

**AT AUCKLAND**

<b>Appellant:</b>	<b>AI (China)</b>
<b>Before:</b>	A N Molloy (Member)
<b>Counsel for the appellant:</b>	E Griffin
<b>Counsel for the respondent:</b>	No appearance
<b>Date of hearing:</b>	25 August 2011
<b>Date of decision:</b>	12 December 2011

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**DECISION**

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**INTRODUCTION**

[1] The appellant is a national of the People’s Republic of China. She is a Muslim, of Uighur ethnicity. Her appeal turns upon whether she is at risk of being persecuted in China on account of her Uighur ethnicity and because of her desire to practise as a Muslim.

[2] She appeals under section 195 of the Immigration Act 2009 (“the Act”) against the decision of a refugee and protection officer of the Refugee Status Branch of the Department of Labour, declining to grant her either refugee status or protected person status.

[3] In order to address the statutory issues common to all appeals of this type, the Tribunal will first outline the account presented by the appellant on appeal. It will then assess the appellant’s credibility, before making the findings of fact upon which the appeal is determined. The Tribunal will then outline the legislation governing such appeals before assessing the appellant’s claim for refugee status and protected person status.

## THE APPELLANT'S ACCOUNT

[4] The appellant was born and raised in City A in the Xinjiang Uighur Autonomous Region (XUAR) in the northwest of China. Her parents and sister still live there.

[5] The appellant graduated from her high school with good grades in 2009. She was disappointed not to be invited to pursue any of her three preferred study options at tertiary level. The appellant's parents suggested that she begin to look abroad for alternative options. As a precursor to doing so, the appellant obtained a passport in early 2010 and enrolled in an English language course.

[6] After completing that course in mid-2010 the appellant's father procured an agent to pursue appropriate opportunities. The appellant obtained a visa enabling her to remain in New Zealand for up to 12 months in order to study. She left China in November 2010 and arrived in New Zealand a day or two later. She later applied for refugee status for reasons that are best understood in light of her inability to openly practise her faith in China.

### Practice of her religion

[7] The appellant was raised as a Muslim, however her ability to learn about and to put into practise the basic rituals of her faith have been progressively undermined by policies adopted by the Chinese government throughout her life.

[8] The appellant's early education in Islam was provided by her parents, particularly her mother. The appellant was able to pray at home. However, for most of her life she has been unable to pray five times daily in keeping with Islamic requirement. Praying at school or university was (and is) not permitted. While the appellant's father attends the mosque, the appellant, her mother and sister are prohibited from doing so, as women, under a direction from the Chinese government.

[9] Government policy has also obstructed and undermined the observance of other fundamental manifestations of faith by Uighur. For example, the appellant was unable to wear the Islamic headscarf outside the home. It is not permitted at school, at university or in the workplace. During *Ramadan*, the appellant's school and college ensured that pupils consume food and liquid during the day. While this is expressly in breach of the obligation to fast during *Ramadan*, the government imposes these requirements under the supposed guise of looking

after the welfare and health of its citizens. Students who tried to observe the fasting requirements were censured and, if they persisted, were expelled.

[10] The appellant was perennially interested in learning more about her Islamic faith, but there was no avenue for such studies as the government also prohibited groups formed for that purpose. However during the summer vacation that followed her final year at school the appellant's father arranged for her to attend unofficial tuition with the wife of one of his colleagues, a schoolteacher called ZZ.

[11] The appellant attended sessions led by ZZ several times a week until about approximately mid-August 2010. She stopped attending after a chance encounter with a police officer one morning as she walked the short distance to ZZ's house. On every other morning the appellant had been driven by her father, however work commitments prevented him from doing so on the morning in question. The appellant had almost reached ZZ's house when she was stopped by a police officer, who noted that the appellant was wearing an Islamic headscarf. The officer questioned her for several minutes and asked why she was wearing the scarf. She explained her attire by claiming she was visiting a bereaved family. The officer took her name and address, warned her, then allowed her to leave.

[12] The appellant was unnerved by her experience and returned home instead of going to class. Her father was upset that she had acted so recklessly as to wear her head covering in public, and warned her not to return to the class. She heeded his advice.

[13] The appellant subsequently heard that the police visited ZZ's house a few weeks later. They questioned ZZ and several students who were present at the time. About a fortnight after she arrived in New Zealand, the appellant learned from her father that ZZ had been detained by the police. As far as she is aware, ZZ is still detained. At around the same time, the police arrived at the appellant's family home and asked where she was. The appellant was so unnerved by hearing this news that she applied for refugee status.

