

1105663 [2011] RRTA 779 (13 September 2011)

DECISION RECORD

RRT CASE NUMBER: 1105663

DIAC REFERENCE(S): CLF2010/86663

COUNTRY OF REFERENCE: China (PRC)

TRIBUNAL MEMBER: Gary Ledson

DATE: 13 September 2011

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 China (PRC), arrived in Australia on [date deleted under s.431(2) of the *Migration Act 1958* as this information may identify the applicant] January 2010 and applied to the Department of Immigration and Citizenship for the visa [in] June 2010. The delegate decided to refuse to grant the visa [in] May 2011 and notified the applicant of the decision.
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] June 2011 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, *Applicant S v MIMA* (2004) 217 CLR 387 and *Appellant S395/2002 v MIMA* (2003) 216 CLR 473.
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.
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. The expression 'the protection of that country' in the second limb of Article 1A(2) is concerned with external or diplomatic protection extended to citizens abroad. Internal protection is nevertheless relevant to the first limb of the definition, in particular to whether a fear is well-founded and whether the conduct giving rise to the fear is persecution.

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. The applicant is a male citizen of the PRC who was born in Urumqi, PRC on [date deleted: s.431(2)]. In Form 80 Personal particulars for character assessment the applicant provides further personal details and details of his family. The applicant is single; his parents reside in Urumqi PRC and he has an [age deleted: s.431(2)] brother who also resides in Urumqi.
21. The applicant states that his ethnicity is Uyghur and he is a follower of Islam.
22. The applicant can speak, read and write the Uyghur language and has some skills in the Mandarin and English languages.
23. The applicant has completed 10 years of education in the PRC at the primary and high school levels and has travelled to Australia where he is undertaking the final years of secondary study.
24. Prior to travelling to Australia the applicant resided in Urumqi and had done so since birth. He has provided his residential address in Australia.
25. The applicant travelled to Australia on a valid PRC passport issued to him [in] August 2008 and he entered Australia [in] January 2010 on a Subclass 571 Schools Sector visa that had been granted to him [in] November 2009.

Protection Visa Application

26. The applicant lodged an application for a Protection (Class XA) visa [in] June 2010.
27. On Form 866C the applicant has indicated at Question 41 that he is seeking protection in Australia so that he does not have to go back to China.
28. In response to Questions 42 to 46 the applicant has provided a Statutory Declaration held in DIAC file CLF2010/86663, folios 33 – 39.
29. [In] February 2011 the applicant was invited to attend an interview with a delegate [in] March 2011 to provide additional information and evidence in respect of his claims for

protection. The applicant attended the interview and a recording of the interview is held in CLF2010/86663, between folios 97 and 98. The Tribunal has reviewed this audio file.

30. The delegate has summarised the applicant's claims as follows:

He has been persecuted by the Han Chinese because he has been denied access to his language and culture and claims that he has been denied the ability to practice his religion at school.

He claims that his family has been subjected to persecution by the Chinese authorities for generations and that they have been forced into labour camps because of their Uighur ethnicity. The applicant claims that he will be targeted by Chinese authorities if he was to return to the PRC as he attended Uighur demonstrations in Urumqi on the 5 July 2009,

The applicant arrived in Australia after his parents sent him here to study. While departing the PRC for Australia, the applicant claims he was taken into a separate room at the Guangzhou airport and questioned by Chinese authorities regarding the 5 July 2009 Uighur demonstrations. The applicant claims that his luggage was searched and that he was asked about video footage or photos he may have been carrying with him. He was permitted to board the plane and continue his journey to Australia.

Primary Decision

31. [In] May 2011 the delegate refused the grant of a Protection Visa.
32. Having considered the applicant's claims the delegate found that the Convention grounds of race, nationality, religion and political opinion are the essential and significant reasons for the harm feared. The delegate further found that the harm feared by the applicant involves serious harm as outlined in s.91R of the Migration Act.
33. The delegate considered each of these grounds separately.
34. On the Convention ground of race the delegate concluded on the basis of the applicant's own evidence and independent country information that whilst the applicant was unable to complete his education in his Uyghur language that this did not amount to persecution; that there was no corroborative evidence of his parents being exiled from Urumqi; the applicant and members of his family have had access to education, his parents have not suffered economic hardship and earn an income in excess of the average in the PRC.
35. On the Convention ground of religion the delegate noted inconsistencies and implausibility in the applicant's evidence relating to his attendance at the mosque in Urumqi given that he was under the age of 18. The delegate did not accept that he would be disadvantaged by such restrictions if he were to return to the PRC as he has now attained the age of 18. In relation to his claimed attendance at the local mosque in [suburb deleted: s.431(2)] the delegate did not accept that he had attended each day as he had claimed.
36. In relation to the riots in Urumqi on 5 July 2009 the applicant made claims of his involvement and when demonstrators had been shot at. He fled to his home after seeing dead bodies on the ground. The following day Han Chinese marched toward his neighbourhood and his family were forced to climb on their roof for protection. He claims Uyghur who tried to stop the mob were beaten and killed. The applicant claims that he was detained [in] July 2009 on suspicion of his involvement in the riots but was released. He was not arrested or

detained. The applicant had not experienced any difficulty after the riots during the 7 months that followed before he travelled to Australia. The delegate concluded on the evidence that the applicant is unlikely to experience harm on the basis of his claimed involvement in the riots.

