religion, nationality, membership of a particular social group or political opinion. The phrase “for reasons of” serves to identify the motivation for the infliction of the persecution. The persecution feared need not be *solely* attributable to a Convention reason. However, persecution for multiple motivations will not satisfy the relevant test unless a Convention reason or reasons constitute at least the essential and significant motivation for the persecution feared: s.91R(1)(a) of the Act.
16. Fourth, an applicant’s fear of persecution for a Convention reason must be a “well-founded” fear. This adds an objective requirement to the requirement that an applicant must in fact hold such a fear. A person has a “well-founded fear” of persecution under the Convention if they have genuine fear founded upon a “real chance” of persecution for a Convention stipulated reason. A fear is well-founded where there is a real substantial basis for it but not if it is merely assumed or based on mere speculation. A “real chance” is one that is not remote or insubstantial or a far-fetched possibility. A person can have a well-founded fear of persecution even though the possibility of the persecution occurring is well below 50 per cent.
17. In addition, an applicant must be unable, or unwilling because of his or her fear, to avail himself or herself of the protection of his or her country or countries of nationality or, if

stateless, unable, or unwilling because of his or her fear, to return to his or her country of former habitual residence.

18. Whether an applicant is a person to whom Australia has protection obligations is to be assessed upon the facts as they exist when the decision is made and requires a consideration of the matter in relation to the reasonably foreseeable future.

CLAIMS AND EVIDENCE

19. The Tribunal has before it the Department's file relating to the applicant. The Tribunal also has had regard to the material referred to in the delegate's decision, and other material available to it from a range of sources.

Background

20. This is an application for review of one of two related protection visa applications. The two applicants in these matters are brothers, and nationals of Pakistan. The older brother, [Person 1], is 28 years of age, and the younger brother, [the applicant], is 20 years of age.
21. The two men arrived in Australia [in] September 2008, and lodged applications for Protection Visas [in] October 2008.
22. Their protection claims were set out in largely identical statutory declarations which accompanied the applications. The statutory declaration of the present applicant [name deleted in accordance with s431(2) of the Migration Act as this information could identify the applicant] reads as follows:
 1. My brother and I arrived in Australia on [date] September 2008. Originally we are nationals of Pakistan but we have spent the greater part of our lives in Dubai, United Arab Emirates, as our father was employed in one of the hospitals there. We are Christians by religion. In Pakistan, Christians are always being targeted by Muslim extremists and militants. The Christian population makes up only 1.5 % of the total population of Pakistan and the Government of Pakistan does not provide any protection to the Christian minority from attacks carried out by the Islamic militant groups.
 2. A number of incidents have taken place in recent years where Christians were persecuted, families came under threat, Christian workers and missionary workers were attacked and raped, church leaders were kidnapped and churches were destroyed by the Muslim militants. The government of Pakistan turns a blind eye to these acts of extremism and violence.
 3. Both, my brother and I, are devoted Christians and my father was [position] of the Church of Pakistan in Dubai, and also a religious poet, much appreciated in our community. Because of our strong ties with the church, my brother and I used to get involved in several religious activities in Dubai. My brother used to compose religious tunes to my father's poetry and play the keyboard, while I used to sing in musical programs. Both of us have performed in various churches in Dubai as well as in Pakistan.
 4. I was born and brought up in Dubai and had seldom been to Pakistan during my childhood. However, when I was 16, I visited Pakistan for a holiday in July 2005. My brother had already performed in churches in Pakistan over previous years. During my holiday, we were both requested to perform at a program held for fund raising. The program was a great success and the Christian population in

Rawalpindi appreciated our sincere efforts. Following this we received numerous requests for performances from several other churches, even churches belonging to other denominations, and private homes in Rawalpindi.

5. After these programs, in August 2005, we started receiving threats to our lives from Muslim extremists. We were living in a house belonging to relatives on our father's side. First, someone threw a letter over the gate in front of the house's front door. This first letter told us something to the effect that we must stop this musical nonsense performances and stop pulling people in the wrong direction or otherwise the consequences would not be good. A couple of days later we received a second letter which said we must convert to Islam or pay with our lives. The letters were unsigned, and handwritten and we thought the two letters were written in the same handwriting.
6. Another 2 or 3 days after the second letter, on the [date] August 2005, we were kidnapped. We were walking along a lane near our house, while coming back to our house in the afternoon. There was a white van parked in front of us on the corner of the lane leading to our house. We did not think much of it when we first noticed it. As we were about to pass the van we realised that the door was already open. We could not see who was inside because there was a curtain.
7. Because the lane was so narrow the people inside did not need to come out of the van to grab hold of us and drag us into the van. There were two people in the back of the van and a third person in the front. All three had beards and the driver had a particularly large beard. He was older and of a smaller build than the other two guys. They were talking in Pashto.
8. They sat us down in the back, on the floor, and they sat opposite us. They were facing us and they both had guns. They told us to keep quiet. First they tied my hands behind my back. Then they tied [Person 1's] hands in the same way. They covered [Person 1's] eyes with a cloth and then mine as well. The drive was about 35-40 mins. During the drive we could hear on the radio verses from the Koran in Arabic.
9. We entered a house. The blindfolds were removed but we were made to sit with our backs to each other, with our hands still tied. There was a fourth person who started shouting at [Person 1]. Then they were all screaming abuse and beating me. First, they assaulted [Person 1], punching him and kicking him in the stomach. After they were done beating [Person 1] they turned to me. They were talking in Pashto and getting angry, then abusing us in Urdu and telling us that we are infidels. The shouting was interspersed with kicks and punches.
10. They said that we should convert to Islam if we want to go to Heaven. After all the abuse we suffered we both agreed that we would stop our Christian activities and that we would do what they asked us to do. They started hugging each other because they were happy that we had agreed to convert. They welcomed us to the Truth, the right religion. They said that we should start reading the Koran and other books on Islam. They said they would give us one book before we leave so we could read it.
11. They blindfolded us again and put us back in the van. This time the drive was much shorter, about 15 mins. They removed the blindfolds again and put the book in my hand. They said we should read the book which would teach us how to do the ablution ("wazu" in Urdu), how to pray and how to practise Islam. They said

we should study the book carefully and after three days they said they would come to our house again and take us to prayers with them. At that stage we would become true Muslims, read the Koran and pray together. They were congratulating us and each other on converting to Islam, choosing the right religion.

12. We took a taxi back home. We told our relatives what had happened. Everyone was worried about us. I was extremely tormented by this ordeal, especially since I was rather young of age at that time. As I was extremely shocked as I had never experienced anything like this in my life. I decided to cut short my intended two month stay to just one month. [Person 1] and I left Pakistan on [date] August 2005. I have never been to Pakistan after that occasion
13. We thought that maybe we should go to the police but our relatives told us that it would be useless. It came to our knowledge that a lot of killings and kidnappings of Christians had taken place in several towns across Pakistan over the past few years. We had heard and read about Christians being persecuted but we did not think we would experience anything like this ourselves.
14. I think it was on [date] a man came to the family house looking for us. Our uncle said that we did not live there, that we had left and had returned to our own house. He told the man that the family had severed all connections to us and did not want any trouble. Our extended family is Christian and they practice Christianity, but they keep a low profile and they are not really active members of the church. Even when we performed they did not always come to see us.
15. In November 2007, my brother was in Karachi. He received a threatening phone call directed towards both of us. He was told that since we had not accepted Islam and had continued with our church activities, we are blasphemers and the only punishment fit for us is beheading, and that we would be found from any corner of Pakistan.
16. It was almost time for our father's retirement now, as the employment laws in UAE prohibit any expatriate from working past the age of sixty. I, on the other hand, had crossed the age of 18 and my father's sponsorship visa that I was residing on was over. This meant that neither my brother nor I could stay in Dubai any longer, which was, as is evident, a grave situation for us. We knew that our lives were under serious threat if we returned to Pakistan, and hence decided to apply for student visas in December 2007 to Australia. The visa was granted to us on [date] September 2008 and we arrived in Australia on [date] September 2008.
17. The period of time during which our student visa applications were being processed was particularly difficult for us as now we had no permanent visas for UAE, and in order to renew our visit visas we had to go to an island close to Dubai called Qeshm, which is Iranian territory, as an alternative to going to Pakistan. We managed to get employment in Dubai and hence received temporary employment visas, but once they would expire, we would have no choice but to return to Pakistan.
18. As we have mentioned earlier the situation for the Christian population in Pakistan is critical. It is even worse for those who have been targeted by extremists. The Pakistani government has always failed to give protection to the Christian minority in Pakistan They claim to the world that they do their best for the safety of religious minorities, but this is far from the truth. Consequently Christians are living under constant fear for their lives.
19. The authorities do not carry out proper investigations into the incidents reported to them, and their indifference indirectly encourages the Islamic

extremists to further engage in their acts of violence. The news releases and foreign reports published at regular intervals of time clearly describe the number of incidents that have taken place against the Christian population in Pakistan by the Islamic extremists.

