

0903167 [2009] RRTA 698 (4 August 2009)

DECISION RECORD

RRT CASE NUMBER: 0903167

DIAC REFERENCE(S): CLF2008/126902 CLF2009/47646

COUNTRY OF REFERENCE: China (PRC)

TRIBUNAL MEMBER: Noel Pullen

DATE: 4 August 2009

PLACE OF DECISION: Melbourne

DECISION: The Tribunal remits the matter for reconsideration with the following directions:

- (i) that the first named applicant satisfies s.36(2)(a) of the Migration Act, being a person to whom Australia has protection obligations under the Refugees Convention; and
- (ii) that the second and third named applicants satisfy s.36(2)(b)(i) of the Migration Act, being members of the same family unit as the first named applicant.

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of decisions made by a delegate of the Minister for Immigration and Citizenship to refuse to grant the applicants Protection (Class XA) visas under s.65 of the *Migration Act 1958* (the Act).
2. The applicants, who claim to be citizens of China (PRC), arrived in Australia [in] April 2006 and applied to the Department of Immigration and Citizenship for Protection (Class XA) visas [in] August 2008. The delegate decided to refuse to grant the visas [in] April 2009 and notified the applicants of the decision and their review rights by letter dated [in] April 2009.
3. The delegate refused the visa application on the basis that the applicants are not persons to whom Australia has protection obligations under the Refugees Convention
4. The applicants applied to the Tribunal [in] April 2009 for review of the delegate's decisions.
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 applicants have 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. Section 36(2)(b) provides as an alternative criterion that the applicant is a non-citizen in Australia who is a member of the same family unit as a non-citizen (i) to whom Australia has protection obligations under the Convention and (ii) who holds a protection visa. Section 5(1) of the Act provides that one person is a 'member of the same family unit' as another if either is a member of the family unit of the other or each is a member of the family unit of a third person. Section 5(1) also provides that 'member of the family unit' of a person has the meaning given by the Migration Regulations 1994 for the purposes of the definition.
9. 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'

10. 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.

11. 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.
12. 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.
13. There are four key elements to the Convention definition. First, an applicant must be outside his or her country.
14. 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.
15. 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.
16. 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.
17. 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.

18. 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.
19. 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.

COUNTRY INFORMATION

The Congressional–Executive Commission on China Annual Report 2008 provides the following information:

Islam

Authorities increased repression of Islam in the Xingjian Uyghur Autonomous Region (XUAR) in the past year, while the government and Party continued to strictly control the practice of Islam in other parts of the country. The Commission observed broad measures implemented in the XUAR to increase monitoring and control over religious communities and leaders; steps to restrict pilgrimages and the observance of religious holidays and customs; and continued measures to restrict children's freedom of religion. Throughout China, Muslims remained subject to state-sanctioned interpretations of their faith and to tight state control over their pilgrimage activities.

INCREASED REPRESSION IN XINJIANG

Authorities increased repression in the XUAR amid preparations for the 2008 Beijing Summer Olympic Games, protests in Uyghur and Tibetan areas of China, and government reports of terrorist and criminal activity in the region. During the year, local governments throughout the XUAR reported on measures to tighten control over religion, including measures to increase surveillance of mosques, religious leaders, and practitioners; gather information on practitioners' religious activities; curb "illegal" scripture readings; and increase accountability among implementing officials. Authorities connected control of religious affairs with measures to promote "social stability" and continued longstanding campaigns to link Islam to "extremism" and the threat of terrorism. In September 2008, XUAR chair Nur Bekri called for strengthening controls over religion and for increasing political training of religious leaders.⁶¹ Amid preparations in the XUAR for the Olympics, overseas media reported in June that authorities in Aqsu district razed a privately built mosque for refusing to post pro-Olympics posters.⁶²

Local authorities and educational institutions in the XUAR continued in 2007 and 2008 to impose restrictions on the observance of the holiday of Ramadan, including restrictions on state employees' observance of the holiday and prohibitions on closing restaurants during periods of fasting.⁶³

Overseas media reported on the detention of two Muslim restaurant managers for failing to abide by instructions to keep restaurants open.⁶⁴ Authorities intensified limits on the observance of Ramadan with measures to curb broader religious and cultural practices.⁶⁵ Some local governments reported on measures to prevent women from wearing head coverings. ⁶⁶ In March, women in Hoten district who demonstrated against various human rights abuses in the region protested admonishments against such apparel issued during a government campaign to promote stability.⁶⁷

The XUAR government continues to maintain the harshest legal restrictions on children's right to practice religion. Regionwide legal measures forbid parents and guardians from allowing minors to engage in religious activity.⁶⁸ In August 2008, authorities reportedly forced the return of Uyghur children studying religion in another province and detained them in the XUAR for engaging in "illegal religious activities."⁶⁹ Local governments continued to implement restrictions on

children's freedom of religion, taking steps including monitoring students' eating habits during Ramadan and strengthening education in atheism, as part of broader controls over religion implemented in the past year.⁷⁰ Overseas sources have reported that some local governments have enforced restrictions on mosque entry by minors, as well as other populations.⁷¹