[14] In April 2011, the police returned to the appellant's family home and again asked where she was. They asked when she was returning from New Zealand. They then telephoned the agent who had arranged the appellant's travel to New Zealand and asked him the same questions.

[15] The appellant believes that if she were to return to China, she would be detained because she attended the unlawful Islamic study classes under her teacher, ZZ.

[16] The appellant's faith is of fundamental importance to her. Since arriving in New Zealand, she has taken the opportunity to increase her knowledge of Islam by attending a weekly class conducted by a teacher from an Islamic trust.

#### Statements of PP

[17] The Tribunal was provided with a statement signed by a teacher from the JJ trust, confirming that the appellant is a member of Islamic studies and Quran classes run by the trust.

[18] PP provided a more detailed statement in September 2011, following the appeal hearing. PP has been a New Zealand citizen since the mid-1990s and has taught the classes in question since the late 1990s. The weekly classes are taught primarily to non-Arabic speaking women for whom gaining access to information and resources about Islam is often problematic. The classes last around three hours and provide an opportunity to learn about Islam in some depth. The statement confirms that the appellant has been attending the classes for several months. She is described as "dedicated".

#### **Material Received**

[19] Counsel wrote to the Tribunal on 10 August 2011, enclosing a schedule of documents together with a supplementary statement in the appellant's name. A further letter from counsel dated 19 August 2011 enclosed a memorandum of submissions together with a further schedule of documents. On the day of the appeal hearing, the appellant handed up a brief statement from her Islamic teacher. Further documents were submitted under cover of letters from counsel dated 15 September 2011, 19 September 2011 and 22 September 2011.

### **ASSESSMENT OF THE APPELLANT'S ACCOUNT**

#### **Whether the Appellant's Claim is Credible**

[20] Before turning to address the legal issues identified below, it is necessary to determine whether the appellant's account is credible. The Tribunal finds that it is.

Her evidence was given in straightforward fashion and was relatively consistent with her previous accounts and with country information relating to the predicament of Uighur in China.

### **Summary of factual findings**

[21] The Tribunal therefore finds that the appellant is a Chinese national of Uighur ethnicity. She perceives her religion to be an inherent part of her ethnicity and wishes to adopt the attire and practices of Muslims. The Tribunal accepts that she has sought to deepen her understanding of her faith both prior to leaving China and after coming to New Zealand. This may have brought her to the attention to the Chinese authorities, who have visited her home since her departure.

[22] It is on that basis that her claim will be assessed.

### **THE LEGISLATION**

[23] Under section 198 of the Act, the Tribunal must determine whether to recognise each or any of the appellants as:

- (a) a refugee under the Refugee Convention (section 129); and/or
- (b) a protected person under the Convention Against Torture (section 130); and/or
- (c) a protected person under the International Covenant on Civil and Political Rights (“the ICCPR”) (section 131).

[24] The Tribunal must first deal with the claim for recognition under the Refugee Convention.

### **The Refugee Convention**

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

“A person must be recognised as a refugee in accordance with this Act if he or she is a refugee within the meaning of the Refugee Convention.”

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

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

[27] The Tribunal adopts the analysis of the Refugee Status Appeals Authority, the body previously established to consider refugee appeals in New Zealand. In *Refugee Appeal No 70074* (17 September 1996), the Authority identified the principal issues as:

- (a) Objectively, on the facts as found, is there a real chance of the appellant being persecuted if returned to the country of nationality?
- (b) If the answer is yes, is there a Convention reason for that persecution?

### **Assessment of the Claim to Refugee Status**

*Objectively, on the facts as found, is there a real chance of the appellant being persecuted if returned to China?*

[28] For the purpose of refugee determination, “being persecuted” has been defined as the sustained or systemic violation of core human rights, demonstrative of a failure of state protection – see *Refugee Appeal No 74665* (7 July 2004) at [36]-[90]. Put another way, persecution can be seen as the infliction of serious harm, coupled with the absence of state protection – see *Refugee Appeal No 71427* (16 August 2000), at [67].

[29] In determining what is meant by “well-founded” in Article 1A(2) of the Convention, the Tribunal adopts the approach in *Chan v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379 (HCA), where it was held that a fear of being persecuted is well-founded when there is a real, as opposed to a remote or speculative, chance of it occurring. The standard is entirely objective – see *Refugee Appeal No 76044* (11 September 2008) at [57].