37. The delegate addressed the applicant's claim that he was detained at Guangzhou airport by customs officers who searched his luggage for material related to the riots. He was questioned but allowed to depart legally. The delegate did not attribute any significance to this claim suggesting that the applicant was inexperienced in security procedures in place at airports. The delegate noted that the applicant's ability to depart the PRC indicated that that he was not of interest to the authorities.
38. The delegate considered the applicant's activities since being in Australia noting his involvement with the Australian Uyghur community including attendance at a mosque on Fridays, community soccer events, being photographed in front of the East Kurdistan national flag. He claims that the PRC government have spies in Australia and reported his involvement in separatist activities. The delegate concluded that if the applicant is imputed with a political opinion it would be due to his ethnicity and not his involvement in activities whilst in Australia.
39. Having regard to all of the claims made by the applicant the delegate concluded that the applicant does not have a profile of interest to the authorities in the PRC that would lead to his persecution. The delegate concluded that the applicant's fear of harm in China for a Convention reason is not well-founded.

Application for Review

40. [In] June 2011 the applicant lodged a valid application for review.
41. The matter was constituted to the Presiding Member [in] June 2011.
42. [In] July 2011 the Tribunal wrote to the applicant advising that it had considered the material before it but was unable to make a favourable decision on that information alone. As a consequence the applicant was invited to attend a hearing [in] September 2011 at 10.00am to present oral evidence and further information about his claims.
43. [In] August 2011 the applicant's representative lodged a submission (by facsimile) on behalf of the applicant and in support of his claims. The original of the submission was received at the Tribunal [in] August 2011, MRT File 1105663, folios 28 to 40 and folios 41 to 53. The submission incorporated details of the applicant's claims, country information regarding the circumstances of Uyghur in the PRC, a statutory declaration made by the applicant in response to the issues raised by the delegate in the decision record, 2 letters of support and photographs of the applicant at a World Uyghur Congress and at demonstrations outside the [Building 1].

Hearing

44. The applicant appeared before the Tribunal [in] September 2011 to give evidence and present arguments. The Tribunal hearing was conducted with the assistance of an interpreter in the Uyghur and English languages.

45. The applicant was represented in relation to the review by his registered migration agent, who attended the hearing.

Oral evidence of the applicant – [Name deleted: s.431(2)]

46. The applicant confirmed that he believed that all of the information he had provided in his visa application and submissions to be true and correct and that there were no errors of which he was aware.
47. The applicant confirmed his personal details including his full name and that he is not known by any other name, date and place of birth, current residential address, country of citizenship, and that he has no legal right to live in another country. The applicant produced his passport that was issued [in] August 2008 and valid to [a date in] August 2018. He told the Tribunal that his mother, father and younger brother live in Urumqi. His father has worked as a bank teller for about 20 years and his mother is a housewife. The applicant's younger brother is a primary school student.
48. The applicant told the Tribunal that he was seeking protection from Australia because it is a free country and as a Uyghur in China he had no freedom to express his beliefs. He said Uyghur had no rights and faced significant discrimination as a consequence of their ethnicity. He said that there was a lot of tension in the Uyghur community. The applicant said that he was unable to access protection in China because of his Uyghur ethnicity.
49. The applicant told the Tribunal that in 2003 the Chinese government decreed that all teaching should be in Mandarin. The applicant said that this placed him at a significant disadvantage as all of his schooling up to that time had been in his Uyghur tongue. He said that this discrimination meant that his opportunity to follow further study was severely hampered. He said that as a Muslim he was prevented from attending the mosque until he was 18. He said that such restriction did not exist in Australia. He said that mosques in China had video cameras which monitored those attending the mosque. The applicant described the discrimination experienced by his grandparents who were exiled from Urumqi during the Cultural Revolution.
50. The applicant described his involvement in the riots of 5 July 2009. He said that he became aware through the internet that a peaceful protest had been organised to protest the deaths of young Uyghur workers in Guangzhou a few days earlier. The applicant said that his parents did not give their permission for him to attend the protest but he decided to attend anyway without their knowledge. He said that the protesters gathered in the people's square. He said that the police attended and they had blocked off the streets into the square. He said the police tried to break up the demonstration and they started beating people. He said that a number of shots were fired by the police and there were many people killed. He said that he ran away and escaped down a narrow street that had not been blocked off.
51. The applicant said that after the protest he had been scared and he remained at home. He said that [in] July 2009 the police were pursuing young Uyghur boys going from door to door looking for those who had been involved in the protest. He said that when the police came to his home he was taken away by the police. He had been taken to the police station and questioned about his whereabouts on the day of the protest. The applicant told the police that on the day of the protest he was sitting an examination at school. The police believed him and he was allowed to leave. The applicant said that during his detention he was abused and beaten.