RESTRICTIONS ON THE FREEDOM TO MAKE OVERSEAS PILGRIMAGES

XUAR authorities continued in the past year to support measures to prevent Muslims from making pilgrimages outside of state channels, following the confiscation of Muslims' passports in summer 2007 to restrict private pilgrimages.⁷²-

CONTINUING CONTROLS OVER INTERNAL AFFAIRS AND DOCTRINE

The government continued to tightly control the internal affairs of Muslim communities. The state-controlled Islamic Association of China aligns Muslim practice to government and Party goals by directing the confirmation and ongoing political indoctrination of religious leaders, publication of religious texts, and content of sermons. ⁷⁹ In the past year, authorities called for continued measures to control religious doctrine. In a 2008 interview, Ye Xiaowen, head of the State Administration for Religious Affairs, justified state interference in the interpretation of Islamic doctrine on the grounds of "public interests." ⁸⁰

Religious Prisoners

Authorities continue to detain, formally arrest, and in some cases imprison Chinese citizens because of their religious activities or for protesting Chinese policies on religion.¹¹⁰ Known cases from the past year and new developments in previously reported cases include:

□ Adil Qarim, an imam at a mosque in Kucha county, Xinjiang, Uyghur Autonomous Region (XUAR), whom authorities detained during a security roundup in the aftermath of a reported series of bomb attacks in the county on August 10. An individual accused of involvement in the August 10 incident had attended the mosque. Adil Qarim denied having any links to the attacks. His current whereabouts are unknown. □ Alimjan Himit (Alimujiang Yimiti), a house church leader in the XUAR detained on January 12, 2008, and charged with subverting state power and endangering national security. Alimjan Himit had previously worked as the branch manager of a foreign-owned company shut down for "engaging in illegal religious infiltration activities." A court in Kashgar tried the case on May 27, 2008, and returned it to the procuratorate due to "insufficient evidence," but authorities have kept Alimjan Himit in detention.

..... □ Mutellip (Mutallip) Hajim, a jade merchant and father of eight detained by XUAR authorities in January 2008 in apparent retribution for his activities helping underground Muslim schools, as well as for supporting the families of prisoners and for violating population planning requirements. Mutellip Hajim reportedly died in detention after being subjected to torture, and his corpse was returned to his family on March 3, 2008, with orders not to publicize his death.

INCREASED REPRESSION IN XINJIANG DURING THE OLYMPICS

Officials in the Xinjiang Uyghur Autonomous Region (XUAR) reiterated a pledge in August 2008 to use harsh security measures to crack down against the government-designated "three forces" of terrorism, separatism, and extremism.³⁰ On August 13, Wang Lequan, XUAR Communist Party Chair, described the battle against the "three forces" as a "life or death struggle" and pledged to "strike hard" against their activities. XUAR Party Committee Standing Committee member Zhu Hailun reiterated the call to "strike hard" at an August 18 meeting.

Wide-scale Detentions. Authorities have carried out widescale detentions as part of security campaigns in cities throughout the XUAR, according to a report from the Uyghur Human Rights

Project. Reported measures include “security sweeps” resulting in mass detentions in the Kashgar area and Kucha county, including blanket detentions in Kucha of young people who have been abroad; the detention of non-resident Uyghurs in Korla city; the forced return of Uyghur children studying religion in another province and their detention in the XUAR for engaging in “illegal religious activities”; and the detention of family members or associates of people suspected to be involved in terrorist activity.

HUMAN RIGHTS ABUSES IN THE XINJIANG UYGHUR AUTONOMOUS REGION INTRODUCTION

Human rights abuses in the Xinjiang Uyghur Autonomous Region (XUAR) remain severe, and repression increased in the past year. As detailed by the Commission in past Annual Reports,¹ the government uses anti-terrorism campaigns as a pretext for enforcing repressive security measures and for controlling expressions of religious and ethnic identity, especially among the ethnic Uyghur population, within which it alleges the presence of separatist activity. It enforces “strike hard” anti-crime campaigns against the government-designated “three forces” of terrorism, separatism, and extremism to imprison Uyghurs for peaceful expressions of dissent, religious practice, and other non-violent activities. In the past year, the government used these longstanding campaigns as a springboard to increase repressive practices amid preparations for the 2008 Beijing Summer Olympic Games, reports of terrorist activity, and protests among ethnic minorities. In the past year, the government also continued to strengthen policies aimed at diluting Uyghur ethnic identity and promoting assimilation. Policies in areas such as language use, development, and migration have disadvantaged local ethnic minority residents and have positioned the XUAR to undergo broad cultural and demographic shifts in coming decades. Government policy in the XUAR violates China’s own laws and contravenes China’s international obligations to safeguard the human rights of XUAR residents. The government has failed to implement its legally stipulated “regional ethnic autonomy” system in a manner that provides XUAR residents with meaningful control over their own affairs. Instead, authorities exert central and local government control at a level antithetical to regional autonomy. Government policies violate the basic human rights of XUAR residents and have a disparate impact on ethnic minorities.²