20. The 2008 report of the United States Commission on International Religious Freedom, which gives a stark picture of the plight of Pakistani Christians. It describes various incidents that have taken place against the Christian population, and the attitude of the Pakistan government and their apathy in stopping such violence against the Christian population. We have enclosed a copy of this report for your reference.
 21. We are also providing you with copies of other news items describing the whole situation. These reports talk about the rapes and attacks against Christian workers by the Islamic extremists, kidnappings of church leaders, the killings of an Evangelical Pastor and of a Pakistani-American Pastor and his wife, the destruction of churches and forcible conversion to Islam. These are not isolated incidents, but are regular occurrences in Pakistan, which the government remains silent over.
 22. To sum up, there is no safety for the Christian population in Pakistan. This is even worse for people who are already targeted by Islamic extremist. In our case my brother and I have been targeted by Islamic extremists for being instruments of praise in the Church, and our life is under immediate threat if we return to Pakistan. It is also clear that the Government of Pakistan will not provide us any guarantee to our life, and that we cannot live in Dubai for visa reasons.
 23. The visa we currently hold has not expired but has become invalid since we are not employed anymore, and hence cannot return to Dubai Therefore the only alternative is to remain in Australia to protect our lives.
 24. We believe the authorities in Australia will understand our hopeless plight and allow us to remain in Australia indefinitely.
23. The Protection Visa application was also accompanied by various pieces of country information concerning the persecution of Christians in Pakistan, being:
- seven reports from the *Christian Persecution Information* website, headed:
 - *Pakistan Church Leader Kidnapped* (dated 14 December 2007);
 - *Pakistan Family Under Islamic Gunfire* (14 December 2007);
 - *Pakistan Christians Report Rapes and Attacks Against Workers* (15 August 2006);
 - *Pakistan Militants Force Christians to Convert to Islam and Shut Churches* (14 May 2007);
 - *Pakistani American Pastor and Wife Shot Dead in Islamabad* (31 August 2007);
 - *Pakistan Evangelical Pastor Killed Amid Growing Religious Tensions* (31 January 2008); and
 - *Twelve Year Old Christian Girl Gang Rapped by Muslims* (23 April 2007);
 - A BBC news report, dated 15 January 2004, headed *Pakistan Church Blast Injures Eleven*, which is reported to have occurred shortly after police received an anonymous telephone warning that a bible society near the church in Karachi would be targeted;
 - A copy of the *United States Commission on International Religious Freedom Annual Report 2008*, which includes the following:

Despite President Musharraf's appeals for religious moderation and tolerance, in addition to indiscriminate extremists' attacks, there are "levels of religiously motivated violence much of it committed against Shia Muslims by Sunni Militants".

Virtually all of the country's severe religious freedom problems – including the country's blasphemy laws; the laws violating the religious rights of the Ahmadi Community; the persistent sectarian violence targeting Shia Muslims, Ahmadis, Hindus, and Christians; and the Haddood Ordinances, which violate the rights of women in Pakistan – were exacerbated by religious militant groups' representation in Parliament, penetration of the state security services and police force, and pressure on the judiciary;

and

- a letter of appreciation from the pastor in charge of the Church of Pakistan in Dubai, dated [in]May 2004, recognising [Person 1's] contribution to the church, but also imposing upon him increased responsibilities within the church community

24. [In] November 2008 the Department received a further letter from the applicants' representative, enclosing a DVD showing the applicants performing in a church in Dubai on two occasions, said to be Christmas 2006 and Easter 2007.
25. [In] January legal submissions on behalf of the applicants were submitted to the department by their representatives, including the following:

2. The applicants have a well founded fear of being persecuted

The applicants, in their statutory declarations, describe a fear of returning to Pakistan. It follows that the key questions are whether that fear is a fear of "persecution", and whether it is "well founded" within the meaning of the Convention.

2.1. Fear of persecution

In relation to the first of these questions, the applicants' statutory declarations intimate that they fear being targeted by Islamist extremists if they return to Pakistan, and in particular fear being killed, kidnapped, attacked, and/or forced to convert to Islam. The past persecution of the applicants in Pakistan is outlined in their statutory declarations. The applicants were subjected to:

- serious threats against their lives;
- physical and verbal assaults;
- kidnapping and false imprisonment;
- attempts to convert them to Islam forcibly despite, or because of, their strong Christian convictions.

The said persecution was clearly for a Convention reason, namely, religion. The applicants fear persecution in Pakistan on that basis, if they return.

The United Nations Refugees Convention Handbook opines that "*a threat to life or freedom on account of race, religion, nationality, political opinion or membership of a particular social group is always persecution*". Other serious violations of human rights--for the same reasons--would also constitute persecution." The High Court has accepted that "persecution" includes at least threats to life or freedom, and in some cases will extend to other denials of rights and freedoms. The applicant's fears are fears of persecution within the meaning of the Convention.

s91R of the *Migration Act 1958* (Cth) narrows the class of feared persecution which can give rise to a claim for a protection visa. It specifies that the persecution must

involve "serious harm" to the person invoking the Refugees Convention, and that it must involve "systematic and discriminatory conduct". On any view, the fears of the applicants are fears of acts which would meet the "serious harm" test in s91R: they include, at least, fears of threats to life or liberty, of significant physical harassment, and of significant physical ill-treatment. The expressed fears are of acts forming part of a pattern of targeted violence on the part of extremist Islamists against the Pakistani Christian community. The feared conduct is thus both systematic and discriminatory.

A further characteristic of "persecution", as it is expressed in Convention jurisprudence, is that it must have some nexus to the action of the state. In this regard, the failure of the state to provide protection from harm will suffice, particularly when this is the product of discriminatory inactivity by reason of a Convention attribute. In the applicants' case, their statutory declarations assert that the government of Pakistan does not provide protection to the Christian minority. This, in combination with the actions of Islamist extremists, constitutes the feared persecution.

It follows from the above that the applicants have a fear of persecution, as defined by the Convention and limited by s91R, if they return to Pakistan. They fear persecution on the basis of a Convention attribute, namely religion.

2.2. Well-foundedness of fear

The applicants' fear is well founded. They rely, in support of that proposition, on the past persecution to which they have been subjected, and to objective country information about Pakistan.

2.2.1. Personal experience of persecution

The applicants refer to their descriptions of persecution in Pakistan, set out in their statutory declarations. [The applicant] was seldom in Pakistan before his last visit in July and August of 2005. On that visit, he and his brother were threatened, kidnapped, and coerced into a false conversion, by Islamist extremists.

[Person 1] has visited Pakistan more frequently than [the applicant]. He participated in a number of religious festivals and worship services. He and his brother participated together in a number of public performances and services in Pakistan in July 2005, before the kidnapping which both of them describe in their statutory declarations.

[The applicant] has not returned to Pakistan since the kidnapping experience in 2005. [Person 1] had to return from time to time to renew his UAE visa. His relatives no longer permitted him to stay with them, by reason of their fears of exposure to violence at the hands of Islamist extremists. Despite his efforts to keep a low profile while in Pakistan, he received a further threat when there in 2007. Subsequently, he visited Pakistan only once, in 2008, when he briefly saw his father. He remained at the airport for the four days he was there.

2.2.2. Country information

The US State Department International Religious Freedom Report 2008 summarised usefully the position in Pakistan in relation to religious freedom:

"serious problems remained. Law enforcement personnel abused religious minorities in custody. Security forces and other government agencies did not adequately prevent or address societal abuse against minorities. Discriminatory legislation and the Government's failure to take action against societal forces hostile to those who practice a different faith fostered religious intolerance, acts of violence, and intimidation against religious minorities. ... Societal discrimination against religious minorities was widespread, and societal violence against such groups occurred. Societal actors,

including terrorist and extremist groups and individuals, targeted religious congregations."

The applicants refer to reports of the US State Department, Amnesty International, Human Rights Watch, and the Human Rights Commission of Pakistan, and submit that there is ample material in these materials to support the propositions that:

- there is considerable religious violence in Pakistan, and that Pakistani Christians are targeted; and
- the Pakistani state fails to protect Pakistani Christians from violence, and does so in a discriminatory way.

Attempts to convert Christian to Islam in the manner described by the applicants is not uncommon. During 2007 a Christian family living in the northwest of Pakistan received bomb threats (on at least two occasions) for refusing to convert to Islam.

The US State Department International Religious Freedom Report 2008 sets out a litany of reported acts of violence and persecution against Pakistani Christians, including the following:

In January 2008 a Sargodha resident was beaten by locals for allegedly arguing against Islam and for Christianity. He sustained severe injuries, but the matter was mediated without any police actions.

According to a minority rights NGO, Ashraf Masih, a Christian, was suspended from his job in Gujranwala in November 2007 for allegedly refusing to separate pages that contained Islamic religious inscriptions from those that did not while clearing out a municipal office. He was later restored in March 2008, but at a lower grade.