52. The applicant said that because of the police threats against further protests and that he would be under surveillance he decided not to get involved in any more protests and he only left home to go to school. As a consequence he had no further difficulty from the authorities before he departed for Australia.
53. The applicant told the Tribunal that his parents had decided that he should leave China and sought assistance through a friend who had offered to assist him to apply to study in Australia. The businessman had helped him apply for a visa and his passport as it was very difficult for Uyghur to apply.
54. The applicant departed China from Guangzhou airport. He said that he was taken into a private room by officials and they took his passport. His luggage was thoroughly searched. The applicant said he was questioned about his involvement in the riots on 5 July 2009. The applicant believed that he had been singled out because he is Uyghur.
55. The applicant told the Tribunal about his educational experience in Australia. The applicant initially attended an English language school to improve his language skills so that he can undertake an electrician course at [college deleted: s.431(2)]. The applicant told the Tribunal that he is currently undertaking Year 11 at [school deleted: s.431(2)].
56. The Tribunal then asked the applicant to outline the activities he had been involved in since he has been in Australia.
57. He said that he had attended a football match in November 2010 to celebrate the national day of East Turkestan. In March 2011 he has attended a democracy and human rights training workshop with Rebiya Kadeer the leader of the World Uyghur Congress (WUC). Also in attendance was the second in charge of the WUC, Alin Seytoff. He said that [in] July 2011 he had attended a protest on the anniversary of the Urumqi riots outside [Building 1] in Melbourne.
58. The applicant said that he became involved in these activities because he supported the rights of Uyghur. He said that he never thought about openly expressing his support for the Uyghur cause in the past in such a manner because such open expression is not even considered in China. He said that many Uyghur ex-patriots did not want to get involved in such activities as it is well known that there are many Chinese spies who report on the activities of Uyghur. The applicant said that any activity such as the congress or the protest outside [Building 1] could be reported back to Chinese authorities as the activities of groups such as Uyghur are monitored. He said that anyone can be a spy and even Uyghur have informed the Chinese authorities on other Uyghur.
59. The applicant said that he had become involved in these activities because back in China he was prevented from openly supporting the Uyghur cause for fear of the authorities. He said that the attendance at the congress enabled him to meet in person the key leaders of the Uyghur movement. The applicant told the Tribunal that he had not participated in these activities to enhance his claims for protection. He said that he had never thought about participating in activities for this reason and he had only done so because of his commitment to the Uyghur cause and he believed that he should do something to help.
60. The applicant last spoke to his parents in July 2011 and his father spoke to him of an incident in Kashgar where there had been significant unrest and tension. His father had told the applicant not to return to China because it was known that he had been involved in anti-

regime activities in Australia. The applicant said that it was difficult to speak openly with his father as it was feared that phones were being monitored.

61. The applicant explained that there was a gap between when he first arrived in Australia and when he lodged his protection visa application because he was not aware that this was an option available to him. He said that after speaking to other Uyghur he became aware that this was possible and it was then that he began looking for a representative to assist his application.
62. The applicant said that he feared returning to China because he believed that he would be killed because the Chinese authorities would consider him to be a terrorist. His father had told him not to return to China, that the Chinese authorities knew of his activities in Australia and he feared if the applicant did return he would never see him again. The applicant said that there would be no life for him in China. The applicant said that the authorities attended his parents' home once a week questioning them about his activities in Australia. He believed that the Chinese authorities believed he is a terrorist or separatist.
63. The applicant did not believe it would be possible for him to relocate to another part of China to avoid harm. He said that in fact because he believed that the authorities were aware of his activities in Australia he would be arrested at the airport and be not seen again.
64. The representative addressed a number of issues that had arisen during the hearing.
65. Firstly the nature of the applicant's activities and whether these had been done in bad faith. It was suggested that the applicant had a political awakening when he attended the protest in Urumqi on 5 July 2009. It is accepted that this is a minor involvement however it should be considered relative to his age. Life for Uyghur is restricted and given the threats made to him by police not to be involved in any activities and that he was being monitored it was not surprising that he was unable to participate in any further activities in China before his departure to Australia.
66. When the applicant came to Australia he had the freedom to investigate and participate in activities from which he had been dissuaded by the Chinese police was genuinely interest in the plight of Uyghur. It was submitted that it was this freedom that was the applicant's motivation to participate in these activities and the activities were not undertaken in order to strengthen his protection visa claim.
67. The representative addressed the delay in the application and noted that the applicant had initially approached her organisation in early April 2010 which was only 2½ months after he had arrived in Australia and considered that he had commenced his application process as early as practicable.
68. The Tribunal acknowledged the country information contained in the representative's submission and indicated that it confirmed the information already before the Tribunal that indicated that Uyghur, particularly young male Uyghur were subject to significant discrimination and adverse attention of the Chinese authorities.
69. The representative contended that if his activities are not considered pursuant to s.91R(3) then the applicant's claims should be assessed on the basis of his ethnicity and religion even if it was not accepted that he was politically involved.

70. The representative indicated that the applicant had suffered previous harm through his experience in his schooling and his disadvantage on account of his education having to undertaken in Mandarin. The applicant had been detained in 2009 and only released after convincing the police that he had not participated in the Urumqi riots and he had been threatened not to be involved in future activities.
71. If the applicant was required to return to China and if he were able to get through the airport without being arrested there would be no way that he would be able to freely express his political beliefs in China. If the applicant were to express his beliefs publically, the country information indicates that he would face imprisonment for advocating Uyghur human rights. The representative submitted that the evidence from the applicant's parents is that the authorities are aware that he is currently involved in separatist activities through the Chinese spy network and that he is currently of adverse interest to the Chinese authorities and there was little doubt that he would be detained or arrested as a consequence.
72. The representative submitted that, in the alternative, the applicant faces persecution for his reason that he is Uyghur and he is Muslim and the imputed or actual anti-government opinion that arises as a result.
73. In respect to relocation it is submitted that Uyghur suffer discrimination throughout China regardless where the applicant might relocate. The system of household registration requirement means that the applicant is prevented from freely moving around China. These circumstances mean that relocation is not reasonable.
74. In conclusion it was submitted that the applicant meets the definition of a refugee and if he were to return to China there is a real chance that he would face persecution for the Convention reasons identified and articulated in the submission accompanying the application for review.
75. In conclusion the applicant told the Tribunal that the day before had been the end of Ramadan which is a time when Muslim families get together. As a son he was unable to wish his family a happy Eid or to be with them on this holy day. He said that phones are monitored in China and because of his activities his parents may suffer adverse attention from the authorities.