ANTI-TERRORISM POLICIES, ANTI-CRIME CAMPAIGNS, AND SECURITY MEASURES

The Chinese government uses anti-terrorism campaigns as a pretext for enforcing harsh security policies in the XUAR. In the past year the government used security preparations for the 2008 Beijing Summer Olympic Games, reports of terrorist activity, and protests in Tibetan areas of China and within the XUAR as platforms for advancing repressive security measures in the region. In spring 2008, the Chinese government claimed it had broken up three terrorist plots to disrupt the Olympics, as well as an attempted terrorist attack on an aircraft. As in the past,³ however, the government provided scant evidence to back up its claims and continued to enforce restrictions on free press that hindered efforts to report on the region.⁴ During the same period, local governments implemented a series of measures to tighten security, restrict religious activity, and hinder citizen activism.⁵

Speaking Out: Uyghurs Punished for Free Speech in Xinjiang

As detailed by the Commission in past Annual Reports,²⁹ Chinese authorities have detained or imprisoned ethnic Uyghurs for various forms of peaceful expression, including non-violent dissent. Such cases include:

□ Tohti Tunyaz, a Uyghur historian living in Japan whom Chinese authorities detained in 1998 while he was visiting the Xinjiang Uyghur Autonomous Region (XUAR) to conduct research. He received an 11-year sentence in 1999 for “stealing state secrets” and “inciting splittism,” based on a list of documents he had collected from official sources during the course of his research, and on a “separatist” book he had allegedly published.³⁰ Abduhelil Zunun, who received a 20-year sentence in November 2001 after translating the Universal Declaration of Human Rights into the Uyghur language.³¹ Abdulghani Memetemin, a journalist sentenced to nine years’ imprisonment in 2003 after

providing information on government repression against Uyghurs to an overseas organization. Authorities

characterized this act as “supplying state secrets to an organization outside the country.”

□Abdulla Jamal, a teacher arrested in 2005 for writing a manuscript that authorities claimed incited separatism.³² Nurmemet Yasin, a writer who received a 10-year sentence in 2005 for “inciting splittism” after he wrote a story about a caged bird who commits suicide rather than live without freedom.³³ □Korash Huseyin, chief editor of the journal that published Yasin’s

story, who received a three-year sentence in 2005 for “dereliction of duty.” Huseyin’s sentence expired in February 2008, and he is presumed to have since been released from prison.³⁴

□Mehbube Ablesh, an employee in the advertising department at the Xinjiang People’s Radio Station, who was fired from her job in August 2008 and detained in apparent connection to her writings on the Internet that were critical of government policies, including bilingual education.³⁵

CIVIL SOCIETY IN XINJIANG

XUAR government policy hinders the growth of civil society in the region. Authorities have banned gatherings of private Islam centered social groups, which had aimed at addressing social problems like drug use and alcoholism.³⁶ Fears of citizen activism have prompted the suppression of locally led political movements, including demonstrations in Hoten district in March led by women protesting repressive policies in the region. ...

The Annual Report of the United States Commission on International Religious Freedom, May 2008 includes the following:

In the XUAR, or Xinjiang, conditions for freedom of religion and belief are particularly poor and the provincial government intensified repression of all religious groups in the province. According to government officials, this repression is justified by its policy to “stamp out terrorism, separatism and religious extremism” in the XUAR. During the last year, Uighur Muslim clerics and students have been detained for various “illegal” religious activities, “illegal religious centers” have been closed, and police continue to confiscate large quantities of “illegal religious publications.” The government continues to limit access to mosques, including the participation of women, children, communist party members, and government employees. All imams in Xinjiang are required to undergo annual political training seminars to retain their licenses, and local security forces monitor imams and other religious leaders. Imams at Uighur mosques are reportedly required to meet monthly with officials from the Religious Affairs Bureau and the Public Security Bureau to receive advice on the content of their sermons. Failure to report to such meetings can result in the imam’s expulsion or detention. Religious leaders and activists who attempt to publicize or criticize human rights abuses in the XUAR have received prolonged prison terms, on charges of “separatism,” “endangering social order,” and “incitement to subvert state power.”

Officials in the XUAR continue to restrict the teaching of Islam to minors. During the Commission’s visit to China, local government officials confirmed that minors were prohibited from participating in any religious activity or instruction before the completion of nine years of compulsory public education. The existence of such a policy contradicts statements made by other Chinese central government officials who claimed that no restrictions exist prohibiting the religious activities of minors. Teaching religion to minors continues to be a criminal offense in the XUAR. Aminan Momixi, a woman in a rural area of Xinjiang, was arrested and detained in August 2005 for holding religious classes for 37 students in her home. Authorities in Xinjiang report that Momixi was released; however, they have failed to account for her whereabouts and U.S. government officials have been refused permission to meet with her. In several localities in Xinjiang, plainclothes police are reportedly stationed outside of mosques to enforce rules forbidding children and government employees from attending services. There are reports that in some areas, individuals under the age of 30 are prohibited from attending mosque. Throughout Xinjiang, teachers, professors, university students, and other government employees are prohibited from engaging in religious activities, such as reciting daily prayers, distributing religious materials, observing Ramadan, and wearing head coverings, and are reportedly subject to fines if they attempt to do so. Such standards are reportedly

enforced more strictly in southern Xinjiang and in other areas where Uighurs account for a higher percentage of the population.