In May 2007 authorities arrested 84-year-old Christian Walter Fazal Khan for blasphemy. He was accused of allegedly burning a Qur'an. The family claimed he was a victim of Muslim businessmen who wanted to buy land Khan was selling for much lower than the asking price. After his arrest, local religious leaders forced Khan's 86-year-old wife to convert to Islam. In June 2007 Khan's wife died and in July Khan was released.

In April 2007 a mob tortured a Catholic man, Sattar Masih, before police arrived and arrested him for allegedly writing blasphemous words against the Prophet Muhammad. Police reportedly tortured him again in prison to obtain a confession. At the end of the reporting period, Masih remained in prison.

In April 2007 officials accused Salamat Masih, a Christian in Toba Tek Singh, and four members of his family of desecrating papers bearing the Prophet Muhammad's name. Officials arrested Salamat, but the other four remained in hiding, including Salamat's 11-year-old son. According to the NCJP, Masih remained in prison; he has not applied for bail, and his family's location is unknown.

In March 2007 a mob of Muslims attacked Amanat Masih, a Christian, for allegedly desecrating the Qur'an. Police arrested Masih for blasphemy. At the end of the reporting period, he remained in prison.

In September 2006 in two separate incidents, courts based custody decisions on allegations that the Christian mothers would convert their children to Christianity, and so gave custody of the children to their Muslim fathers. The fathers, however, were suspected of kidnapping their children from the ex-wives. In the first case, a Muslim man was given custody of his 12-year-old daughter Molly because his ex-wife had reconverted to Christianity. Sajad Ahmed Rana gained custody of Molly after telling courts in Lahore that Molly's mother was living with a man in Scotland she was not married to and was not raising Molly in an Islamic home. Molly disappeared from her school in Scotland and reappeared several days later with her father in Lahore Molly reportedly continued to live with her father in Lahore, and the case was dropped by the mother, still in Scotland The court gave her the right to visit Molly at any time.

In September 2005 in Lahore, Younis Masih, a Christian, confronted a Muslim cleric about loud music accompanying a nighttime religious ceremony. During the course of

their altercation, Masih allegedly insulted the Prophet Muhammad. Police arrested Masih on charges of blasphemy, and shortly thereafter, a mob attacked the Christian community. Masih was sentenced to death by the district court in Lahore on May 30, 2007. The case was on appeal at the end of the reporting period, and Masih's attorney, Pervez Aslam Chaudhry, was receiving threats, ordering him to stop pursuing the appeals for his client's case.

Forced and coerced conversions of religious minorities to Islam occurred at the hands of societal actors. Religious minorities claimed that government actions to stem the problem were inadequate.

In September 2007 Tahira Salamat, a Christian girl from Multan, was abducted by Muhammad Ramzan and forced to convert to Islam and then marry him. She was able to escape Ramzan and was reunited with her family in February 2008. Her family filed a case against Ramzan in the Lahore High Court, and the case was under process at the end of the reporting period.

According to press reports, two Christian girls, aged 16 and 11, were forcibly converted to Islam and married to Muslim men after they went missing in August 2007. The families of the two girls filed complaints with the local Faisalabad police, but their alleged abductors produced false marriage certificates with false ages for the girls. Because the police did not register a case against the men, the local Human Rights Commission of Pakistan chapter, in cooperation with local Christian lawyers, took action and was able to get the girls back to their families. By the end of the reporting period, the police had not taken any action against the abductors.

On June 21, 2008, unidentified militants kidnapped during prayer 25 to 32 Christian men and boys in Peshawar and released them on June 22. One Muslim also kidnapped with the group was still missing. The Muslim man had rented a building, which was formerly a madrassah, to the Christians. According to press reports, the militants were affiliated with Lashkar-e-Islam (LI), a militant group with ties to terrorist organizations. The Muslim man was later released after he promised to pray five times a day, grow a beard, and never commit an un-Islamic act.

On November 16, 2007, three Christians were killed in "cross firing" between the military and militants. The Christians, identified as Waheed, Gulzar, and Raja, were returning from work as office and home cleaners in the Kabler area when they were shot on the road to Mingora. The funerals of the three men were held on November 18, 2007, but local Christians stated no priest or pastor was able to attend the funerals because roads into the area were blocked. No clergy resided in the valley to serve the Christian community of approximately 70 families.

According to Compass Direct News, in October 2007 Islamic militants threatened to bomb a Christian family for refusing to convert to Islam in NWFP. The Christian community reported increasing pressure to conform to Shari'a. Christians began wearing Islamic attire in order to blend in, and men were being forced to grow beards.

In relation to state failure to protect the Pakistani Christian minority from violence and extremism, the International Crisis Group has concluded that:

"[A]lthough the superior judiciary has the power to rule against any law that violates the constitution, it has failed to do so with respect to this body of discriminatory religious legislation, which has undermined the rule of law, encouraged vigilantism and emboldened religious extremists."

The International Crisis Group has also said of the Pakistani police force that::

"[I]t is hardly surprising that this under-staffed, ill equipped, deeply politicised, and pervasively corrupt force has failed to counter the growing extremist menace that is undermining the stability of the Pakistani state, claiming hundreds of lives in terror attacks."

It follows from the above that, insofar as the applicants are practising Christians who have been prominently involved in public worship, and who have been previously

targeted by Islamist extremists, the well-foundedness of the applicants' fears is supported by objective country information.

2.2.3. Relocation or living 'discreetly'

In relation to the well foundedness of the applicants' fear, within the meaning of the Convention, it is relevant also to consider whether the applicant could relocate in Pakistan, or cease his public Christian activity, in order to avoid persecution.

The abovementioned country information demonstrates that both the private and public aspects of the conduct which constitutes the persecution feared by the applicants, are widespread in Pakistan. That is, the applicants could not avoid persecution by way of relocating elsewhere in Pakistan, because anti-Christian violence occurs across the whole of the country, and so does government failure to prevent it. Anywhere they lived, they would have a well-founded fear of violent acts at the hands of Islamist extremists, and of a failure of state protection.

In relation to the question of whether the applicants' fear is not well founded, in that they could temper their religious behaviour, the High Court has made it clear in the case of S395 that where a person must act "discreetly" to avoid persecution, the decision maker must ask whether the choice to act discreetly is voluntary. McHugh and Kirby JJ said (at paragraph 35):

The reasons of the Tribunal show, however, that it did not consider whether the choice of the appellants to live discreetly was a voluntary choice uninfluenced by the fear of harm if they did not live discreetly. It did not consider whether persons for whom the government of Bangladesh is responsible condone or inculcate a fear of harm in those living openly as homosexuals, although it seems implicit in the Tribunal's findings that they do. Nor did the Tribunal reasons discuss whether the infliction of harm can constitute persecution where an applicant must act discreetly to avoid that harm. Nor did they discuss whether, if the appellants wish to display, or inadvertently disclosed, their sexuality or relationship to other people, they were at risk of suffering serious harm constituting persecution. If the Tribunal could not have properly exercised its jurisdiction without considering these matters, it has fallen into jurisdictional error.

S395 and S396 concerned homosexuality (membership of a particular social group). However, these principles clearly apply in relation to religion. In *NBHI v Minister for Immigration Barnes FM* held that:

[i]n these circumstances the Tribunal's finding that the applicant could participate in religious activities in the manner he had done in the past 2 1/2 years [that is, in a discreet manner that would not antagonise the authorities] was akin to a finding that a person would act in a private manner and thereby avoid persecution. In SZACV v MIMIA [2004] FCA 469 at [20] - [21] Gyles J found that a finding that a person may practise his religious beliefs on a private basis answered the question "Could the person can [sic] live in that country without attracting adverse consequences?" and that this was the question which Gummow and Hayne JJ had identified in S395 at [80] as the wrong question (also see VWBA v MIMIA [2005] FCA 71 at [37]). In such circumstances the Tribunal had asked itself the wrong question in a manner constituting jurisdictional error.

The applicants have strong Christian beliefs. They have always been allowed to practise their religion in the UAE. They were educated in English. They were born and grew up in UAE, a society where Christians are tolerated. They participated in public religious observance in Pakistan. It would be impossible for them to accept the stifling of their religious expression in Pakistan. They would not willingly modify their behaviour so as to avoid engaging in religious activity.

2.3. Summary: a well founded fear of persecution

It follows from the above that the applicants have a fear of persecution, within the meaning of the Convention, on a Convention ground, namely religion. It further

follows, both from their own experiences in Pakistan and available country information, that that fear is well founded.

3. The applicants are outside their country of nationality

The applicants are citizens of Pakistan. Their claims should be assessed against Pakistan. As of 1 October 2008 the UAE is not a party to the Refugees Convention¹⁵ and therefore the applicants could not be expected to seek protection there. In any event, the applicants have no right to enter and reside in the UAE even though they have lived there for most of their lives. Their presence there was dependent upon the legal status of their father, and on their status as his minor children. As adults, the applicants have no right to enter and reside in UAE. Since turning 18, they entered UAE only on tourist visas, which visas they instruct have become increasingly difficult to obtain.