COUNTRY INFORMATION

76. The Tribunal has had regard to the country information submitted in support of the protection visa application and referred to in the primary decision. The Tribunal also has regard to the country information submitted by the representative as part of the application for review.
77. The Tribunal notes in particular the following account of the July 2009 riots in Urumqi and their aftermath, published on 11 March 2010 in the 2009 United States State Department (USSD) report on human rights in China, and available at <http://www.state.gov/g/drl/rls/hrrpt/2009/eap/135989.htm>:

On July 5, riots broke out in Urumqi, the provincial capital of Xinjiang, after police used force to break up a demonstration reportedly composed mostly of Uighur university students who protested the killing of Uighur migrant workers by Han co-workers in Guangdong Province. Violence erupted leaving approximately 200 people dead and 1,700 injured. According to official sources, most of the dead were Han Chinese. On July 7 and September 4, groups of Han Chinese engaged in retaliatory violence, resulting in more deaths. At year's

end Urumqi remained under a heavy police presence and most Internet and international phone communication remained cut off.

According to official media reports, 197 persons died and 1,700 were injured during the July 5 rioting in Urumqi. A second wave of riots, on a smaller scale, occurred on July 7. On September 25, charges were brought against 21 of the more than 200 persons facing prosecution in connection with the riots. On November 9, eight Uighurs and one Han were executed without due process for crimes committed during July riots. At year's end 22 persons had been sentenced to death; five others reportedly received suspended death sentences. Of these, one was reported to be ethnically Han Chinese and the rest were Uighurs.

According to RFA reports, police detained Uighur Shohret Tursun in Urumqi during the July 5 riots. In September police returned his disfigured body to family members and ordered them to bury him; the family refused to do so without an explanation of his death from the police. On September 20, the police surrounded the family home and forced the family to bury the body without an autopsy.

The government's policy to encourage Han Chinese migration to move into minority areas significantly increased the population of Han in the XUAR. In recent decades the Han-Uighur ratio in the capital of Urumqi has shifted from 20 to 80 to 80 to 20 and continued to be a deep source of Uighur resentment. Discriminatory hiring practices gave preference to Han and discouraged job prospects for ethnic minorities. According to 2005 statistics published by XUAR officials, eight million of the XUAR's 20 million official residents were Han. Hui, Kazakh, Kyrgyz, Uighur, and other ethnic minorities comprised approximately 12 million XUAR residents. Official statistics understated the Han population, because they did not count the tens of thousands of Han Chinese who were long-term "temporary workers." While the government continued to promote Han migration into the XUAR and fill local jobs with migrant labor, overseas human rights organizations reported that local officials under direction from higher levels of government deceived and pressured young Uighur women to participate in a government-sponsored labor transfer program.

The XUAR government took measures to dilute expressions of Uighur identity, including measures to reduce education in ethnic minority languages in XUAR schools and to institute language requirements that disadvantaged ethnic minority teachers. The government continued to apply policies that prioritized Mandarin Chinese for instruction in school, thereby reducing or eliminating ethnic-language instruction. Graduates of minority language schools typically needed intensive Chinese study before they could handle Chinese-language course work at a university. The dominant position of standard Chinese in government, commerce, and academia put graduates of minority-language schools who lacked standard Chinese proficiency at a disadvantage.

During the year authorities increased repression in the XUAR and targeted the region's ethnic Uighur population. On July 5, a Uighur demonstration was forcefully suppressed by police, and outbreaks in violence throughout the region following the crackdown drew an international spotlight on longstanding ethnic tensions in the XUAR and Uighurs' grievances toward government policies that undermined the protection of their rights. In late 2008 and during the first half of the year, officials in XUAR reiterated 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 reeducation campaign.

It was sometimes difficult to determine whether raids, detentions, and judicial punishments directed at individuals or organizations suspected of promoting the "three forces" were instead actually used to target those peacefully seeking to express their political or religious views. The government continued to repress Uighurs expressing peaceful political dissent and independent Muslim religious leaders, often citing counterterrorism as the reason for taking action.

Uighurs were sentenced to long prison terms, and in some cases executed, on charges of separatism. The government reportedly sought the repatriation of Uighurs living outside the country, where they faced the risk of persecution.

Freedom of assembly was severely limited during the year in the XUAR. On September 8, the government announced it would demolish three buildings owned by the family of exiled Uighur leader Rebiya Kadeer, president of the World Uighur Conference. The government blamed Kadeer, a Uighur businesswoman in exile, for orchestrating the July 5 riots in Urumqi.

Possession of publications or audiovisual materials discussing independence or other sensitive subjects was not permitted. Uighurs who remained in prison at year's end for their peaceful expression of ideas the government found objectionable included Mehbube Ablesh, Abdulla Jamal, Tohti Tunyaz, Adduhelil Zunun, Abdulghani Memetemin, and Nurmuhemmet Yasin.

During the year XUAR officials defended the campaign against separatism and other emergency measures taken as necessary to maintain public order and continued to use the threat of violence as justification for extreme security measures directed at the local population and visiting foreigners.

In September state media reported that XUAR authorities approved the Information Promotion Bill, making it a criminal offense to discuss separatism on the Internet and prohibiting use of the Internet in any way that undermines national unity. The bill further bans inciting ethnic separatism or harming social stability. The bill requires Internet service providers and network operators to set up monitoring systems or strengthen existing ones and report transgressions of the law.

Han control of the region's political and economic institutions also contributed to heightened tension. Although government policies brought economic improvements to the XUAR, Han residents received a disproportionate share of the benefits.

