

DECISION RECORD

RRT CASE NUMBER: 071413088

DIAC REFERENCES: CLF2006/92736, CLF2007/71821

COUNTRY OF REFERENCE: Pakistan

TRIBUNAL MEMBER: Kira Raif

DATE DECISION SIGNED: 18 July 2007

PLACE OF DECISION: Sydney

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

- (i) that the first named applicant and the second-named applicant satisfy s.36(2)(a) of the Migration Act, being persons to whom Australia has protection obligations under the Refugees Convention; and
- (ii) that the other named applicants satisfy s.36(2)(b)(i) of the Migration Act, being the dependants of the first named applicant.

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

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).

The applicants, who claim to be citizens of Pakistan, arrived in Australia and applied to the Department of Immigration and Citizenship for Protection (Class XA) visas. The delegate decided to refuse to grant the visas and notified the applicants of the decision and their review rights by letter.

The delegate refused the visa application on the basis that the first named applicant is not a person to whom Australia has protection obligations under the Refugees Convention.

The applicants applied to the Tribunal for review of the delegate's decisions. 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

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.

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 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).

Section 36(2)(b) provides as an alternative criterion that the applicant is a non-citizen in Australia who is the spouse or a dependant of a non-citizen (i) to whom Australia has protection obligations under the Convention and (ii) who holds a protection visa.

Further criteria for the grant of a Protection (Class XA) visa are set out in Parts 785 and 866 of Schedule 2 to the Migration Regulations 1994.

Definition of 'refugee'

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.

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.

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.

There are four key elements to the Convention definition. First, an applicant must be outside his or her country.

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.

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.

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.

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.

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.

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

The documentary material before the Tribunal is contained in Tribunal case file 071413088 and the Departmental case files CLF2006/92736 and CLF2007/71821. 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.

Primary application

According to the protection visa application the primary applicant ('the applicant') is a female born in Pakistan. She has completed ten years of schooling and has been a housewife since her marriage. She stated that she resided at the same address in District B for many years. Her children are included in the application and one child, the second-named applicant, had made separate claims for protection. The applicant stated she speaks, reads and writes Urdu and that she speaks and writes English. She states that her religion is Ahmadi.

The second-named applicant is a male born in Town A, Pakistan. He has completed eleven years of schooling and for the past few years he states that he helped in his family's business. He states his religion as Ahmadi. When making the application the second-named applicant provided a statement in which he made the following claims:

- He is Ahmadi by birth along with all his family members from Town C, Pakistan. He sets out his family composition. He and his family had been experiencing the worse kind of discrimination, harassment, persecution from the government and fanatic mullahs on the basis of the Ahmadiyya belief.
- The applicant describes the following incidents relating to himself and his family:
 - Several years ago an elderly relative was brutally murdered. A copy of the post mortem is attached.
 - upon completion of SSC, he enrolled in a College in Town C to study for the HSC. The students were from all communities including many Sunni fanatic students. This resulted in the applicant being persecuted in many ways either in the playground or in the college canteen and even in the classroom because of his Ahmadiyya religion and there were quite a few incidents with other Sunni students during his studies at the college. Among the incidents, the most notable one was when he was participating in sporting activities at the college ground and had an argument with other Sunni boys. He was punched and abused by being called an Ahmadiyya dog. He was unable to attend college and did not finish the HSC. From the following year he started to help his father in the family business.