4. The applicants cannot get protection from their country of nationality

I refer to the applicants' statutory declarations in relation to their experiences in Pakistan. It is clear that they were victims of persecution, and that they will be subjected to further persecution if they return.

Country information clearly demonstrates that the applicants could not rely on the Pakistani state for protection from that persecution. The US Commission on International Religious Freedom 2008 Annual Report deemed Pakistan a "Country of Particular Concern".

The Commission said that:

Sectarian and religious motivated violence continues, particularly against Shi'a Muslims, Ahmadis, Christians, and Hindus, and the government's response continues to be insufficient and not fully effective.

The Commission also said that:

Government officials do not provide adequate protections from societal violence to members of these religious minority communities, and perpetrators of attacks on minorities are seldom brought to justice. In some recent instances, the government of Pakistan has directly encouraged religious intolerance.

5. Conclusion in relation to protection claims

It follows from the above that the applicants are nationals of Pakistan who have a well founded fear of persecution if they return to that country, who can't obtain protection from Pakistan, and who have no right to enter and reside in any other country.

26. The applicants were interviewed by an officer of the department [in] February 2009.
27. Subsequently, [Person 1] submitted a supplementary Statutory Declaration dated [in] February 2009, which was received by the Department [in] February 2009, and contains the following.
 1. I refer to the statutory declaration, dated [date] October 2008, which I filed with the Department of Immigration and Citizenship along with my protection visa application.
 2. I provide the following further information in relation to my visits to Pakistan, subsequent to the kidnapping which I described in my first statutory declaration.
 3. Subsequent to the kidnapping in August 2005, I went to Pakistan on a number of occasions. All but one of these was a visit in order to obtain a new visa to the

United Arab Emirates, except for one visit which was also because I needed to complete examinations for my education.

4. As I indicated in my statutory declaration dated [date] October 2008, I was born in the United Arab Emirates, and for most of my life had no difficulty in obtaining a valid visa to remain there. However, after I turned 18, I could no longer remain on my father's visa. Over time, the authorities in the United Arab Emirates became stricter about granting visas. It became harder to obtain a visa to remain there, and the process to obtain a visa lengthened.
 5. As I indicated in my statutory declaration dated [date] October 2008, I had to visit Pakistan a number of times after the visit during which I was kidnapped, in order to obtain a new visa to enter the United Arab Emirates. On each of those occasions, starting with my visit to Pakistan in October 2005, I kept away from Rawalpindi as much as possible, and tried to live in as 'low-key' way as possible, staying in small hostels.
 6. I visited Pakistan again in late 2005 and early 2006. I again made those visits to obtain a new visa.
 7. In April 2006, I went to Pakistan in order to obtain a new visa and also to complete my O-level exams, in order to obtain a certificate which would help me obtain employment in the United Arab Emirates, and a work visa. The exams were held over several weeks in Islamabad. Again, I stayed away from Islamabad as much as possible, and tried to live as discreetly as possible.
 8. I made another visit to Pakistan to obtain a new visa, in July and August of 2006. Because of the increasing strictness of the approach of the United Arab Emirates immigration authorities, the time for granting of a United Arab Emirates visa was increasing. This visa application in mid-2006 took some time.
 9. After that visit, always I sought to obtain a new visa by taking short visits to Kish and Qeshm, islands in the Persian Gulf which are part of Iran. These are more expensive places to stay than Pakistan. Stays are limited to a maximum of 40 days, and a visa is required for any stay of more than 14 days.
 10. In March 2007, I obtained a work visa for the United Arab Emirates. This was cancelled in about August 2007, after which I had to return to Pakistan for a short visit. This was because it was not possible to get another United Arab Emirates visa after a cancellation, without returning to my home country.
 11. In November 2007, I visited Pakistan again. Because of the increasing time it was taking to obtain a visa, I thought I was better off waiting in Pakistan for the visa to be granted. I was concerned I might not be able to stay long enough in Iran, and that my stay would be very expensive. I described my November 2007 visit to Pakistan in my previous statutory declaration.
 12. My passport shows that, after my November 2007 visit to Pakistan, which I described in my statutory declaration of [date] October 2008, I waited in Qeshm for the grant of new United Arab Emirates visas. I did this despite the expense of staying there, and the limits placed by the Iranian government on staying there. I did so because of my fear of what would happen to me if I returned to Pakistan.
 13. Subsequently, my only visit to Pakistan was the visit I made to see my father, in August 2008. I have explained in my previous statutory declaration that I did not leave the airport during that short visit.
28. The applications were refused [in] March 2009.

29. The delegate accepted that although the applicants were former habitual residents of the United Arab Emirates they no longer had a right to enter or reside there and, therefore, did not have effective protection in that country. Their claims were therefore assessed only against Pakistan.
30. The delegate considered that *the applicant's account of his experiences in Pakistan ... [was] consistent with country information reports of deteriorating human rights and increased violence, but continued that there was no evidence that the attempt was anything other than random criminal acts ... It appears that he fears harm in a country where crime, a high incidence of lawlessness, is unrelated to Convention grounds.* Although the delegate accepted that the applicant had *experienced hostility and harassment from some individual Muslims, she did not accept that he had experienced, or faces, a real chance of systematic and discriminatory conduct or serious harm which might amount to persecution under s.91R(1) of the Act, or that he has been, or would be, denied the normal protection of the law in relation to violent or criminal acts.*
31. Relying on country information referred to in the decision, the delegate did not *accept that Christians in Pakistan do not enjoy freedom of worship, or that Christians in general are persecuted and denied protection in that country.*
32. The delegate noted that *after the 2005 incident the applicant has visited Pakistan several times in 2006, 2007 and 2008 and did not receive any serious harm each time* She concluded that there was *no evidence to show that he had a profile that would cause him to be targeted by any groups or the authorities of Pakistan.* The delegate also noted that there was *no evidence of his having sought assistance of the police or any other government authorities after the 2005 incident,* and considered that country information showed that the government of Pakistan *had stepped up its assistance from relation to those claiming intimidation or assault due to blasphemy allegations and that these crimes are investigated and have not gone unpunished.* In essence, the delegate considered that state protection was available to the applicant in Pakistan.

Review Application:

33. [In] March 2009 the Tribunal received applications for review of the decisions.
34. [In] April 2009 the applicants were invited to attend a hearing scheduled [in] May 2009 after having indicated through their representative that they consented to their matters being heard jointly.
35. [In] April 2009 the Tribunal received a submission on behalf of the applicants enclosing various supporting documents in the following terms:

1. Relevant documents

1.2 Documents provided with this submission

- Report of International Crisis Group, Pakistan: *The Militant Jihadi Challenge*, dated 13 March 2009
- Article from the *Guardian*, "Video of girl's flogging as Taliban hand out justice", dated 2 April 2009
- Article from *The New York Times*, "United Militants Threaten Pakistan's Populous Heart", dated 14 April 2009

- Article from *The New York Times*, "Islamic Law Now Official for a Valley in Pakistan", dated 15 April 2009
- Article from the *Guardian*, "Red mosque siege leader walks free to hero's welcome", dated 17 April 2009
- Article from the *Guardian*, "Islamabad in frontline of Pakistan struggle with Islamic militants", dated 18 April 2009
- Article from *The New York Times*, "Taliban Seize Vital Pakistan Area Closer to the Capital", dated 23 April 2009
- Article from *The Age*, "Clinton issues dire warning on Pakistan", dated 24 April 2009

2. Background

2.1 *The Applicants' personal histories*

[Person 1] and [the applicant] are Pakistani. However, both were born in the United Arab Emirates. [Person 1] was born in 1980, and [the applicant] in 1988. They have lived substantially their entire lives in the United Arab Emirates, with their Pakistani mother and father. Their father worked in the United Arab Emirates, and they were entitled to visas to remain there as his children up until their respective 18th birthdays.

[Person 1] and [the applicant] grew up as Christians. Historical country information appears to corroborate their assertions that, in the United Arab Emirates, there has been general toleration of a diverse range of religious practice.

[Person 1] turned 18 in 1998. He sought visas to remain in the United Arab Emirates for a number of years, periodically exiting the country in order to renew his temporary work visa. In 2005, when he travelled to Pakistan for visa renewal, [the applicant] joined him there. In July and August 2005, they participated in public worship services in various churches around Pakistan. They came to the attention of Islamic militants, and were beaten and kidnapped. Their claims in this regard are set out in their statutory declarations dated October 2008. They assert therein that they did not seek the assistance of Pakistani police because they thought the police unlikely to assist them.