78. The abovementioned USSD report also notes, with respect to human rights abuses in China:

The government's human rights record remained poor and worsened in some areas. During the year the government increased the severe cultural and religious repression of ethnic minorities in the Xinjiang Uighur Autonomous Region (XUAR). Tibetan areas remained under tight government controls. ... As in previous years, citizens did not have the right to change their government. Other serious human rights abuses included extrajudicial killings, executions without due process, torture and coerced confessions of prisoners, and the use of forced labor, including prison labor. The government continued to monitor, harass, detain, arrest, and imprison journalists, writers, dissidents, activists, petitioners, and defense lawyers and their families, many of whom sought to exercise their rights under the law. A lack of due process and restrictions on lawyers, particularly human rights and public interest lawyers, had serious consequences for defendants who were imprisoned or executed following proceedings that fell short of international standards. The party and state exercised strict political control of courts and judges, conducted closed trials, and continued the use of administrative detention. Prolonged illegal detentions at unofficial holding facilities, known as black jails, were widespread.

79. In the UK Border Agency Country of Origin Report, China, 24 August 2011 reports on human rights in XUAR:

Human rights in Xinjiang (East Turkestan)

20.06 In April 2005 Human Rights Watch published a report entitled, *Devastating Blows: Religious Repression of Uighurs in Xinjiang*. This report stated, "Xinjiang leads the nation in executions for state security 'crimes', with over 200 people sentenced to

death since 1997.” [7a] (p8) The report also noted, “A rare documentary source obtained by Human Rights Watch, a scholarly paper from a Ministry of Justice compendium, shows that in 2001 9.2 percent of convicted Uighurs – one out of eleven – were serving prison time for alleged ‘state security crimes’. This probably amounts to more than 1,000 Uighur prisoners.”

20.07 In its *Annual Report 2011* (events of 2010), published on 13 May 2011, Amnesty International noted, “Security measures were tightened in the XUAR, including revision of the Comprehensive Management of Social Order, effective 1 February. This renewed the authorities’ commitment to ‘strike hard’ against crime in the region, in particular crimes of ‘endangering state security’. The authorities announced that 376 such cases had been tried in 2010 in the XUAR, up from 268 in 2008.”

20.08 The USSD Report 2010 noted:

“During the year [2010] authorities continued to implement repressive policies in the XUAR and targeted the region’s ethnic Uighur population. Officials in the XUAR continued 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 antiseparatist reeducation campaign. It was sometimes difficult to determine whether raids, detentions, and judicial punishments directed at individuals or organizations suspected of promoting the three forces were actually used to target those peacefully seeking to express their political or religious views. The government continued to repress Uighurs expressing peaceful political dissent and independent Muslim religious leaders, often citing counterterrorism as the reason for taking action. Uighurs continued to be sentenced to long prison terms, and in some cases executed, on charges of separatism and endangering state security. The government reportedly sought the repatriation of Uighurs outside the country, who faced the risk of persecution if repatriated. Freedom of assembly was severely limited during the year in the XUAR.”

20.09 The same source recorded:

“Possession of publications or audiovisual materials discussing independence or other sensitive subjects was not permitted... During the year XUAR and national-level officials defended the campaign against the three forces of religious extremism, splittism, and terrorism and other emergency measures taken as necessary to maintain public order. Officials continued to use the threat of violence as justification for extreme security measures directed at the local population, journalists, and visiting foreigners. In September 2009 state media reported that XUAR authorities approved the Information Promotion Bill, making it a criminal offense to discuss separatism on the Internet and prohibiting use of the Internet in any way that undermines national unity. The bill further bans inciting ethnic separatism or harming social stability. The bill requires Internet service providers and network operators to set up monitoring systems or strengthen existing ones and report transgressions of the law. Han control of the region’s political and economic institutions also contributed to heightened tension. Although government policies continued to allot economic investment in, and brought economic improvements to the XUAR, Han residents received a disproportionate share of the benefits.”

20.10 In July and August 2011 China accused Muslim Uighur separatists in Xinjiang province of attacks on a police station in Hotan and a restaurant and passers-by in Kashgar that left dozens dead. Police killed seven Uighurs suspected of being behind the attacks in Kashgar. (BBC News, *China Timeline*, 2 August 2011) [9a] On 5 August 2011 *The Guardian* reported, “China has ordered a sweeping security clampdown in the western region of

Xinjiang following recent deadly attacks blamed on Muslim ethnic Uighur militants, with Beijing vowing ‘no mercy’ toward anyone pursuing violence or separatism”.

80. Also from the UK Border Agency Country of Origin Information Report, 24 August 2011 the following refers to the monitoring of Uyghur activities abroad:

Monitoring of activists abroad

20.27 On 24 November 2009 *Spiegel Online* reported:

“German investigators on Tuesday morning [24 November] searched the residences of four suspected Chinese spies. According to information obtained by Spiegel Online, the suspects had been spying on Munich’s Uighur community on orders from the Chinese government. Several hundred Uighurs live in exile in Munich, and many of them are politically active. Munich has one of the world’s largest exile communities of Uighurs and the World Uighur Congress is based there. The government in Beijing is interested in everything the Uighurs think, talk about or plan. The Uighurs are one of the ‘five poisons’ the Communist government is fighting against with all the means at its disposal. The Federal Prosecutor’s Office has discovered that the Chinese government has been recruiting a number of informants to spy on Munich’s Uighur community. Investigators believe that the suspected group of agents is controlled from within the Munich consulate by a consul who has been observed conducting conspirative meetings with the alleged agents. The consul himself has diplomatic immunity from prosecution in Germany but prosecutors are investigating four of his alleged informers... The spying activities in Munich are closely coordinated with Beijing, with the consul reporting directly to the homeland... Two years ago, the Chinese diplomat Ji Wumin, who also lived in Munich, had to leave the country after investigators observed him meeting around a dozen times with spies who provided him with information about the Uighur community. Ji left before he could be expelled.” [56a]

20.28 On 9 March 2010 the BBC reported:

“China’s foreign ministry has denied that the country has been spying on political refugees living in Sweden. The reaction comes after a Stockholm court jailed a Uighur refugee for 16 months for passing on information about other Uighurs to a Chinese agent... Babur Maihesuti, 62, was found guilty on Monday [8 March] of collecting information about other Uighurs and passing it on to a Chinese spy posing as a diplomat and journalist. The court said the case was ‘especially serious because the intelligence served a superpower which does not have full respect for human rights’. It said the verdict was based on ‘strong’ prosecution evidence, including wire-tapped telephone conversations and interviews with Uighur witnesses.”