[30] The appellant’s predicament must be understood in the context of the manner in which the Chinese government has dealt with Uighur in the XUAR. This has changed fundamentally since the area was originally given autonomy in 1955, in recognition of the Uighur’s predominance in the area. The status thus accorded by the Chinese Constitution “entitle[d] ethnic minorities to organs of self-

government in order to exercise autonomy”; Amnesty International *Uighur ethnic identity under threat in China* (April 2009) (“the 2009 AI report”).

[31] The Chinese government fostered that autonomy for some time. During the 1980s it pursued liberal policies that allowed greater freedom of religion and expression to its citizens. However, according to the 2009 AI report (p2) Uighur in the XUAR experienced a sharp reversal from the mid-late 1990s, when the authorities:

“...embarked on an aggressive campaign against the “three evils”: “terrorism, separatism and religious extremism”.”

[32] The predicament subsequently faced by Uighur was addressed in a comprehensive report by Human Rights Watch *Devastating Blows: Religious Repression of Uighurs in Xinjiang* (April 2005) (“the HRW report”), which claims to be based on previously undisclosed regulations, policy documents and interviews in Xinjiang and elsewhere.

[33] According to the HRW report, Uighur in the XUAR fall into the same broad category of political concern as indigenous communities in Taiwan and Tibet. The Chinese State perceives the strong sense of Uighur cultural identity as a threat to the rule of the Chinese Communist Party. Once recent discoveries of oil were added to the mix, strategic and security concerns led to the development of stringent policies relating to the region. According to the HRW report (p7):

“Non-Uighur groups are not perceived as presenting a secessionist threat for Xinjiang and are subject to less stringent controls. The other ethnic groups in Xinjiang have independent states outside China and are not perceived to have similar ethnonationalist aspirations. Among the major Islamic groups, only the Uighur do not.”

[34] As a result, the HRW report finds, p7:

“China’s efforts to control Uighur religion are so pervasive that they appear to go beyond suppression to a level of punitive control seemingly designed to entirely refashion Uighur religious identity to the state’s purposes.”

[35] According to the HRW report, the Chinese state, known for tight constraints on freedom of religion, has placed the Muslim faith of Uighur under “wholesale assault”; HRW report, p3.

[36] The HRW report notes (at p7) that religion and ethnic identity are, for Uighur, inextricably intertwined:

“For most Uighurs the paramount issue is not religion *per se*, but the perceived threat that religious repression poses to their distinct identity coupled with their acute feeling of being colonised. They view the tight restrictions placed by the

Chinese authorities on Uighur Islam as an attempt to debase their very identity, as Islam is an essential component of their traditional identity and culture.”

[37] The People’s Republic of China is described as “an authoritarian state in which the Chinese Communist Party constitutionally is the paramount authority”; United States Department of State *International Religious Freedom Report: China* (8 April 2011). The government has, over a period of time, adopted a range of measures as part of a specific policy to repress and subordinate Uighur and to subsume the populace of the XUAR into the ethnic Han mainstream. These include means such as undermining the use of the Uighur language and changing the balance of the populace on ethnic lines.

[38] According to the Minority Rights Group International report, *China: Minority Exclusion, Marginalisation and Rising Tension* (2007) (“the MRG report”), the government has implemented a policy whereby minority students begin to learn Chinese from the first grade at primary school. The MRG report states that the system is “systematically designed to deny [Uighur children] the opportunity and ability to learn their own histories and languages, and to practise their own religions and cultures”; (p28).

[39] Another significant policy relates to the migration of Han Chinese into minority areas. The 2009 AI report states that:

“According to the latest Chinese census in 2000, there are more than 18 million people living in the XUAR of whom 47 per cent are Uighur, 40 per cent are Han Chinese and 12 per cent are other ethnic groups, including Kazaks...”

[40] The discrepancy is greater in urban areas. In recent decades, for example, the Han-Uighur ratio in the capital of city A has shifted from 20/80 to 80/20: United States Department of State 2010 *Human Rights Report: China* (8 April 2011) (“the DOS report”), section 6. The MRG report indicates, at p24, that:

“Population transfers have an adverse effect on minority groups’ opportunities to benefit from economic development, and are a major source of cultural integration and assimilation in these regions. ...In XUAR, Han and Uighurs make up 41 per cent and 44 per cent of the provincial population respectively...[however these figures]...do not indicate the much higher proportion of Han Chinese in the autonomous regions’ major cities, including their capitals. Population transfers are a significant problem for the preservation of minority culture and identity.”