Subsequent to the August 2005 attack, [the applicant] did not return to Pakistan. [Person 1] sought to avoid returning to the country, but was unable to avoid the need to do so, on a few occasions over the following years. He returned for visa renewals, and for an educational examination which allowed him to obtain a temporary work visa to enter the United Arab Emirates. He kept a low profile during his visits to the country. Extremist Islamists were able to obtain his telephone number, and in November 2007 threatened him while he was in Pakistan. [Person 1's] only subsequent visit to Pakistan was a visit in August 2008, when he met his father but did not leave the airport.

2.2 *Decision by the Department of Immigration and Citizenship*

By a decision dated [date] March 2009, a delegate of the Minister for Immigration and Citizenship refused the Applicants' applications for protection visas. It seems that the delegate refused their claims on the basis that "*there is no evidence that [the kidnapping] was anything other than random criminal acts [sic]*". The delegate indicated that she did not "*accept that Christians in Pakistan do not enjoy freedom of worship or that Christians in general are persecuted and denied protection*". It further appears that the delegate held that their claims could not succeed because the Pakistani state was not, on country information, unable or unwilling to protect Christians from religious violence. The delegate placed significant weight on the fact

that the Applicants did not seek the assistance of the Pakistani police subsequent to their kidnapping.

The delegate did not dispute that the Applicants had in fact been kidnapped. She did not call into question the account of events given by the Applicants - though she drew attention to the fact that they had not contacted Pakistani police following the attack.

2.3 Clarifying the Applicants' claims

With respect, the delegate failed to come to grips with the Applicant's claims. The delegate did not question the Applicants' account of the events they described in July and August 2005. In that account, they described events including:

- Written threats, indicating that they must stop participating in public worship, and that they must convert to Islam;
- A kidnapping and detention during which they were abused as infidels, and were physically coerced into agreeing to convert to Islam; and
- At least one subsequent threat of violence because of the Applicants' blasphemy.

In that context, the delegate's assertion that there was "*no evidence*" that the events which the Applicants described were anything but random criminal violence, is unsustainable. The Applicants assert that the violence they have suffered is religious violence. For the avoidance of doubt, [Person 1] and [the applicant] claim that if they return to Pakistan they have a well-founded fear of being persecuted by extremist Islamists.

The Applicants claim that they have maintained a high profile as Christians in Pakistan, and have been targeted in the past by Islamic militants. The delegate's decision failed to come to grips with the fact that the Applicants put their claims on the basis that their profile and public religious observance rendered them at a risk of persecution even greater than ordinary Pakistani Christians.

The Applicants assert that the Pakistani government is unable or unwilling to protect them from Islamic militants. There is a failure of state protection, providing the necessary state element to the persecution. This issue is dealt with in greater detail below.

By reason of the approach taken by the delegate, the submissions hereunder focus on the questions of, first, the specific targeting Pakistani Christians and, second, the failure by Pakistani authorities to protect Pakistani Christians.

3. Persecution of Christians in Pakistan

3.1 The Applicants' instructions

It is clear from the material submitted on behalf of the Applicants that their complaint was not about an incident which was the product of "*lawlessness... unrelated to convention grounds*". The Applicants, rather, recount an incident in which their Christian activity led to their targeting by Islamist militants. These militants specifically sought their conversion. The Applicants fear violence, not merely because it is a risk of life in a chaotic country such as Pakistan, but because it appears they will be specifically targeted by reason of their religious views.

3.2 Pakistan - country information

The delegate was provided with details of country information which detailed the specific targeting of Christians in Pakistan. I refer to and repeat the material set out and referred to in my submission to the delegate on the Applicants' behalf. That material demonstrates that:

- There are widespread problems of religious discrimination and violence in Pakistan; and
- The Pakistani state, and institutions such as the police and the military, have by a combination of unwillingness, corruption and incompetence failed to prevent violence against Christians and other religious minorities.

With respect, the delegate's conclusion that Christians in Pakistan are not subject to persecution, is not sustainable as a general proposition, having regard to the country information provided.

Recent material confirms the growing extremist Islamist threat in Pakistan. The International Crisis Group's recent report *Pakistan: The Militant Jihadi Challenge* confirms that the extremist movement has spread and gathered force in Pakistan, expanding from tribal areas throughout the Punjab, and into major urban centres such as Karachi and Islamabad.

The spread of extremist Islam, with its concomitant increase in religious violence, has gathered pace in recent weeks. Newspaper articles describe the spread of the territorial control of the Taliban, and the increase in support for extremist Islam, across Pakistan. These articles do not specifically describe anti-Christian violence. However, country information confirms that, in recent history, such violence in Pakistan typically comes out of Islamic fanaticism. In that regard, I refer to the country information set out in the submission provided in support of the Applicants' claims. It follows that, insofar as there is a demonstrated increase in Islamic fanaticism, there is a likely increase in risk to Pakistani Christians. The risk is yet greater for Christians who have a significant public profile.

3.3 Conclusion - persecution of Christians in Pakistan

The experience of past persecution by the applicants, and the available and enclosed country information, serves to demonstrate that the Applicants are at real risk of being targeted by Islamist militant groups, by reason of their Christian religion. Their claims are only the stronger for the fact that they have had a high profile in their public religious expression.

4. Failure of State Protection

4.1 Law in relation to failure of state protection

In *Minister for Immigration and Multicultural Affairs v s152* (2004) 222 CLR 1, Gleeson CJ, Hayne and Heydon JJ said that “*although the paradigm case of persecution contemplated by the Convention is persecution by the state or agents of the state, it is accepted in Australia, and in a number of other jurisdictions, that the serious harm involved in what is found to be persecution may be inflicted by persons who are not agents of the state.*”

They said further that:

Even where the harm feared is harm not inflicted by the state, or agents of the state, but where the state is complicit in the sense that it encourages, condones or tolerates the harm, the same process of reasoning applies [as in respect of a case of direct state persecution]. The attitude of the state is relevant to a decision whether the fear of harm is well-founded; it is consistent with the possibility that there is persecution; it is consistent with the person being outside the country of nationality because of a well-founded fear of persecution; and it supports a conclusion of unwillingness to seek (external) protection based on a fear of persecution because of the state's encouragement, condonation or tolerance of the persecution.'

However, they noted that “*No country can guarantee that its citizens will at all times, and in all circumstances, be safe from violence.*”

The question of whether state protection is adequate has been answered by reference to the touchstone of 'reasonableness', or 'international standards'. In *A & ors v Minister for Immigration and Multicultural Affairs* (1999) 53 ALD 545, the Full Court of the Federal Court held that components of adequate protection are effective judicial and law enforcement bodies, and machinery for the enforcement of the rule of law. Some degree of competence and efficiency, and respect for the rule of law and human rights, on the part of state agents, appear to be minima for adequate state protection. Discriminatory conduct on the part of the agents of the state appears to be a consideration of particular importance in the context of assessing the adequacy of state protection.

4.2 Country information in relation to failure of state protection in Pakistan

The submission provided to the Department of Immigration and Citizenship in support of the Applicants' visa applications highlighted the recent criticism of Pakistani authorities, in terms of their failure to protect religious minorities. In this regard, the International Crisis Group has criticised both the law enforcement bodies, and the judicial authorities, of Pakistan. Another recent report has pointed out persistent problems in law enforcement in Pakistan, which need to be rectified before law enforcement agencies can be effective in combating Islamist extremist violence in the country. The recent newspaper articles, referred to above under 3.2, serve to confirm that the Pakistani state is, by unwillingness or incapacity, failing to effectively combat the extremist Islamist threat.

4.3 Conclusion - failure of state protection in Pakistan

It follows from the above that, though the Applicants fear harm at the hands of private actors, they are reasonably unwilling to seek protection from the Pakistani state. The machinery of the Pakistani state would not provide them with effective protection, providing the necessary state element to their claim of feared persecution. In this respect, it was entirely explicable that the Applicants did not seek the assistance of police after their kidnapping.

5. Relocation in Pakistan

5.1 Law in relation to relocation

The law in relation to relocation was summarised in the submission provided with the Applicants' visa applications. In summary, the questions for a decision maker are twofold: first, is it possible to physically avoid persecution by internal relocation, and second, is such relocation reasonable?

The delegate did not address the question of relocation in any detail.

5.2 Country information in relation to relocation in Pakistan

The country information referred to herein, and referred to in the submission provided with the Applicants' visa applications, discloses that anti-Christian violence, associated with extremist Islamism, is widespread in Pakistan. Recent country information indicates that extremist movements have recently spread, and gained greater power, in Pakistan.

5.3 Conclusion - relocation in Pakistan

The Applicants are not merely Pakistani Christians, but Christians who have been publicly active and have attracted the attention of extremists. There is a real chance that they will suffer persecution, irrespective of where they live in Pakistan. Even if they could avoid persecution in Pakistan, it would only be by significantly tempering their religious observance, to the point where they would suffer a significant restriction on their freedom of religious expression. That would not be a voluntary

decision on their part. It follows that relocation does not bring their fear of persecution below the 'well-foundedness' threshold.