81. This Tribunal, in a separate matter took evidence from Alin Seytoff, who at the time was the vice-president of the Uyghur America Association, on the circumstances of Uyghur refugees who have returned to China as failed asylum seekers - RRT 1005823 dated 31 August 2010, at [68] – [73]:

Mr Seytoff has worked closely with Uygur people over the past ten years and he claimed some expertise on the situation of Uygur in general and specifically about the circumstances of Uygur who have been returned to the PRC as failed asylum seekers.

He reminded the Tribunal of a situation in which 20 Uygurs were deported back to the PRC from Cambodia in December 2009. Some of them had been charged as

terrorists. He said that nothing has been heard of these people since. Mr Seytoff stated that once a Uygur was deported they disappear. He said that there were many cases from Pakistan, Saudi Arabia and Egypt when Uygur had been deported back to the PRC and it is very difficult to find out about them or locate them.

Mr Seytoff told the Tribunal that the PRC government considered that applying for a protection visa was considered a crime for Uygurs. It is his experience that returnees are prosecuted by the PRC authorities.

Mr Seytoff informed the Tribunal that the United States and Canada did not ever return Uygurs to the PRC. He said that he was not aware of any Uygur being deported from the UK.

Mr Setoff referred to a report by the Uygur Human Rights Project about the incident on Urumqi on 5 July 2009 called 'Can You Hear Us' which contains interviews with Uygurs about their involvement in the protest and the response of the Chinese authorities. He referred to a Human Rights report that documents the disappearance of Uygur. Mr Seytoff provided web addresses for both of the documents. Amnesty International had also released a report regarding the specific issues of Uygur in July 2010.

When asked to comment on the likely circumstances of the applicant if he were returned to the PRC, Mr Seytoff said that he would be detained and severely questioned about his activities whilst in Australia and why he sought protection. Mr Seytoff told the Tribunal that the PRC authorities would be aware of the applicant's activities whilst he was in Australia. He said that it was easy for the PRC authorities to track the activities of Uygurs overseas through its network of spies which he regretted included some Uygurs.

FINDINGS AND REASONS

82. The applicant claims to be a national of the PRC and ethnic Uygur who arrived in Australia on a valid passport issued by the PRC. The Tribunal accepts, on the evidence before it, that the applicant is a citizen of the PRC and, for the purposes of the Convention, has assessed his claims against the PRC as his country of nationality.
83. The Tribunal observes that the mere fact that a person claims fear of persecution for a particular reason does not establish either the genuineness of the asserted fear or that it is "well-founded" or that it is for the reason claimed. It remains for the applicant to satisfy the Tribunal that he satisfies all of the required statutory elements. Although the concept of onus of proof is not appropriate to administrative inquiries and decision-making, the relevant facts of the individual case will have to be supplied by the applicant himself, in as much detail as is necessary to enable the examiner to establish the relevant facts. A decision-maker is not required to make the applicant's case for him. Nor is the Tribunal required to accept uncritically any and all the allegations made by an applicant. (*MIEA v Guo & Anor* (1997) 191 CLR 559 at 596, *Nagalingam v MILGEA* (1992) 38 FCR 191, *Prasad v MIEA* (1985) 6 FCR 155 at 169 70.)
84. In determining whether an applicant is entitled to protection in Australia the Tribunal must first make findings of fact on the claims he has made. This may involve an assessment of the applicant's credibility and, in doing so, the Tribunal is aware of the need and importance of being sensitive to the difficulties asylum seekers often face. Accordingly, the Tribunal notes

that the benefit of the doubt should be given to asylum seekers who are generally credible, but unable to substantiate all of their claims.

85. On the other hand, as stated previously, the Tribunal is not required to accept uncritically any or all allegations made by an applicant. In addition, the Tribunal is not required to have rebutting evidence available to it before it can find that a particular factual assertion by an applicant has not been established. Nor is the Tribunal obliged to accept claims that are inconsistent with the independent evidence regarding the situation in the applicant's country of nationality (See *Randhawa v MILGEA* (1994) 52 FCR 437 at 451, per Beaumont J; *Selvadurai v MIEA & Anor* (1994) 34 ALD 347 at 348 per Heerey J and *Kopalapillai v MIMA* (1998) 86 FCR 547). On the other hand, if the Tribunal makes an adverse finding in relation to a material claim made by an applicant, but is unable to make that finding with confidence, it must proceed to assess the claim on the basis that the claim might possibly be true (See *MIMA v Rajalingam* (1999) 93 FCR 220).