[41] The same report continues, at p26:

“The massive influx of Han Chinese settlers and migrants into autonomous areas and their dominance of the public sphere has made it hard for minorities to preserve their distinct cultural identities. Through literature and practice the PRC regularly exoticises minorities, thereby portraying them as backwards and in need of modernisation”.



[42] This policy of assimilation has coincided with an increase in general discrimination against Uighur. For example, Amnesty International *China: Justice: The July 2009 Protests in Xinjiang, China* (2 July 2010) states, at p8:

“Uighurs interviewed by Amnesty International – even those with high levels of education and training – testified to their difficulties in finding a job which they directly attributed to discrimination. Uighurs who were employed said they were paid a fraction of what their Han Chinese colleagues were paid for doing the same job. Some also reported that they were not allowed to speak Uighur at their work place...”

[43] The Minority Rights Group International *World Directory of Minorities* (update, July 2008) describes the gradual exclusion of Uighurs from both state-based employment and the rising private sector, as “stunning and statistically verifiable from a variety of sources” (p2). It contrasts the unemployment rate of Han Chinese in Xinjiang, approximately 1 per cent, with the rate of Uighur: “a staggering 70 per cent”.

#### *Religious restrictions*

[44] As a fundamental plank in its policy to undermine the cultural identity of the Uighur, the government has progressively taken various steps to reduce the influence and importance of religion.

[45] Following terrorist attacks carried out by Muslims in the United States in September 2001, China has consistently portrayed Uighur in Xinjiang as the source of a serious Islamic terrorist threat. This has been accepted without question by much of the Han populace, and contributes to the level of discrimination experienced by Uighur in the region.

[46] Government employees in the XUAR, including teachers, police officers, state enterprises workers and civil servants, risk losing their jobs if they engage in religious activity; Amnesty International *People’s Republic of China Uighur’s fleeing persecution as China wages its “war on terror”* (7 July 2004) pp3 and 5: (“the 2004 AI report”).

[47] The authorities maintain tight control over mosques and religious clergy and there are significant restrictions on religious education. Some of the government’s measures are specifically aimed at undermining the role of women in religious education. Women intending to study Islam must do so in a clandestine fashion *Won’t anyone listen to Justice?* Radio Free Asia (19 November 2008) and, according to Human Rights Watch, Uighur women are afraid to teach their children

religion in case any display of religious awareness on behalf of the children attracts the unwanted attention of authorities; HRW report, p59.

[48] According to the HRW report, mosques have been under government control and surveillance since the mid-1990s with the aim of discouraging attendance, especially by children or young adults; HRW report, p5. Those who may teach scripture must be approved and there is a ban on religious activity among children; HRW report, p60.

[49] Any manifestation of religious education or even adherence is prohibited in schools; HRW report, p60. Students are prohibited from performing even the most basic requirements of the Islamic faith such as reading the Koran or other religious texts, engaging in daily prayer, fasting during the holy month of *Ramadan* or displaying one's religion through clothing or personal appearance; HRW report p62.

[50] The same restrictions are placed upon those in government employment; the HRW report, pp60, 62; the MRG report pp29, 30. Students and civil servants report that it is impossible for them to publicly engage in any religious activity other than observing the Muslim ban on eating pork. Men are not permitted to wear beards and women are not permitted to wear head scarves. The government also takes steps to ensure that traditional practises such as fasting during *Ramadan* are undermined by the provision of lunches for its employees, and the insistence that food is consumed. These are presented in the guise of measures taken for the welfare of employees, but are thinly disguised attempts to undermine Islamic practice.

#### *Present circumstances in the XUAR*

[51] According to the DOS report, authorities continue to implement repressive policies in the XUAR to target the region's ethnic Uighur population. It states that officials "continue to implement a pledge to crack down on the government designated three forces of religious extremism, splittism, and terrorism", and outlined efforts to launch a concentrated anti-separatist re-education campaign (section 6). It also states that:

"The government reportedly sought the repatriation of Uighur outside the country, who faced the risk of persecution if repatriated."

[52] *The Congressional Executive Commission on China Annual Report for 2010* (10 October 2010) also reports the deterioration of religious freedom for Muslims in the XUAR:

“Authorities implemented various campaigns to restrict religious practice. This included campaigns to dissuade Muslim women from wearing veils, confiscating illegally printed religious books, restricting children’s freedom of religion undermining the ability to teach religion to children.”