- Later his father sent him to Town D along with a relative with a large amount of money that had been collected in the business over a period of time, to complete a business transaction. There was an amount equivalent to a large sum Australian dollars. They were robbed at gunpoint on the way to the bank. They informed the police.
- Early in Year Z his father was running the business as usual and a group of people came to the shop pretending to be customers and showed the applicant's father the money. The father gave them an amount of Pakistani rupees but they did not give him the item in exchange. When the applicant's father started to argue over the matter, he was physically assaulted and warned that if he reported it to the police, they would bring the preaching allegation against the father, which would pose a serious problem. They also told him to leave the area as soon as possible, otherwise the family would face miserable consequences. No FIR was made as the applicant had fallen victim for making the first FIR in Town D.
- They received phone calls of threat, abuse, etc for the past six months.
- The applicant states that the recent incident in Town C in Year Z, the preaching allegations against his father with physical assault for no reason and taking away a huge amount of money clearly indicate the involvement of risk to run the business and stay in that area. Given the whole situation, they were extremely panicked and decided to leave the country, rather than take the risk to their lives and business, especially as his father was targeted over the robbing incident and recent preaching allegations against the father. As a safe course, he, his mother and his siblings applied for a visa to Australia and arrived in Australia later.
- They had a chance to leave Pakistan and come to Australia, where he feels safe and comfortable, their conscience and faith have been liberated but his father is not safe in Pakistan. If they return to Pakistan, there is an apprehension that they would be harmed or killed or imprisoned because of their religion.
- As they have already left Pakistan, his father is trying to sell the properties, including the family home, and is getting prepared to come to Australia once the applications are successful.

The first-named applicant had also provided a statement in which she made claims which were substantially the same as the claims set out in the second-named applicant's statement, as set out above. The applicants' representative stated the following in a submission accompanying the application:

- the applicant is a Pakistani national who travelled to Australia on a visitor visa, accompanied by her children. They were applying for protection on the basis of the applicants' persecution in Pakistan for being members of the Ahmadiyya community.
- The applicant and her family are members of the Ahmadi religion by birth but she, her husband and the children had fallen victims of the Ahmadiyya Muslim religion in Pakistan more recently.

- The applicant's siblings were granted a protection visa in other countries for facing persecution on the basis of their Ahmadi religion. Another sibling is also married to a husband who had been granted protection in another country on the basis of persecution as an Ahmadi in Pakistan. Clearly, it appears that the applicant's family members have been badly persecuted in Pakistan and there has been a long persecution history which has been recognised by the authorities in other countries.
- The applicant's husband was a businessman in Pakistan for a long period of time and recently confronted severe discrimination and harassment, including being robbed of money, physical assault with allegation of preaching simply to take religious advantage.
- The second named applicant faced discrimination and hatred at an educational institution and had to stop going to college, resulting in not completing the HSC. They faced fearful circumstances as reported to the police by identifying the person involved in the money robbing matter and on that basis the applicant and her children managed to escape from Pakistan in order to avoid further persecution, discrimination, assault and threat of life, which are likely to occur on an ongoing basis.
- The preaching allegation is likely to cause serious problems to the applicant's husband including assassination, as there are many instances in Pakistan. As a result, the applicant's husband did not continue his business by remaining in Town C but he has been recently living in Town A trying to sort out his business and other properties while the others in his family escaped from Pakistan.
- The applicant's husband not only faces persecution or harassment in the form of oral abuse or hatred, he was physically assaulted and money was taken from him in a tricky way in the name of a business transaction and it was eventually alleged that he was preaching.
- The applicant's relative was robbed of a large amount of money and as he reported it to the police, he became a target and religion became an issue, although the religious background has nothing to do with the family business or the robbing incident.

The representative refers to paragraph 51 of the UNHCR Handbook which states that there is no universally accepted definition of persecution and also to Article 33 of the Convention. The representative refers to Professor Hathaway's discussion on the meaning of 'persecution' and submits that Ordinance XX 1984 prohibits Ahmadis to practise their religion in Pakistan and that s 295c of the blasphemy law is a clear violation of the UN charter of human rights. The applicant has fallen victim of the Ahmadiyya religion.

The representative submits that the applicants have ongoing fear for life in Pakistan as a member of the Ahmadiyya religion with the husband's preaching allegations and the applicant's siblings have been granted protection in other countries for being Ahmadiyya community members. The applicants have been facing enormous threats and persecution due to their religion of choice. The representative also noted that an error in the first-named visa applicant's date of birth appears in the passport.

The representative included a lengthy report on the background of Ahmadiyya, the religious freedom in Pakistan and the situation of Ahmadis in Pakistan.