6. Conclusion

The Applicants have a well-founded fear of persecution at the hands of extremist Islamists. This risk of persecution is not obviated by adequate state protection - in fact, the Pakistani state does not act effectively to prevent such persecution. Neither is the risk of persecution one which can be avoided by relocation. It follows that the Applicants are persons to whom Australia owes protection obligations under the Refugees Convention.

Tribunal Hearing

36. The applicant appeared before the Tribunal [in] May 2009 to give evidence and present arguments. With the applicant's consent, the matter was heard jointly with that of his brother, [Person 1].
37. The applicants were represented in relation to the review. Their representative was also present at the hearing.
38. The Tribunal indicated at the start of the hearing that it agreed, in general terms, with the submissions made on behalf of the applicants by their representative.
39. The Tribunal indicated that it wished to hear personally from [Person 1] his account of the applicants' background and claims in order to satisfy itself that they are who they say they are, and that they do have the claimed background described in their applications.
40. The Tribunal also indicated that would seek clarification as to their current visa status with respect to the United Arab Emirates as a possible safe third country.

Evidence of [Person 1]:

41. [Person 1] was asked to describe the events that he had been subjected to in Rawalpindi in Pakistan.
42. [Person 1] explained that he used to go in and out of Dubai. He is a keyboardist and his father is a writer and his brother, the other applicant, sings. They performed in different churches.
43. They had to return to Pakistan periodically because of visa problems in Dubai. Their father would sponsor them for visitor visas and they were looking for jobs to get "permanent visas", but it was not possible to get a truly permanent visa.
44. [Person 1] came to Pakistan while [the applicant], his brother, had a summer vacation. They had planned to come and visit relatives, and were staying with their father's brother in Rawalpindi. He was involved in both church and general musical activities there. This included [names of churches deleted: s431(2)], which is the church that he feels he belongs to although he is happy to go to any church.
45. The churches used to call them and they would come and perform, and they also had a program at a church in Karachi. They would go to the [details of churches deleted: s431(2)]. Their family didn't come to the [church name deleted: s431(2)], but they did attend the others. [The applicant] joined him and they had a program at the [church name deleted:

s431(2).. Many other musicians and notables would attend. The applicants performed their own music and became quite well known and attracted visitors. They were called to perform at Christian functions as well as general pop music functions.

46. [In] August 2005 his aunt found a piece of paper with a threatening message, which said they should stop their music nonsense and their gatherings or else there would be consequences. His aunt brought it to his attention, but he didn't tell [the applicant]. He was a bit worried, but he also thought it could just be a joke.
47. Two or three days later another letter appeared in similar circumstances and it warned them to accept Islam or else they would lose their life. They both saw this letter, and [the applicant] was particularly disturbed by it. They tried to withdraw from some of their activities as [Person 1] had become concerned about their safety, particularly for [the applicant].
48. [In] August 2005 when he was returning home with [the applicant] there was a van blocking the laneway just before the lane where they would enter their own house. He could see that there was a person inside, but as they were just about to try and pass by they were both dragged into the van, which moved off. They were initially shocked. There were two men with guns who warned them not to speak and held them at gunpoint. Curtains were drawn to cover the windows. One man held the guns while the other one tied them up and blindfolded them. By this stage [Person 1] was praying. He recalls that the radio was playing Koranic verses in Arabic, although the kidnappers themselves were speaking in Pashto. After more than half an hour or maybe 40 minutes the van stopped and they were taken into a room about the size of the hearing room. The blindfolds were removed, but their hands were still tied. They were pushed to the ground and forced to sit back to back.
49. [Person 1] described the two men who had pulled them into the van as being in their thirties whereas the driver was older and with a large beard, and then there was a fourth man also in the room who had not been in the van. The men started shouting at them and saying abusive things about the bible; and hit them and called them infidels. He was slapped, punched and kicked. Then they started on [the applicant] and the others jointed in as well. He was beaten on the legs and chest. They spoke to each other in Pashto and became flamed although he didn't understand what it was they were saying. They increased their violence, and the applicants started begging and agreed to whatever they wanted as they felt real terror and that they were in danger of being killed. They didn't know what to expect, but they offered to stop their activities.
50. As a result of this beating, ribs were badly hurt and he couldn't sit properly. The men started to talk about Islam and what it is, and asked whether they were ready to accept Islam and urged them to come to the real life. They started lecturing them and stopped beating them. Then they began talking in Arabic and they repeated what they had said. When they thought that the applicants had agreed to convert, they began hugging each other and congratulating them on coming to Islam. It was at that point that he started to feel that they had been convinced and that they would be alright. The men gave them books to study and explained how they had to pray. They were then taken back in the van for about 15 to 20 minutes although they weren't returned right to their home. The men stopped and let them go after giving them a book on Wuzu, or ritual cleaning; however, they said they would return after three days to check on their progress, but told them not to worry.

51. After this incident [Person 1] had wounds on his face and [the applicant] was also injured. Asked whether they required hospital treatment he said it was not necessary, but they had internal pains for a long time and were also apprehensive about complaining about the incident.
52. They went into the sitting room and explained to their aunt and uncle what had happened. They were very anxious and called their father and he told them that they would have to leave.
53. [In] August 2005 he managed to get them a visa and tickets for the [date deleted: s431(2)], and they were able to get back to Dubai by [date deleted: s431(2)] August 2005 The following day their uncle called their father and said that a man had come looking for them, but he had told him that they had left. Following that no-one returned to their house looking for them.
54. [Person 1] was asked whether any complaint was made to the police over the kidnapping. He said they had spoken to their family and the family had said they would be crazy to go to the police. As it was all done in the name Islam they felt they would be wasting their time. They said that corruption was endemic and they felt that it would be safer for them to simply return to Dubai because of the rule of law. Although they are Muslims there in Dubai, they are not as fanatical.
55. [The applicant] and their father were terrified. It was the first time anyone had ever beaten [the applicant]. He was still able to stay in Dubai on his father's visa, but [Person 1] had to come and go. After this the applicant's broke off contact with their relations in Pakistan. Their parents had been separated for years anyway and he was no longer in contact with his mother.
56. [Person 1] was asked whether their visas were based on jobs held in the United Arab Emirates. He said that they had been recruited to work in a bank via a private agency. Asked whether he had ever, in fact, worked for the company named as his sponsor, he said that he had. Asked whether he had formally resigned, he said he hadn't. He could not formally resign, but he had told them that they were not coming back. Asked whether he was considered to have absconded, such that he would be liable for a one year re-entry ban, he agreed and said he could only re-enter with another visa. The Tribunal noted that the visa didn't clearly appear to have been cancelled and queried whether they might give him the right to enter and reside in the United Arab Emirates. He said that the visas would have been cancelled by the Dubai Immigration because they had ceased working and left their jobs without permission, and the company would have wanted to get replacement workers. Despite the fact that he was born in Dubai they had no rights.
57. [Person 1] was asked to confirm the whereabouts of his parents and his sister. He reiterated that he had no contact with his mother since, even, before he was kidnapped. His own sister is still able to live in Dubai on his father's visa; however, she was willing to marry an Indian and she did, in fact, marry an Indian in Dubai. [Person 1] was asked whether his father is at risk. He said his father had had to leave after 30 years in Dubai once he retired. He returned to Karachi and he was living there discreetly with a hidden identity, but he has now moved to Islamabad as he feels even Karachi is no longer ok. In Pakistan, religion is not mentioned in the ID card so he has to hide his Christianity as he was living with Muslims who wanted him to come to prayers. A lot of Christians know them from Dubai, which is an easy option for

Pakistanis to visit. A lot of Christians came to the [church name deleted: s431(2)] in Dubai. His father also has a profile as he is a well-known poet.

58. In 2007, when he was in Karachi, [Person 1] received a call from a man who warned him that he could not be forgiven for having fraudulently pretended to convert. He was warned that he would be beheaded. After receiving this call he removed his SIM card and broke it, and changed his hotel. He has no idea how the caller obtained his mobile number, but thinks maybe it was from someone in the music industry. Subsequently, he didn't return to Pakistan except as was absolutely necessary and he was, in fact, able to instead extend his visas at the Iranian island of Qeshm and thereby avoid the need to return to Pakistan. He only returned to Pakistan on one occasion thereafter, [in] August 2008 to see his father.
59. [Person 1] was asked why they came to Australia. He said that from 2007 he started thinking about his options. His family went to the UK Embassy and applied to visit as a family, with a view to seeking asylum. They didn't think they would be rejected. Then his father had to leave Dubai at the beginning of 2008 when he turned 60, but was able to return there on a visitor visa sponsored by the applicants' sister. However, the sister married in mid-2008 and she and her husband have now gone to the United States. [Person 1] and his brother started going to agents to try and find out where they might be able to go. They were thinking of Canada or the United States; or the United Kingdom or Australia or New Zealand – they didn't care where.
60. The agent who assisted them used to send students to England, but he noticed they had already been rejected by the United Kingdom authorities so he decided to send them to Australia. They were told to get IELTS tests and apply for Student Visas, and the agent organised everything. By the end of 2007 the documents were ready and the application was submitted. They only got approved in September 2008 and it was a terrible time waiting for that.
61. The Tribunal indicated that it didn't need to hear any further evidence from the applicants, that it was satisfied about their claims, and that it would prepare the decisions and reasons as soon as practicable.