In the past year, authorities in the XUAR introduced regulations to ensure that the government-approved Chinese Patriotic Islamic Association controls all hajj pilgrimages. To fulfill these new regulations, XUAR authorities require Muslims to turn over their passports to local government offices for registration. To retrieve their passports, Muslims are required to submit information regarding their hajj travel plans to ascertain that they did not receive a foreign visa without authorization. Uighur human rights activists outside of China also expressed concern that the new policy may be used to identify and punish Uighurs who travel outside of the XUAR (United States Commission on International Religious Freedom 2008, *Annual Report of the United States Commission on International Religious Freedom*, May, pp.174-175.

The U.S. Department of State report on *International Religious Freedom in China 2008* includes the following:

Section II of the report states:

During the period covered by this report, the Government's respect for religious freedom remained poor, and controls tightened in some areas, including in Tibetan areas, the XUAR, and Beijing.

... In March 2005 a Foreign Ministry spokesperson said the country had no national regulations preventing children from receiving religious instruction but religion should not interfere with public education. However, Article 14 of the Xinjiang Implementing Measures of the Law on the Protection of Minors still states that "parents or other guardians may not permit minors to be engaged in religious activities." Schools in the XUAR reportedly require students to attend mandatory classes on Friday, effectively preventing them from attending Friday prayer at the mosque.

... XUAR authorities continued to restrict Muslim religious activity, sometimes citing counterterrorism as the basis for taking repressive action. In recent years XUAR authorities detained and formally arrested persons engaged in unauthorized religious activities and charged them with a range of offenses, including state security crimes. They often charged religious believers with committing the "three evils" of terrorism, separatism, and extremism. Because authorities often did not distinguish carefully among those involved in peaceful activities in support of independence, "illegal" religious activities, and violent terrorism, it was often difficult to determine whether particular raids, detentions, arrests, or judicial punishments targeted those peacefully seeking political goals, those seeking to worship, or those engaged in violence.

The Government reportedly continued to detain Uighur Muslim citizens for possession of unauthorized religious texts, imprison them for religious activities determined to be "extremist," and prevent them from observing certain sacred religious traditions. Compared to other provinces and autonomous regions, the XUAR government maintained the severest legal restrictions on a child's right to practice religion, and XUAR authorities in a few areas prohibited women, children, CCP members, and government workers from entering mosques. Tight controls on religion in the XUAR reportedly affected followers of other religions as well.

The Government of the XUAR often prohibited public expressions of faith by teachers, professors, and university students, including during Ramadan. Some local officials reportedly called on schools to strengthen propaganda education during Ramadan and put a stop to activities including fasting and professing a religion.

...The Government attempted to restrict Hajj travel to IAC-sponsored Hajj tours... In 2007, foreign media reported that XUAR officials confiscated the passports of more than 2,000 Uighur Muslims in an effort to prevent unauthorized Hajj pilgrimages. Foreign media reported that some Uighur Muslims

were told they would have to pay a deposit of \$6,600 dollars (45,195 RMB) to retrieve their passports for overseas travel.

...Under the RRA and regulations on publishing, religious texts published without authorization, including Bibles and Qur'ans, may be confiscated and unauthorized publishing houses closed. Religious adherents are subject to arrest and imprisonment for illegal publishing. Authorities often confiscated Bibles in raids on house churches. Customs officials continued to monitor the importation of Bibles and other religious materials. In the XUAR, government authorities also at times restricted the buying and selling of the Qu'ran.

...The Government reportedly arrested two Uighur Christian employees of foreign-owned companies that were scrutinized for "illegal religious activities." On October 9, 2007, the Kashgar Municipal Bureau for Ethnic Affairs told Alimujiang Yimiti, a Uighur Christian employed by a British-owned company, that he had violated provisions of the 2005 RRA, the "Explanation of the Regulations on Not Permitting Christians to Engage in House Church Religious Activities" promulgated by the UFWD, and the "Notice on Strengthening Administration Work on Christianity" promulgated by the XUAR Party Committee of the UFWD. In January 2008 Kashgar authorities arrested Yimiti on charges of "engaging in illegal religious activities in the name of business" and preaching Christianity to ethnic Uighurs, according to the NGO. On May 27, 2008, the Kashgar District Intermediate People's Court tried Yimiti on the charge of "endangering national security." According to an NGO report the Government closed Yimiti's company on suspicion of "foreign religious infiltration." The Kashgar court sent his case back to prosecutors due to "insufficient evidence."

According to the NGO, on November 27, 2007, XUAR authorities sentenced another Uighur Christian, Wusiman Yiming, who worked for an American-owned company, to 2 years of reeducation through labor. The owner of the company, an American Christian, was expelled from China and the company was shut down. The Reeducation through Labor Committee that sentenced Wusiman Yiming accused him of "assisting foreigners with illegal religious activities."