The applicant provided a copy of what appears to be a police report indicating that early in Year Y the first named applicant's husband reported a theft. The report indicates that he sent two relatives from Town C to Town D in a taxi to complete a business transaction. His relative informed him that two motor riders snatched the money bag. The official notation indicates that the case has been registered upon receiving the report and sent to investigation staff. The applicant also provided a statement from an Ahmadiyya Muslim Association in Australia confirming that the applicants are members of the Ahmadiyya Muslim Association.

The first-named applicant provided a copy of her passports and her children's passports. These show that the applicants hold valid multiple travel visitor visas for another country. The Department's file also contains notes relating to the applicants' applications for the Australian visitor visas. These indicate that the applicant stated that she and the children wished to travel to Australia for sightseeing. They stated that every year they travel overseas. The first-named applicant also provided a notarised statement relating to the incorrect date of birth as it appears in her passport and the applicants subsequently provided Australian penal certificates.

The delegate conducted an interview with the first-named and second-named visa applicants. The visa applicants stated that they did not have a current right to enter and reside in any other country but the first-named visa applicant confirmed that she held a valid visa enabling her to travel to another country and that she also travelled to other countries. When asked why she had not sought asylum previously when she travelled overseas, the first-named visa applicant said that at the time the situation was not bad and she did not fear persecution. The change in circumstances since that period was because a family member was killed and her children had now grown up and she fears that they may be harmed. She said that she did not know who killed her relative. She said that she fears persecution from religious groups who are against the Ahmadis. She stated that her husband did not travel with the family because he did not have a passport and it was difficult to obtain. She said that her husband continues to reside in the family home. The visa applicants spoke of their claims as set out in their statements, as set out above.

Following the interview the delegate initiated an effective protection check with respect to the visitor visas held by the applicants and confirmed that the applicants' visas remained valid.

The delegate decided to refuse to grant the visas. The delegate found that the applicants did have a genuine fear of harm and that there was a real chance of persecution in Pakistan. However, the delegate noted that the applicants hold valid multiple travel visitor visas for another country. The delegate referred to the information about the visas and found that the visas provided the applicants had a legally enforceable right to enter and reside in another country and did not have a well-founded fear of persecution in that country.

Application for review

The applicants sought review of the delegate's decision. When applying for review the applicants had not provided any additional material to the Tribunal.

Subsequently the Tribunal received a further submission from the first-named applicant setting out the reasons why she disagreed with the delegate's decision. With respect to the existence of a present and legally enforceable right to enter and reside in the other country, the applicant refers to a number of judicial authorities including *WAGH v MIMA* (2004) 75 ALD 651. She states that the family hold a temporary visitor visa only and not a permanent

visa, at the end of the permitted period of 180 days they would be required to leave that country and return to Pakistan and therefore there was a danger of refoulement to Pakistan. As the delegate found that they would face persecution in Pakistan, it would not be correct to conclude that there is effective protection and there is no legally enforceable right to asylum in that country.

The applicant states that she and the children obtained the visa solely for attending a conference. Such visas were granted to many Ahmadis in Pakistan and elsewhere subject to a condition that no visa holder would apply for protection while visiting the country. This undertaking was given by the president of the community in that country and if anyone applied for protection, the visas may not be issued in the future. It is a policy of the community that if a member of the community visits another country to attend a community meeting or a festival and seek asylum, they would be immediately expelled from the community forever. The applicant referred to a decision of the Tribunal, differently constituted, recognising this situation.

The applicant states that she could not go to the other country for the annual conference because of her husband's illness. By the end of that year, they started facing problems which were accepted by the delegate. As they obtained visas for the purpose of the Conference, they would be unable to remain within the Ahmadi faith if they had sought protection. For this reason, she did not think to go there for protection to save herself from being expelled from the Ahmadi faith. The applicant provided statements from the Ahmadiyya Muslim Association of that country and others, confirming that people attending the Conference are required to depart the country and not seek asylum.

Subsequently the Tribunal received further submissions from the applicants. The applicants provided translated Friday sermons which condemn the making of asylum applications and states that those who seek asylum would be excluded from the community and would not be able to re-enter. The applicants also provided a report issued by a Human Rights Group which refers to the treatment of the Ahmadiyya Muslim Community in Pakistan. The applicants provided other documents confirming that people attending the conference were unable to seek asylum and a copy of a decision of the Tribunal, differently constituted, where the Tribunal accepted that an applicant could not travel to the conference to seek asylum.