The Applicant's Claims

86. The applicant's claims are clearly articulated in his representatives' submission lodged with the Tribunal [in] August 2011 and are as follows:

The applicant fears that if he is returned to China, he will suffer persecution including arbitrary arrest, detention, torture, serious physical harm and death at the hands of the Chinese authorities on account of, either separately or cumulatively:

- i. His actual and imputed political opinion against the Chinese government and its treatment of the Uyghur minority resulting from his:
 - (a) his identity as a Uyghur Muslim; and/or
 - (b) his profile as a young Uyghur male; and/or
 - (c) his participation in the 05 July 2009 demonstration in Urumqi against the killing of Uyghur toy factory workers in Guangzhou; and/or
 - (d) his activities in supporting Uighur rights in Australia.
 - ii. His membership of the particular social group of 'young Uyghur males'; and/or
 - iii. His Uyghur ethnicity; and/or
 - iv. His East Turkistan nationality; and/or
 - v. His Muslim religion.
87. In relation to his activities in Australia the applicant claims that the Chinese authorities have become aware of these activities within the Uyghur community through the spy network that exists to report anti-government or separatist activities of Uyghur and other minority groups that may be seen to oppose them. In particular the applicant has participated in a Human Rights Congress at which Rebiya Kadeer and Alin Seytoff were in attendance and has participated in a protest outside [Building 1] in Melbourne [in] July 2011 to mark the Urumqi riots that occurred on 5 July 2009. The applicant claims that his parents' family home has been visited by Chinese authorities who report these activities to his parents and accuse him of being a terrorist or separatist on the basis of these activities.
88. The applicant fears that if he were to return to China he will be abused, detained and imprisoned. He believes that he would be killed simply because he is Uyghur.

Assessment of the Applicant's Claims

89. The Tribunal does not dispute the claims made by the applicant in respect of the treatment of Uyghur by the Chinese authorities. All of the country information accessed by the Tribunal

confirms that the circumstances for Uyghur are tenuous at the least, particularly if they challenge the manner in which they are treated by the Chinese authorities.

90. In considering the applicant's claims overall the Tribunal finds that the essential and significant reasons for the harm feared by the applicant is for one or more than one of the Convention reasons of his race (ethnicity), his religion, his imputed or actual political opinion and for his claimed nationality.
91. The applicant fears that if he were returned to the China he would certainly be detained, arrested, imprisoned or be killed. The Tribunal considers that each of these elements, taken either singularly or in combination, could amount to serious harm as contemplated by s.91R.
92. The Tribunal considers that the applicant's claims refer to two distinct periods - his life until he departed the PRC and then his period of time since he arrived in Australia.
93. In respect of the applicant's experience prior to travelling to Australia the Tribunal accepts that the applicant has suffered discrimination during his education and the differential treatment he suffered at the hands of his teachers; the Tribunal accepts that the change in the language of instruction in 2003 placed the applicant at a substantial disadvantage compared to his Han Chinese peers; the Tribunal accepts that the applicant suffered restrictions in the practice of his Muslim religion.
94. The Tribunal accepts that the applicant participated in the riots in Urumqi on 5 July 2009. The Tribunal accepts that the applicant was arbitrarily detained by the police during a house to house sweep of Uyghur homes three days later and questioned about his involvement in the riots. The Tribunal accepts that during this detention the applicant was abused and threatened by the police and warned not to involve himself in any future anti- government protests. The Tribunal accepts that the applicant believed, when during his detention he was told by police, that he would be subject to surveillance in the future.
95. In respect of these claims and having regard to the country information cited above that details the treatment of Uyghur by the Chinese authorities, the Tribunal is satisfied that this treatment of the applicant is for reason of, either singularly or in combination, his race (ethnicity), his religion, his nationality or his actual or imputed political opinion.
96. With respect to the applicant's time in Australia the Tribunal accepts that the applicant has been involved in a number of activities that have been organised by Uyghur groups or individuals. The evidence for this is indisputable with the applicant providing photographs of his involvement in a World Congress of Uyghur held in Melbourne in March 2011 and [in] July 2011 his participation in a demonstration outside [Building 1] in Melbourne to mark the anniversary of the Urumqi riots in 2009. The Tribunal notes that the applicant has provided photographs taken with two key international leaders and advocates of Uyghur human rights – Rebiya Kadeer and Alin Seytoff. The Tribunal notes also the statements of support for the applicant from [name deleted: s.431(2)] of the Uighur Association of Australia, Victoria and the [official deleted: s.431(2)] of the [society and name deleted: s.431(2)]. [Name deleted: s.431(2)] offers the view that because of the applicant's involvement in these activities he would be of adverse interest of the authorities if he were to return to China.
97. This position is supported by Alin Seytoff, Uyghur America Association who gave sworn evidence to this Tribunal in a separate matter '*that there is an extensive network of spies,*

including some Uyghurs, who regularly monitor the activities of Uyghurs throughout the Western world and report on their activities to the PRC authorities' at [80] above.