...On April 13, 2008, XUAR police took 46 Christians into custody who were worshipping at the home of Ding Zhichun in Shache County, Kashgar, XUAR. Authorities reportedly forced the Christians to confess to illegal worship activities and to study the Government's handbook on religious policy. Forty-four were released following payment of a fine. The Government sentenced two church members to 15 days of administrative detention. Authorities detained nine house church members in March 2008 in Qu County, Sichuan Province, on suspicion of "using an evil cult to obstruct the enforcement of the law."

...The Government sought the forcible return of several Uighur Muslims from other countries, some of whom had reportedly protested limits on the Hajj and encouraged prayer and fasting by fellow Muslims.... According to NGO reports, in July 2007 Pakistan reportedly arrested and forcibly returned to the country Osman Alihan, a Uighur Muslim businessman who participated in protests against Hajj restrictions. That same month the Government of Saudi Arabia also reportedly arrested and forcibly returned Habibulla Ali, a Uighur Muslim who discussed the hajj restrictions with other Uighur Muslims in Saudi Arabia, according to NGO reports.

...On June 23, 2008, media stated that a mosque near Aksu City in the XUAR was demolished. A representative of the World Uighur Congress claimed that the congregation of the mosque was accused of illegally renovating the structure, carrying out illegal religious activities, and illegally storing copies of the Qur'an. A spokesman for the Ministry of Foreign Affairs claimed that the structure was not a mosque (US Department of State 2008, *International Religious Freedom Report for 2008 - China (includes Tibet, Hong Kong, Macau)*).

A report issued in October 2008 by The New York Times stated:

To be a practicing Muslim in the vast autonomous region of northwestern China called Xinjiang is to live under an intricate series of laws and regulations intended to control the spread and practice of Islam, the predominant religion among the Uighurs, a Turkic people uneasy with Chinese rule.

The edicts touch on every facet of a Muslim's way of life. Official versions of the Koran are the only legal ones. Imams may not teach the Koran in private, and studying Arabic is allowed only at special government schools.

Two of Islam's five pillars — the sacred fasting month of Ramadan and the pilgrimage to Mecca called the hajj — are also carefully controlled. Students and government workers are compelled to eat during Ramadan, and the passports of Uighurs have been confiscated across Xinjiang to force them to join government-run hajj tours rather than travel illegally to Mecca on their own.

Government workers are not permitted to practice Islam, which means the slightest sign of devotion, a head scarf on a woman, for example, could lead to a firing.

....

Uighurs are the largest ethnic group in Xinjiang, accounting for 46 percent of the population of 19 million. Many say Han Chinese, the country's dominant ethnic group, discriminate against them based on the most obvious differences between the groups: language and religion.

The New York Times report further states: "Critics say the government is trying to restrict the movements of Uighurs and prevent them from coming into contact with other Muslims, fearing that such exchanges could build a pan-Islamic identity in Xinjiang." And, "The government restrictions are posted inside mosques and elsewhere across Xinjiang. ...officials take great pains to publicize the law prohibiting Muslims from arranging their own trips for the hajj." (Wong, E. 2008, 'Wary of Islam, China Tightens a Vise of Rules',

Country sources indicate that it is likely that Uighurs overseas and in Australia are monitored by the Chinese authorities.

In respect of monitoring in Australia by Chinese authorities DFAT advised in June 2006:

A1. It is likely that Chinese authorities seek to monitor Uighur groups in Australia and obtain information on their membership and supporters (see CX154325 [see below]). In pursuing information, Chinese authorities would not necessarily exclude sources who do not have a political profile. It is therefore conceivable that Chinese authorities would approach Uighur secondary school students to inform on the Chinese Uighur Community in Australia.

A2. Failure to comply with Chinese authorities expectations to provide information could possibly result in repercussions on return to China This could include Chinese authorities harrassing (sic) individuals and/or their family members, (for example including, but not necessarily limited to, creating difficulties in pursuing education or public sector employment opportunities.)

A3. We consider there to be a small likelihood of Chinese authorities learning of individuals' PV applications in the absence of some indiscretion by the applicants. But if this information were revealed, on return to China, failed applicants would be likely to be subject to official scrutiny. In addition to possible consequences listed in paragraph 2, authorities might interview the person and might put the person concerned in administrative detention

(DIAC Country Information Service 2006, *Country Information Service No. 06/29 – CIS Request No 8597: China: Treatment of Uighurs on Return to China*, (sourced from DFAT advice of 28 June 2006), 29 June).

In May 2006, DFAT advice on the return of members of Uighur associations to China included information on the likelihood of Uighurs being monitored in Australia:

A.1. It is not possible to say definitively how Chinese authorities would treat a particular individual who returned to China after being involved in a Uighur group in Australia. **It is likely that the Chinese authorities seek to monitor Uighur groups in Australia and obtain information on their membership and supporters.** On return to China, it is likely that the authorities would at least put such people under surveillance and might detain them for interview.