The applicant then informed the Tribunal of the appointment of a representative to act on her behalf and subsequently the Tribunal received further submissions from the applicant's representative. The representative submits that the applicants' claims are more detailed and complex than those that appear in the statements accompanying the application and the following aspects of the claims have not been sufficiently explained or have been omitted:

- The first-named applicant's relative was murdered at home several years previously. The perpetrators were Muslims known to the family and the motivation for the killing was religion. The applicant's relative held an Ahmadi prayer group at home and received threats before the murder. The murder was reported to the police who took no action.
- When the second-named applicant was robbed at gun point, he reported the matter to the police identifying the perpetrators who were previously known to him. The police accused him of lying and suggested that he and his father had conspired to make a false complaint. He was placed in a cell and sustained injuries and was subject to attempts to intimidate him into withdrawing the complaint.

- Some time later, a robbery occurred in the business of the applicant's husband. This was not reported to the police due to lack of action taken on the last occasion. Following the robbery the family began to receive threatening phone calls at home and at the business, which occurred every few days. The callers threatened that if they did not renounce their faith and leave the area, they would be harmed or killed. The family became fearful, particularly for the female members of the family.
- The family made the decision to flee Pakistan. The first-named applicant and children held passports and tourist visas for another country but the family considered it was not an option for them to travel there to seek asylum due to the stigma this would cause for them within the community as a result of the widely held Ahmadi belief that any Ahmadi claiming asylum there would jeopardise the chances of further visas being issued for the annual conference. Instead, the family applied for the visas to Australia where they intended to seek asylum. They believed that their chances of gaining visas would be greater if one member of the family remained and it was decided that the applicant and the children would travel first and her husband would travel later once they were granted asylum.
- Since the applicants' departure, the husband had been moving around, staying at the homes of various family members due to his fear of suffering harm from Muslims in a religious motivated attack. He stopped going to his office during the day and an employee now manages the business. He only visits at night to perform the necessary checks.

The representative noted that the relevant country information and further submissions on the application of s 36(3) may be provided at a later date.

The Tribunal received further declarations from the applicants, in which they described in more detail the events that occurred prior to their departure from Pakistan.

Subsequently the Tribunal received further submissions from the review applicants' representative. The representative notes that the primary applicant has difficulty discussing the past traumatic events, which may affect her ability to give evidence at the hearing but that due to time constraints medical evidence was not available. The representative outlines her concerns with the delegate's decision, discussion the operation of s 36(3) of the Act and case law which defines the term 'a right to enter and reside' in that provision. The representative notes that the applicants hold a visa for another country which confers a right to enter and remain in that country for six months at a time and the visa may be cancelled or they may not be permitted to enter the country if their true circumstances were disclosed. It is submitted that the applicants do not hold a present, legally enforceable right to enter and reside in a third country. Further, the fact that the visa may enable the applicants to seek asylum in the future does not amount to a present legally enforceable right. The representative notes that there is widely available credible country information concerning persecution of Ahmadis in Pakistan and the lack of state protection. It is submitted that the applicants have a well-founded fear of persecution in Pakistan due to their faith.

Hearing

The applicants appeared before the Tribunal to give evidence and present arguments. The Tribunal hearing was conducted with the assistance of an interpreter in the Urdu and English languages.

Evidence from second-named applicant

The second-named applicant said that he has completed some schooling in Pakistan. After a while he started working for his father. He said that the family lived at one address in Pakistan and that is the address which appears on the application form. He said that a long time ago the family also lived in Town A for a short time of about a few months and they travelled to Australia from Town A. The applicant said that the family also travelled to several other countries. He was not sure when he travelled there.

The applicant said that his father worked in a business. He said that the family never had any financial problems and the trips overseas were paid for from his father's business. He said that the last time he travelled overseas was when they travelled for the conference.