[53] Recent unrest in the area has brought about more stringent restrictions; see *China: ‘End injustices’ says exile leader* Radio Free Asia (20 July 2011):

“China is placing restrictions on its Muslim Uighur population during the fasting month of Ramadan, following a string of violent attacks in its north-western region of Xinjiang. Restrictions were in place for government cadres, who risk losing pensions and other benefits. Private companies are offering lunches to Uighur Muslims, and any who refuse to eat could lose their annual bonus, or even their job, he added. ...the government has announced a ban on any religious activities during the Muslim holy month of Ramadan... “to preserve social stability...”

[54] The United States Commission on International Religious Freedom, *USCIRF Annual Report 2011* (May 2011) also states that “religious freedom conditions continue to deteriorate”. It continues:

“In the XUAR and other areas of Xinjiang Province ... Following demonstrations and riots... Muslims...have experienced increased harassment, arrests and efforts to weaken religious adherence and cultural identity.”

[55] It is against this background that the appellant’s predicament is to be assessed.

### *Findings*

[56] The Tribunal has accepted that the appellant is a Muslim of Uighur ethnicity from a city in the XUAR. It accepts that she and her family have endeavoured to practise their faith in China within the confines of state policy, and that religion is an important part of her identity as a Uighur. While in China, the appellant was unable to practice her religion in any meaningful way, either in private or together with others. She was not permitted to attend the mosque, had no avenue by which to study or improve her understanding of her faith and was not permitted to outwardly manifest her faith, for example, by wearing the *hijab*.

[57] The Tribunal accepts that since coming to New Zealand the appellant has been attending study sessions to deepen her understanding of Islam. She is now able to conform to the Islamic requirement to pray five times daily, both because she is free to do so and because she has acquired an understanding of how and

why to pray. She has also adopted Islamic dress. The Tribunal accepts that these are the manifestation of her sincere desire to develop her knowledge of her religion, and accepts her claim that this is an ongoing process for her.

[58] If the appellant were to return to China, her ability to practise and manifest her faith would be severely impeded. While it would be possible for her to conduct her daily prayer ritual prior to sunrise and after sunset, her ability to pray during the day would be severely compromised. If she sought, for example, to adopt Islamic dress, pray five times daily and observe *Ramadan*, it is likely that she would be subjected to discrimination and harassment in the workplace. Her practice may exclude her from employment within the government sphere and this would significantly undermine her ability to work and support herself. It would also expose her to ongoing harassment by non-Uighur and by the Chinese authorities in their myriad forms.

[59] In short, the appellant would be denied the fundamental right to freedom of religion enshrined in Article 18(1) of the ICCPR, which provides that:

“Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.”

[60] As a Uighur in Xinjiang, the appellant would not be able to manifest her religion, in public or in private, alone or in community with others. This would amount to serious harm for the purposes of the Refugee Convention. While Article 18(3) of the ICCPR provides that freedom of religion may be subject to such limitations prescribed by law as are necessary for the protection of “public safety, order, health or morals”, the pervasive policy of “punitive control” implemented by the Chinese government transcends any such description.

*Is there a Convention reason for the persecution?*

[61] In the context of the XUAR, the appellant’s predicament is based upon her ethnicity and may also be viewed as political. It is however most obviously characterised as for reason of her religion. There is a clear nexus to a Convention reason.

### **Conclusion on Claim to Refugee Status**

[62] The appellant has a well-founded fear of being persecuted for a Convention reason if she were to return to China. She is entitled to recognition as a refugee under the Refugee Convention.

[63] The Tribunal now turns to consider the appellant's claim to be a protected person under the Act.

### **THE CONVENTION AGAINST TORTURE**

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

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

### **Conclusion on Claim under Convention Against Torture**

[65] The appellant is recognised as a refugee. By virtue of section 129(2) of the Act (the exceptions to which do not apply) she cannot be deported from New Zealand. This is in accordance with New Zealand's non-refoulement obligation under Article 33 of the Refugee Convention. Accordingly, the appellant is not a person requiring protection under the Convention against Torture. She is not a protected person within the meaning of section 130 of the Act.

### **THE ICCPR**

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

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

### **Assessment of the claim under the ICCPR**

[67] For the reasons given, the appellant cannot be deported from New Zealand. Accordingly, she is not a person requiring protection under the ICCPR. She is not a protected person within the meaning of section 131(1) of the Act.

## CONCLUSION

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

- (a) is a refugee within the meaning of the Refugee Convention;
- (b) is not a protected person within the meaning of the Convention Against Torture; and
- (c) is not a protected person within the meaning of the ICCPR.

[69] The appeal is allowed.

"A N Molloy"

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Member

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