98. The oral evidence of the applicant which is supported by country information indicate that any form of political dissent in China is not tolerated to any degree by the authorities and any suggestions that ethnic minorities, such as Uyghur, are involved in what are considered separatist activities are dealt with severely and uncompromisingly. It is clear to the Tribunal that whilst the activities in which the applicant has participated in whilst in Australia would be viewed by the Australian community as being benign, the Chinese authorities view them as separatist or terrorist activities and those involved in such activities would attract a harsh response from the authorities.
99. On the evidence of the applicant, supported by country information, the Tribunal is satisfied that the activities of expatriate Uyghur in Australia would in all likelihood be reported to Chinese authorities and there is more than a remote chance that the applicant may be at risk of persecution for his participation in these activities if he were to return to China.
100. s.91R(3) requires the decision maker to disregard any conduct engaged in by a person in Australia unless it is satisfied that the conduct was engaged in otherwise than for the purpose of strengthening their claim to be a refugee. In the current matter, the conduct in question is his involvement with the Uyghur Association of Australia, his attendance and participation in the World Uyghur Congress in March 2011 attended by Rebiya Kader and Alin Seytoff and his participation in demonstrations outside [Building 1] in July 2011 against the Chinese authorities' response to demonstrations in Urumqi in July 2009.
101. For s.91R(3) to be enlivened the conduct must have been engaged in for the *sole* purpose of strengthening the refugee claim: *MIAC v SZJGV* [2009] HCA 40, per French CJ and Bell J at [13], per Crenann and Kiefel JJ [59] –[60]. If the decision-maker is satisfied that relevant conduct was engaged in for some other concurrent purpose, then it cannot be disregarded.
102. In the current matter the Tribunal has found the applicant to be a credible witness who has presented consistent written and oral evidence to both the delegate and the Tribunal. The Tribunal takes into consideration the young age of the applicant and accepts that he has just recently become politically active. The Tribunal accepts that in XUAR the applicant would have limited access to broader political issues and discussion of Uyghur human rights. He has submitted that he had no involvement in anti-government activities in China because of his knowledge of the harsh response to any dissent from the authorities. When the applicant did get involved in the Urumqi riots he observed firsthand the harsh treatment of those involved. The applicant's detention after the riots compounded his view of the Chinese authorities and his lack of involvement in political activities after the riots was a consequence of his treatment during his detention during which he was warned against future involvement in anti-government activity and that he would be monitored by authorities in the future.
103. It was not until the applicant had been in Australia that he observed the relative freedom offered to express political views and engage in political debate. Additionally, the evidence to the Tribunal is that Uyghur in communities, such as Victoria, are relatively small and there is a tendency for Uyghur to gravitate to ethnic based associations simply as a means of mutual support of fellow expatriates. Such associations loosely or more formally organised, such as the Uyghur Association of Australia, bring like-minded people together and inevitable discussions about personal experiences will naturally occur. At such times the discussion of issues related to ethnicity, religion or politics would inevitable arise and it is these relatively

innocent activities which are reported to Chinese authorities. The Tribunal notes the country information at [79] from the UK Border Agency which confirms the existence and activities of spies reporting the participation of Uyghur in what are deemed by the Chinese authorities to be anti-government activities.

104. The Tribunal accepts that prior to coming to Australia the applicant's political profile was negligible. But the Tribunal considers that this profile was a consequence of the threats firmly placed before the applicant that effectively suppressed any political ambitions that he may have held. The Tribunal accepts that the involvement of the applicant in various pro-Uyghur activities in Australia is a result of the applicant's genuine desire to improve the human rights of Uyghur generally and have not been engaged in in bad faith. Having carefully considered the evidence before it, the Tribunal is satisfied that the applicant's activities in Australia were not engaged in for the sole purpose of strengthening his claims for protection and therefore s.91R(3)(b) is met.
105. It is apparent from country information that the Chinese government do not tolerate any political dissent with respect to ethnic minorities, such as Uyghur, or any suggestion of separatism. Those involved in such activities are actively and vigorously targeted by the Chinese authorities.
106. Whilst the applicant has made claims in respect of a number of Convention grounds, the Tribunal finds that the essential and significant reason for the harm feared, amounting to persecution which involves serious harm and systematic and discriminatory conduct, is for reason of his imputed or actual political opinion.
107. The country information shows that those involved in or suspected of involvement in political dissent, particularly where it is capable of being characterised as separatism, risk serious consequences capable of amounting to persecution such as detention, physical mistreatment and worse. In addition, having accepted that the applicant holds genuine political views in opposition to those of the Chinese authorities, the Tribunal finds that requiring him to suppress those views in the event that he returns to China would involve placing an impermissible restriction on his right to political expression capable of amounting to persecution
108. The Tribunal again refers to the evidence of Alin Setoff, cited above, who has monitored the plight of Uyghur who have been returned to China as failed asylum seekers and quotes from RRT 1005823, [118]:

..... His evidence is that those Uygurs deported from third world countries back to the PRC have been subject to persecution by the PRC in the past. His evidence is that the PRC consider any of its residents seeking asylum in another country are committing a crime. He states that his investigations more recently are that the treatment of deportees by the PRC authorities is more subtle and once deportees arrive in the PRC they disappear. Mr Seytoff held the strong view that if the applicant were returned to the PRC he would, as a minimum, be detained and questioned about his activities in Australia and he feared that he may also suffer the fate of those Uyghur who he has been tracking over the years.
109. On the basis of this and other country information the Tribunal therefore finds that the likely response of the Chinese authorities, in respect of the applicant, would amount to systematic and discriminatory conduct as in s.91R(2).

110. The Tribunal concludes that if the applicant were to return to the China there is a real chance, rather than a remote chance, that the applicant will experience serious harm in the reasonably foreseeable future for the purposes of s.91R of the Act.
111. In respect of state protection, the Tribunal does not consider that the applicant could reasonably avail himself of state protection to an acceptable international standard because in the view of the Tribunal it is the state, the Chinese authorities that would in fact be his persecutor.
112. The Tribunal has considered whether it is reasonable for the applicant to relocate within the China to avoid the harm feared. The view of the Tribunal, supported by country information that Uyghur face persecution anywhere in China, is that the risk of harm for the applicant would be the same wherever he relocated in China and considers that internal relocation is not a reasonable option.
113. The applicant's oral evidence to the Tribunal is that he has no legal right to enter and reside in a safe third country. There is no evidence before the Tribunal to the contrary.
114. In conclusion, the Tribunal finds that the applicant has a well-founded fear of persecution for the purposes of the Convention, if he were to return to China, now or in the reasonably foreseeable future.

CONCLUSIONS

115. The Tribunal is satisfied that the applicant is a person to whom Australia has protection obligations under the Refugees Convention. Therefore the applicant satisfies the criterion set out in s.36(2)(a) for a protection visa.

DECISION

116. 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.