The Tribunal asked the second-named applicant to describe the incident in early Year Y. He said that his relative sent him from Town C to Town D to complete a business transaction and his relative named the place where he had to complete the transaction. While he was coming back, the money was stolen from him. He said that his relative was away doing some work while the driver was in the car. When the incident happened, he ran back to the business and called his relative from there. He said that the driver did not see it as he was away. The Tribunal asked the applicant whether the family had any prior dealings with the businessman. He said that they had dealt with this person a long time ago and this was the second time they dealt with him. He said that there was no regular person they used for this type of business.

The applicant said that he reported the incident to the police. The businessman told the police about his religion. The police let them go and detained the applicant. The Tribunal asked the applicant how the businessman was aware of his religion. The applicant said that most people they dealt with were aware of his religion. The Tribunal pointed out that they only had dealings with this person once before and it was a long time ago. The applicant said that most people from Town C belonged to the same religion. The Tribunal asked the applicant if the businessman knew about his religion only because he was coming from Town C. The applicant said that he did not have dealings with him, mostly it was his father and most people knew about their religion.

The applicant said that when he spoke to his father, his father told him that he informed this person not to send the applicant anywhere. He told the police his story. The businessman gave the police his statement and told the police that the applicant was lying. After that these people were allowed to go while the police beat the applicant. He said that he contacted his father, who contacted his relative and some people came to the police station. The Tribunal asked the applicant who were people in 'high positions' that he was referring to in his statement. He said that they contacted other people involved in business transactions but the police also refused to talk to them. He said that some people in high positions had contacts with other people.

The applicant said that after he returned to Town C, their business was normal. A short time before he came to Australia, he spoke to his father, asking him why he did not follow up with the police. He also spoke to his father about it shortly after the incident. Before he came to Australia, his father informed him that he was not able to follow this case because he was threatened that his children would be harmed and that they may do other things.

The Tribunal noted that the next incident described in the statement occurred in early Year Z. The Tribunal asked the applicant if the family had any difficulties between Year Y and Year

Z. The applicant said that his father told him that from several months before they came to Australia, he started to receive threatening phone calls. He said that he does not know about these because his parents were picking up the phone.

The applicant said that in early Year Z some people came into his father's business, saying that they wanted to conduct a business transaction. His father completed the transaction but they did not give him money in return. His father told the applicant that when he demanded money, they beat him up. When his father told him that they would lodge a complaint against them, they told him that they would complain about him, saying that he was propagating his religion. The Tribunal asked the applicant if anything similar happened in the past. The applicant said that he does not remember if anything similar had ever happened in the past. The Tribunal noted that this was a serious incident which the applicant may be expected to remember unless he was very young. The applicant said that most of the things that happen to the family were hidden from them, it is only the incident that he was involved in that he was told about.

The Tribunal asked the applicant about the arrangements the family made about leaving Pakistan. The applicant said that he only got to know about leaving Pakistan when the visa was granted. He said that he was not aware if the family discussed leaving Pakistan before the visa was granted. The Tribunal asked the applicant why his father remained in Pakistan. He said that his father has never had any passport or a visa and he told the applicant that if he applied together with the family, nobody would have been able to get the visa. He said that he has spoken to his father three or four times since he came to Australia. Last time they spoke, his father was in Town C, but he did not ask him whether he was living in the family home.

Evidence of first- named applicant

The Tribunal took evidence from the first-named applicant. She said that the family lived in one address in Town C before coming to Australia. She said that her husband was involved in a business which was a good business. The income from that business was sufficient to support the family.

She said that she travelled to other countries for visits. She could not remember when her last trip overseas was. The Tribunal noted that the applicant referred to discrimination against the Ahmadis in Pakistan. The Tribunal asked the applicant if she had ever considered leaving Pakistan prior to this trip. She said that at the time they did not have any troubles, their troubles started recently. The Tribunal noted that it was claimed that her son had problems at school and there is also country information about the general discrimination against Ahmadis. The Tribunal asked the applicant if she was suggesting that despite that, the family had no problems. She said that what she is trying to say is that small incidents do happen but it is only when things become big that one has to leave one's business and country of origin. The Tribunal noted that her husband was also able to build up a business which was doing well financially. The applicant agreed. The Tribunal asked the applicant whether prior to a particular time she had no intention of leaving the country. She agreed that she did not.