Other Information

62. The following reports accessed from the *freemuse* website on 4 May 2009 illustrate the risks which Musicians generally, and Christian musicians in particular, can face in Pakistan. The first report, dated 16 February 2009 and headed Harmonium player murdered by Taliban militants was accessed from <http://www.freemuse.org/sw32121.asp>:

On 15 December 2008, a group of musicians were attacked by armed men. Two days later at a hospital in Peshawar, the harmonium player Anwar Gul died from his wounds.

It was a chilling cold night of in December when a group of armed men attacked two vehicles transporting the popular Pashto singer Sardar Yousafzai and 11 members of his orchestra home from a wedding performance. Five musicians were seriously injured, and the harmonium player Anwar Gul died two days later at a hospital in Peshawar. Anwar Gul is another victim of Taliban's campaign against musical expressions in North Western Pakistan. Time has gone when musical gatherings and concerts would be a hallmark of Peshawar city, the capital of Pakistan's North West Frontier Province (NWFP) and main hub of social and cultural activities for millions of Pashtuns on both sides of the Pak-Afghan border.

Starting with attacks on music shops in different parts of North Western Pakistan, Taliban militants are now directly targeting singers and people affiliated with the entertainment industry.

Anwar Gul was a famous harmonium player and music composer who earned name and fame for his mastery of the Pashtuns' music. Being a skilled musician he performed with eminent Pashto singers like Khyal Muhammad, Nazia Iqbal, Anwar Khyal and Mahjabeen Qazalbash.

He had more innovative plans for the future of Pashto music but his untimely death at the hands of Taliban militants left his dreams unfulfilled. Anwar Gul left one widow, five sons and one daughter to mourn his death.

Opened fire

In an interview with singer Sardar Yousafzai, he told Freemuse that they had been performing at a marriage ceremony at Shawa village of Malakand Agency – a mountainous district in North West Frontier Province. As they were returning to Peshawar, a few kilometres outside of Alladhand Dheri, in a village in Malakand, an armed group with covered faces intercepted their vehicles on the main Mingora-Peshawar highway and opened fire on them.

“They did not ask for anything. They just started firing. Five musicians including Anwar Gul seriously injured in the incident. We took him to a hospital in Peshawar but he could not succumb to the injuries and died two days later”, Sardar Yousafzai said.

A sense of helplessness

A report was registered with a local police station in Batkhela, the main town of Malakand Agency, against the unknown militants. Anwar Gul friends and family told Freemuse that so far no one has been arrested for his murder. Despite the high claims of the local government for promoting arts and culture, the authorities has not shown any care for Anwar Gul's treatment, and when he died, no support has been provided to his family. Naveed, the elder son of Anwar Gul, confirmed to Freemuse that the authorities have completely failed to bring the killers of his father to the book:

“My father committed nothing wrong against any one. His murder signifies that the militants are adamant to close the doors of musical expressions on our people”, he stated.

Naveed Gul fears that after the death of his father no one will think of adopting music as a career in his family, adding that he himself is a Rabab Player but the recent attacks on singers and musicians has left him with no choice but to switch over to another profession.

“My family is facing hard times these days. I don't know how to survive in this suffocating environment. We are helpless”, said Naveed Gul.

Promotion of fear

In previous incidents, Taliban militants attacked Sardar Yousafzai and Gulzar Alam, two popular Pashto singers, and they abducted Alamzeb Mujahid, a famous tv actor in Peshawar.

A regional expert says that there is no space for art in Taliban state

“They want to discourage artistic expressions of human emotions so that to create fear and uncertainty in the society. When there is more fear, it is more useful for the promotion of their fundamentalist agenda,” observed Dr. Shah Jehan, a Peshawar based social scientist and cultural expert.

63. The second report, entitled *Musician threatened in Karachi*, is dated 8 December 2008 and was accessed from <http://www.freemuse.org/sw31250.asp>:

Musician and singer Noel Jamshaid was threatened with "dire consequences" by unidentified persons in Karachi, reported Rehman Saman on 21 September 2008.

The newsletter *Minorities Concern of Pakistan* wrote:

"Some men halted Noel Jamshaid when he was on his way home around 9 PM on his motorbike. They jolted him and warned him for composing Christian music and imparting music skills for church activities.

The culprits also snatched his mobile phone and wallet. In the past, Noel, who is head of an organisation named *Church Music & Message Ministry* had already been threatened a number of times through unknown phone calls."

64. The following *Compass Direct* news report dated 12 June 2009 and accessed from <http://www.compassdirect.org/en/display.php?page=news&lang=en&length=long&idelement=5962> on 19 June 2009, suggests that the situation for Christians in that country is currently deteriorating:

In a growing culture of violence here, a traffic incident in Punjab Province this month led to Muslim assailants later mounting an attack on the home of a Christian pastor they have increasingly resented for his evangelism and justice ministries. The attackers threatened more violence if the pastor does not drop assault charges. A few of the 17 assailants struck the mother and sister-in-law of pastor Riaz Masih with rifle butts after the pastor's brother, who lives at the same multi-housing complex as Masih in Kila Sardar Shah, Sheikhpura district, on June 1 complained to a local councilor about the official nearly driving into his sons. Christian leaders said the roadside incident was only the fuse igniting hostilities that have grown due to meetings held by Christ for All Nations Ministries (CANM). The meetings have attracted many youths, including some Muslims. Pastor Masih is national coordinator of CANM, a self-supported church-planting ministry. CANM Chairman Saqib Munawar said a growing culture of violence means minor incidents more easily erupt into attacks. "As the Swat operation is going on, hostilities against Christians are on the rise," Munawar said. "Extremism, which has flourished in the last few decades, is now creating problems for all Pakistanis. This attitude has promoted violence in the country."

65. The 2008 United States State Department report on Human Rights Practices published on 25 February 2009, includes the following in its section on the United Arab Emirates, available at <http://www.state.gov/g/drl/rls/hrrpt/2008/nea/119129.htm>:

Protection of Refugees

The law does not provide for the granting of asylum or refugee status in accordance with the 1951 UN Convention relating to the Status of Refugees and its 1967 protocol, and the government has not established a system for providing protection to refugees. In practice the government did not provide protection against the expulsion or return of refugees to countries where their lives or freedom would be threatened.

National/Racial/Ethnic Minorities

Societal discrimination against noncitizens, comprising approximately 80 percent of the resident population and originating primarily from the Indian subcontinent, was prevalent and occurred in most areas of daily life, including employment, education, housing, social interaction, and health care. Although the government endeavors to improve standards of living for all residents, there were few programs targeted at improving conditions for noncitizens.

66. According to Dubai FAQs, accessed from <http://www.dubaifaqs.com/visa-ban-uae.php> there are penalties imposed on employees leaving their employment without permission

Except for UAE national citizens (and GCC nationals for the most part), all residents need permission from the UAE government (the Ministry of Immigration or equivalent) to live in Dubai and the UAE or visit the UAE. Each emirate has their own immigration department so it is possible the rules vary slightly but for the most part they are consistent in each emirate. What is more likely is that the same rules are interpreted differently, and/or applied differently by different emirates and to different nationalities. Keep this in mind if encountering difficulties with visa and work permit processing.

An immigration ban can also arise if you have broken the rules related to immigration for example entering the country illegally, working without a work permit, absconding (leaving your job without informing your sponsor / employer), overstaying (this last one is not so likely to be a problem, just expensive when you get your overstaying fine).

FINDINGS AND REASONS

Country of Nationality

67. The applicant claims to be a citizen of Pakistan. He arrived in Australia on an apparently valid Pakistani passport, issued to him by the Pakistani authorities in Rawalpindi and stating that he is a national of that country. The Tribunal finds on this basis that he is a national of Pakistan, and has assessed his claims against that country.