Whether the person would face more serious consequences could be influenced by whether China perceived the person's activities outside of China as amounting to criminal activities. China regards separatist activities (eg calling for Xinjiang's independence from China) as criminal, regardless of whether the person was in China or in another country when he or she carried out such activities. In determining what constitutes separatist activity, China does not make a significant distinction between non-violent political calls for Xinjiang independence and advocacy of violence (although the latter would likely attract more severe punishment).

If the Chinese authorities establish that the person has been in contact with any of the four East Turkistan organisations which China considers to be terrorist organisations (the East Turkistan Liberation Organisation, the East Turkistan Islamic Movement, the World Uighur Youth Congress and the East Turkistan Information Centre), **it is likely that the Chinese authorities would consider that the individual has been involved in criminal activities.** The use of "East Turkistan" in naming an organisation would be perceived by China as indicating that an organisation has separatist intentions.

Depending on the level of the individual's involvement in Uighur organisations, if on return to China the individual renounced his or her previous political sentiment and promised to cease any political activity, the Chinese authorities might act more leniently – for example, the authorities might interview the person and possibly put him or her in administrative detention (re-education through labour) for a period. On the other hand, if the individual continued to be politically active, he or she would likely face more serious consequences.

A.2. As noted above, the consequences for the individual on return to China would be related to his or her level of involvement with the organisation outside of China, as well as the individual's behaviour on return to China. **The more involved the individual had been in a Uighur organisation outside of China, the more likely that China became aware of the individual's activities** (with repercussions as outlined above)

CLAIMS AND EVIDENCE

20. The Tribunal has before it the Department's file and the Refugee Review Tribunal file relating to the applicants. 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.

21. The applicants appeared before the Tribunal [in] June 2009 to give evidence and present arguments. The Tribunal also received oral evidence from [name deleted in accordance with s.431(2) of the Migration Act as it may identify the applicant], who is a friend of the applicant. The Tribunal hearing was conducted with the assistance of an interpreter in the Uyghur and English languages.
22. The applicants were represented in relation to the review by their registered migration agent. The representative attended the Tribunal hearing. The review applicant was emotional continually throughout the hearing.
23. The review applicant came to Australia [in] April 2006 with her husband and her two daughters (the secondary applicants) on a Class UC, subclass 457 (Business Longstay) visa as a dependant on her husband's 457 visa.
24. The review applicant claimed that they obtained their Chinese passports (the four of them) by paying a bribe of 15,000 Yuan to a distant friend who found someone inside the Government that could approve the passports.
25. The applicant claimed that they were all questioned at the airport for three hours when they were leaving for Australia and that they were told not to get involved in anything odd while in Australia.
26. The applicant said she feared she would be sent to jail, tortured, and possibly even killed if she returns to China because she is a Muslim Uyghur who has engaged in activities in Australia which the Chinese would consider as 'separatist' and/or linked to 'international terrorism.' The applicant claimed that the authorities will not protect her, as they are the persecutors.
27. A detailed submission by the applicant's representative was provided with the protection visa application. In it she outlined the applicant's background, claims, and referred to numerous media and analytical reports which describe persecution of Uyghurs by the Chinese government in China. The applicant's representative argued that the applicant's fear of persecution was due to multiple Convention grounds – i.e. nationality (East Turkistan), political opinion, religious beliefs (Islam) and membership of a particular social group. She said she has suffered so much in China.
28. The applicant claimed that when she was at university she attended political rallies against the government between 1984 and 1986 because Uighurs were not treated as equals, the family planning law in that persons were only permitted to have two children and because of a nearby nuclear plant that was causing health problems for people.
29. The review applicant said that her father who was formerly a lecturer [information deleted: s431(2) but is now retired was abused, tortured and imprisoned during the Cultural Revolution.
30. Her mother was a [occupation deleted: s431(2)] and was also severely abused, tortured and imprisoned during the Cultural Revolution.
31. The applicant claimed that her mother was held in detention for eight months and also that when she (the applicant) became a doctor she was not even permitted to speak her own language (Uyghur) at the hospital she worked at.

32. The applicant said that she started working at the hospital in 1988 for three years and was able to do so because her father paid a bribe of 10,000 Yuan to get a job there and also because her mother worked at the same hospital previously. The authorities kept a record of everything she did at work and at one stage they claimed that she had wrongly diagnosed a person so they locked her up for seven days. She said that she was forced to carry out abortions and make women infertile which is against her religion and because she helped a woman who was five months pregnant she was not paid for three months and was questioned a lot.
33. She had also assisted a Uyghur person who had been shot in the leg during an anti Chinese government event and she was detained for seven days. After that she was forced to do two years of cleaning at low pay.
34. The applicant claimed that she grew up in a family in which the Muslim religion and cultural traditions were strong. She said that many Uyghurs teach their children religion in secret and when a well known elderly doctor was invited to the hospital to practice the applicant invited a few of her friends over so he could teach the children about their religion. The political manager at the hospital found out about that so she was penalised for three months and had to work in a factory as a labourer, received a reduced salary and her annual award of 2000 Yuan was not paid to her. The applicant said the man disappeared after two months and she is now suspicious that that man may have been the person who told the authorities about her activities.
35. The applicant fears returning to China as she believes that she would be arrested at the airport on her arrival and imprisoned, tortured or killed because the Chinese authorities have recently searched her house and confiscated personal property that could cause her to be classed as an enemy of the state.
36. The applicant said that the police raided her house and took away books about the history of the Uyghurs and CDs and they detained the applicant's brother for three days, questioning him about the applicant's activities in Australia but he convinced them that the material did not belong to him. She is not aware where her brother is now. She also claimed that her younger sister had been questioned by the police and that her sister's husband had asked the applicant not to contact them again.
37. Furthermore, while in Australia, the applicant has attended Uyghur events, including the visit to Adelaide by Rabiye Kadeer, the head of World Uyghur Congress, in February 2008 at a rally attended by 500 people. Photographic evidence of the applicant with Ms Kadeer and standing with a group of people with the Uyghur national flag are held on file. The applicant claimed that she attended a mosque weekly in Perth where Uyghur activities are discussed.
38. The applicant was asked why her husband had not applied for protection and she said that they were separated for a while but are now back together and he discouraged her from applying for protection because he believes that when his visa expires in December 2009 the company that he is working for will apply for an extension of his visa for a further four years.
39. The applicant was asked at the hearing what would happen if that visa is not granted to her husband and she said she did not know. The Tribunal said that the applicant must understand that the Tribunal is concerned that her husband was not at the hearing to support her application.

40. The representative said that she too had asked the same question of the applicant and she said that her husband was confident that he could get permanent residency through his employment. The representative said that she had advised the husband of the applicant that he should get advice on his position.
41. The applicant was asked why she conducted a 'Nezir', where people read the Koran in memory of relatives, at the hospital, and wouldn't it be considered provocative by the authorities. The applicant said that it was held for her late father in law and around 30 people attended because her house was too small to hold the service. She said that there were many little halls at the hospital and she felt there was nothing wrong in doing that as the authorities are concerned if people meet to read the Koran in their homes.
42. The applicant was asked why she took 28 months to apply for protection and she answered that she knew nothing about how to go about the process for applying for protection but finally her sister who lives in Australia told her what to do.
43. The applicant was asked what has happened to her when she has been detained and she claimed that she became very scared and started screaming when the police were beating other people so they then beat her with an electronic 'stick' around her left arm and then she passed out.
44. The witness [name deleted: s.431(2)] claimed that she didn't know the applicant in China but met her in Perth at a picnic and when she went home to China [in] July 2008 she was questioned at the airport about a photo the authorities had showing the applicant at the community gathering with Rebiya Kadeer. Asked at the hearing why they would show her the photo the witness said they were asking all Uyghurs because it was just before the Olympic Games and just because she was a Uyghur returning from overseas.
45. The representative said that she had met Rebiya Kadeer and she was informed that there are Han Chinese spies as well as Uyghur spies in Australia and that she is very careful dealing with Uyghur community members.

FINDINGS AND REASONS

46. The applicants travelled to Australia on a passport issued by the relevant authority of PRC. The applicants claim to be nationals of PRC who were born in former East Turkistan, now known as Xinjiang Uyghur Autonomous Region (XUAR) of PRC. The Tribunal accepts that the applicants are nationals of PRC and that they are outside their country of nationality.
47. The Tribunal accepts that the applicant's obtained their Chinese passports by paying a bribe and that they were questioned at the airport when they were leaving for Australia and that they were told not to get involved in anything odd while in Australia.
48. The Tribunal further accepts that the applicant started working in a hospital in 1988 as a doctor and was able to do so because her father paid a bribe. The Tribunal also accepts that the authorities kept a record of everything she did at work and she was held in detention on occasions and also that she was forced to carry out operations that were against her religion and was forced to do cleaning as part of her punishment.