Well-founded Fear of Persecution for a Convention Reason

Assessment of Protection Claims

68. Shortly after his arrival in Australia, the applicant provided in writing clear and detailed protection claims as set out in full above.
69. The applicant has also provided documentary evidence in support of those claims, including evidence of his active involvement in the Christian Church in the United Arab Emirates in the form of a letter from that church and a DVD showing some of he and his brother's lengthy musical performances in what was clearly a very well attended church setting. The Tribunal considers that this evidence clearly supports the applicant's claim to have a high profile within the Pakistani Christian community as a musical performer.
70. The applicant has also provided country information with the application and the supporting submissions. In the view of the Tribunal, this information tends to support the applicant's claims. For example, the information extracted from the *US State Department International Religious Freedom Report* of 2008 documents many recent examples of persecution such as that which the applicant and his brother claim to have experienced in Pakistan, in the form of being kidnapped and subjected to conversion to Islam under duress at the hands of non-state agents. Similarly, the *freemuse* report shows that Christian musicians have been specifically targeted, including being assaulted and threatened via anonymous phone calls. The information therefore tends to support the applicant's claims by showing that there is nothing implausible about those claims, despite the inherent illogicality in the underlying premise - on the part of the persecutors - that religious adherence secured in such circumstances could have any validity whatsoever.

71. Detailed legal submissions have been provided in support of the application, and are set out above. The submissions argue in a clear and legally well- reasoned manner why the applicant's claims bring him within the scope of the Convention. The Tribunal agrees with and accepts those submissions.
72. At the Tribunal hearing, the applicant gave oral evidence which was consistent with his written claims, and he did so in a clear and convincing manner.
73. The Tribunal notes that the applicants have returned to Pakistan a number of times since first encountering the threat of persecution in that country. However, they also claim to have kept a low profile during those visits. In this respect the Tribunal has had regard to the fact that the applicants are claiming that the principal risk of the harm they fear comes from non-state agents. Consequently, any temporary returns the applicants have made to Pakistan do not undermine their claims or bespeak a lack of subjective fear on their part, as would, for example, a return in circumstances where the threat was said to arise directly from the state itself, with whose agents the applicants would automatically come into contact when passing through immigration clearance.
74. In light of the above, the Tribunal accepts the applicant's claims with respect to what has happened to him and his brother in the past in Pakistan.
75. The Tribunal also accepts, on the evidence before it, that the applicant's Christian beliefs are genuine, and that it is an important part of his expression of those beliefs for him to actively participate in the performance of religious music in a religious setting.
76. In *Appellant S395 of 2002 v Minister for Immigration and Multicultural Affairs* (2003) 216 CLR 473, McHugh and Kirby JJ made the following observation at [40]:

...persecution does not cease to be persecution for the purpose of the Convention because those persecuted can eliminate the harm by taking avoiding action within the country of nationality. The Convention would give no protection from persecution for reasons of religion or political opinion if it was a condition of protection that the person affected must take steps - reasonable or otherwise - to avoid offending the wishes of the persecutors. Nor would it give protection to membership of many a "particular social group" if it were a condition of protection that its members hide their membership or modify some attribute or characteristic of the group to avoid persecution. Similarly, it would often fail to give protection to people who are persecuted for reasons of race or nationality if it was a condition of protection that they should take steps to conceal their race or nationality.
77. Consequently, the Tribunal accepts that to require the applicant modify his behaviour by concealing or suppressing his Christian activities including musical performances would amount to a persecutory curtailment of his religious expression. Just as it was erroneous for the Tribunal in, to assume that the homosexual applicant could simply return to Bangladesh and avoid persecution by behaving discreetly, it seems to the Tribunal that it would be similarly erroneous to expect the applicant in the present case to suppress his legitimate and genuinely held religious beliefs in order to avoid further problems in Pakistan.
78. In any event, it does not appear, on the evidence before the Tribunal, that simply refraining from further religious activity would ensure the applicant's safety, as the further communications he received from the persecutors suggest that it was the applicants' refusal

or failure to genuinely convert which has placed them at ongoing risk of persecution, regardless of what if any future Christian activities they participate in.

79. The Tribunal therefore finds that there is more than a remote chance that the applicant will encounter serious harm capable of amounting to persecution for the purposes of s.91R of the Act in the reasonably foreseeable future, should he return to Pakistan.

Convention Nexus

80. From the applicant's claims, which the Tribunal has already indicated it accepts, and from the country information available to the Tribunal, it is evident that the essential and significant reason why the applicant is at risk of persecution in Pakistan is the Convention reason of his religion, namely his Christianity, and the Tribunal finds accordingly.

Availability of State Protection

81. The applicant claims that state protection is not available to him in Pakistan, as the government is unwilling and/or unable to protect him from the harm feared, and that to seek protection from the authorities in such circumstances would be futile. This claim is amply borne out by the country information cited, such as the US State Department report where it states that...

[I]aw enforcement personnel abused religious minorities in custody. Security forces and other government agencies did not adequately prevent or address societal abuse against minorities. Discriminatory legislation and the Government's failure to take action against societal forces hostile to those who practice a different faith fostered religious intolerance, acts of violence, and intimidation against religious minorities.

82. The Tribunal finds on the basis of this evidence that the state of Pakistan at present fails to provide the level of protection which its citizens are entitled to expect according to international standards: see *Minister for Immigration and Multicultural Affairs v Respondents S152/2003* (2004) 222 CLR 1 at [27]-[29]. The Tribunal concludes that the applicant's unwillingness to seek protection from those authorities is therefore justified for the purposes of Article 1A(2).

Conclusion on Persecution

83. In the present case, the Tribunal finds that the applicant faces a real chance of persecution if he returns to Pakistan in the reasonably foreseeable future, for the Convention reason of his religion, which for the purposes of s.91R(1)(a) is the essential and significant reason for the harm feared.

Internal Relocation

84. The country information extracted above suggests that Christians are experiencing problems throughout Pakistan. The Tribunal is satisfied that in the present case the risk of Convention persecution exists in the country as a whole, and that safe relocation within Pakistan is therefore not reasonably open to the applicant.

Safe Third Country

85. As indicted above, section 36(3) of the Act provides that Australia is taken not to have protection obligations to a non-citizen who has not taken all possible steps to avail himself or

herself of a right to enter and reside in, whether temporarily or permanently and however that right arose or is expressed, any country apart from Australia, including countries of which the non-citizen is a national.

86. Section 36(3) requires a right to enter and reside in another country. The word “right” in s.36(3) means a legally enforceable right to enter and reside in a country: *Applicant C v Minister for Immigration and Multicultural Affairs* [2001] FCA 229 (Carr J, 12 March 2001) at [28], *Kola & Anor v Minister for Immigration and Multicultural Affairs* [2001] FCA 630 (Mansfield J, 30 May 2001) at [36], upheld by the Full Federal Court in *Minister for Immigration and Multicultural Affairs v Applicant C* (2001) 116 FCR 154 and *Kola v Minister for Immigration and Multicultural and Indigenous Affairs* (2002) 120 FCR 170 at [63] respectively.
87. Current authority indicates that the right referred to in s.36(3) must be an existing right, and not a past or lapsed right, or a potential right or an expectancy.
88. There is no evidence before the Tribunal to suggest that the applicant is a national of any country other than Pakistan. However, he was born in the United Arab Emirates, and has resided there lawfully for most of his life without, evidently, encountering any problems while practising his religion. Furthermore, the applicants’ passports contain UAE visas suggesting that they may have a current right to enter and reside in that country.
89. On the other hand, the applicants have explained that as they left their jobs in Dubai they would be considered to have absconded, and their visas would have been cancelled, and the country information from *Dubai FAQs* appears to support this proposition. The Tribunal is therefore inclined to conclude that the applicants’ former right to enter and reside in the UAE, as well as being contingent on their ongoing employment, would have lapsed. The Tribunal therefore concludes that the applicant does not have a presently existing, legally enforceable right to enter and reside in the United Arab Emirates for the purposes of s.36(3) of the Act.
90. Furthermore, the US State Department report on the UAE states that *[i]n practice the government did not provide protection against the expulsion or return of refugees to countries where their lives or freedom would be threatened*, suggesting that even if the applicants were admitted to that country there is a real chance they may be refouled to Pakistan, where they face a real chance of persecution for reason of their religion. The Tribunal therefore finds on the basis of that information that even if they did have a right to enter and reside in the UAE, s.36(5) of the Act would be enlivened such that s.36(3) would not apply to them.
91. The Tribunal therefore concludes for the purposes of s.36(3) of the Act that the applicant does not have a presently existing, legally enforceable right to enter and reside in the United Arab Emirates.
92. Accordingly, the Tribunal finds that the Australia’s protection obligations are not excluded under s 36(3) of the *Migration Act* 1958.

CONCLUSION

93. The Tribunal is therefore satisfied that the applicant is a person to whom Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol.

Therefore the applicant satisfies the criterion set out in s.36(2)(a) for a protection visa and will be entitled to such a visa, provided he satisfies the remaining criteria.

DECISION

94. The Tribunal remits the matter for reconsideration with the direction that the applicant satisfies s.36(2)(a) of the Migration Act, being a person to whom Australia has protection obligations under the Refugees Convention.

<p>I certify that this decision contains no information which might identify the applicant or any relative or dependant of the applicant or that is the subject of a direction pursuant to section 440 of the <i>Migration Act 1958</i>. Sealing Officer's I.D. RCHADW</p>
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