49. The Tribunal also accepts that the applicants house has been raided by the police and also that her younger brother and sister has been questioned by the police about the applicants activities.
50. The Tribunal accepts the applicant's reasons why it took her 28 months after arriving in Australia to apply for protection and the statement by the witness [name deleted: s.431(2)] that she was shown a photo of the applicant by the authorities when she returned to China in July 2008.
51. Based on evidence on file and at hearing the Tribunal accepts that the applicant has participated in activities since arriving in Australia in support of the Uyghur community particularly by attending a visit by Rabiye Kadeer, the head of World Uyghur Congress, in February 2008. Photographic evidence of the applicant with Ms Kadeer and standing with a group of people with the Uyghur national flag are held on file.
52. The Tribunal also accepts that the applicant has, since arriving in Australia, become more aware of her cultural/ethnic and religious identity and has begun to form political opinions about the situation of Uyghur Muslims in XUAR.
53. Critical to the Tribunal's findings is an assessment of whether the applicant engaged in the activities with the Uighur community in Australia for the *sole* purpose of obtaining protection and enhancing his visa application (pursuant to section 91R(3) of the *Migration Act 1958*).
54. However, given the evidence before it, the Tribunal considers that this was not the *sole* reason and therefore the applicant's conduct in Australia is not disregarded, even if strengthening refugee claims may also have been a motivation.
55. The Tribunal is required to determine whether the applicant has a well-founded fear of persecution if she were to return to China and whether there is a real chance that she will suffer serious harm due to: i) her involvement and participation in Australia with the Uyghur community; and ii) as an active Muslim. The applicant has claimed that if she returned to China now or in the reasonably foreseeable future she fears she would face harm from the Chinese authorities (in the form of imprisonment, torture and/or death) because of her ethnicity as Uighur, her religion as Muslim, and her actual and imputed political opinion as an active member of the Uyghur community in Australia.
56. The test for determining well-founded fear which the Tribunal will apply in this case was enunciated by the High Court in *Chan v MIEA* (1989) 169 CLR 379 in which the judges held that 'well-founded fear' involves both a subjective and objective element. That is, the definition will be satisfied if an applicant can show genuine fear founded upon a 'real chance' of persecution for a Convention reason.
57. Having regard to *Chan v MIEA*, the Tribunal finds that country information strongly suggests that if the applicant returned to China now or in the reasonably foreseeable future there is a real chance that she would face persecution from the Chinese authorities for her: imputed political opinion, religion and race.
58. The Tribunal finds that the persecution which the applicant fears clearly involves 'serious harm' as required by paragraph 91R(1)(a) of the *Migration Act 1958* in that it involves a threat to his life or liberty or significant physical harassment or ill-treatment. The Tribunal finds that the applicant's religion, race, and her imputed political opinion regarding the rights

of Uyghurs, are the essential and significant reasons for the persecution she fears, as required by paragraph 91R(1)(a). The Tribunal further finds that the persecution which the applicant fears involves systematic and discriminatory conduct, as required by paragraph 91R(1)(c), in that it is deliberate or intentional and involves selective harassment for convention reasons, namely her religion, imputed political opinion as well as race.

59. In assessing the applicant's claims the Tribunal has given due regard to independent country information regarding the treatment of Uyghurs in China, as well as Uyghurs returning from overseas. The country information indicates that the ability of Uyghurs in China to express their culture and use their language is severely restricted, and any practice of Islam in Xinjiang is tightly controlled. DFAT advice indicates that it is likely that Chinese authorities monitor Uyghur groups in Australia and obtain information about their membership and supporters. It is also apparent from this information that any individual perceived to have been involved with such groups would be subject to surveillance and possibly detention if they return to China. The country information indicates that the Chinese authorities do not appear to make any significant distinction between non-violent political action and advocacy or violence but rather treat all advocates of East Turkistan independence as criminals or members of terrorist organisations.
60. Based on this information the Tribunal finds that the applicant, as a person who has participated in activities related broadly to the Uyghur community in Australia (and therefore perceived to be linked to the East Turkistan movement), would face a real chance of being imputed with a political opinion as a supporter of the East Turkistan separatist cause if she returned to China now or in the reasonably foreseeable future and that she would face a real chance of being detained and questioned by the Chinese authorities for his activities in Australia. The Tribunal finds that such detention, being deprivation of liberty, amounts to serious harm that would constitute persecution for the purposes of the Convention.
61. The Tribunal finds that the applicant is a practicing Muslim. The Tribunal accepts that the applicant's regular attendance at the mosque is an important part of her faith. The Tribunal accepts that if the applicant was to return to China it is unlikely that she could freely practice Islam to the extent that she has in Australia, without attracting the attention and suspicion of the Chinese authorities. If the applicant continued to practice Islam this way the Tribunal finds that there is a real chance that she would face persecution for reasons of her religious practice.
62. In this case the necessity to conceal the applicant's religious and ethnic identity to avoid actual or threatened harm actually suggests that the applicant's fear is well-founded.
63. In terms of protection by the authorities, the country information indicates a lack of commitment or willingness by any state authority to protect Uyghurs against persecution, given that the authorities are the perpetrators of the harm feared.

CONCLUSIONS

64. The Tribunal is satisfied that the first named applicant is a person to whom Australia has protection obligations under the Refugees Convention. Therefore the first named applicant satisfies the criterion set out in s.36(2)(a) for a protection visa and will be entitled to such a visa, provided she satisfies the remaining criteria.

65. The other applicants applied as members of the same family unit as the first named applicant. The Tribunal is satisfied that they are the daughters and are members of the same family unit as the first named applicant for the purposes of s.36(2)(b)(i). The fate of their applications depends on the outcome of the first named applicant's application. As the first named applicant satisfies the criterion set out in s.36(2)(a), it follows that the other applicants will be entitled to protection visas provided they meet the criterion in s.36(2)(b)(ii) and the remaining criteria for the visa.

DECISION

66. The Tribunal remits the matter for reconsideration with the following directions:
- (i) that the first named applicant satisfies s.36(2)(a) of the Migration Act, being a person to whom Australia has protection obligations under the Refugees Convention; and
 - (ii) that the second and third named applicants satisfy s.36(2)(b)(i) of the Migration Act, being members of the same family unit as the first named applicant.

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 *Migration Act 1958*

Sealing Officer's I.D. prrt44