The applicant said that in around that time, her son went to complete a business transaction and he was attacked by non-Ahmadis and when he went to the police, he sustained injuries. The Tribunal asked the applicant if her husband had followed up with the police after her son returned to Town C. She said that he tried, but he was receiving threatening phone calls. She said that she did not know who these people were who were making the calls but they received threats that if they followed it up, they would be in trouble.

The Tribunal asked the applicant if they had considered leaving the country at that time. The applicant said that they were making plans at that stage. They were not able to get the visa for a particular country but if they got the visas for any other country, they would leave. The applicant said that they applied for visas for another country but they were unable to get these. She said that they did not apply for visas to any other countries at the time because she said it would have been difficult for them to leave the country and it would take time to get letters from a sponsor. The Tribunal noted that the applicant did travel overseas to several countries. The applicant said that it takes time to get the sponsoring letter. The Tribunal asked the applicant if they had initiated any steps to leave the country in Year Y. She said that they did not. The Tribunal asked the applicant why they had not done so if they intended to leave the country. She said that it would have taken time to get sponsor's letters from other countries. That is why they applied for the Australian visa. The Tribunal noted that the Australian visas were granted in mid Year Z and that normally the visa process takes about a month. The applicant said that she could not remember when she applied for the Australian visa but if that is the case, it may have been about a month before grant of the visa. The Tribunal again asked the applicant why the family had not taken any steps to leave the country in Year Y. The applicant said that her husband has a medical condition and due to the incident, he felt so ill that he needed an operation. The Tribunal asked the applicant if her husband continued to run the business at that time. She said that when he was sick, her son was helping with the business.

The applicant said that she is a housewife and her husband does not give her much information. Her husband told her that in early Year Z some people came to his business wanting to engage in a business transaction.. Her husband completed the transaction but they did not pay him the money. When her husband demanded money from them, they refused to pay, threatening that they would go to the police stating that he was propagating his religion and that would not be good for his future. She said that this is how much her husband had told her. The Tribunal asked the applicant why she thought these people were targeting her husband's business. She said that he was well-off and they wanted to harm him. The Tribunal asked the applicant whether she thought there was any other reason why they wanted to harm him. She said that the main target is their religion. The Tribunal asked the applicant if anything similar happened in the past. She said only to her son and not to her husband.

The applicant said that her husband had been running this business for many years. The Tribunal asked the applicant why she thought these people had never approached her husband in his business in the past if the main target was religion and if he was running his business successfully for many years. She said that her children were small at the time and when they grew up, these people wanted to create problems. The Tribunal asked the applicant to explain the significance of her children's age. She said that when the children are small, they do not mix in the society but when they grow up, when there is a child who is helping, that is when they became enemies. She said that this is one of the reasons.

The Tribunal noted that the applicant was claiming fear of persecution because of her religion. The applicant said that although they did have small problems, they were not so chronic as for them to leave the country and if that was the case, they would have left the country during one of the previous visits. It is only when the problems became intolerable that they decided to leave. The Tribunal asked the applicant why she thought they became intolerable in Year Y or Year Z if their religion had not changed. She said that the situation was not much worse before, there were small problems that they were facing but it is only when they started to receive threats that they became scared. The Tribunal asked the applicant

why she thought they started to receive threats in Year Y and Z and not in the past, despite living in the same place. The applicant said that when they realised that the family was well-settled and had a good business and also due to their religion, that is when they decided to harm them. She was also afraid that whatever happened to her relative would also happen to her child.

The Tribunal noted that the applicant appeared to suggest that the harm she feared arose from the business and the family's financial position and not from religion. She said that religion is the main difficulty as they want them to change religion. The Tribunal noted that their religion has not changed, but the applicant had not considered these difficulties to be significant enough for them to want to leave the country. The applicant said that after her child started going to college, they started to threaten that they should leave the city and the country, saying that they would kill all of them. She was so stressed that she would not pick up the phone. The Tribunal again asked the applicant why she thought this happened in Year Y or Year Z and not in the past. She said that her children were small before and the situation worsened when they grew up.

The applicant said that there was a large Ahmadi population in Town C and that the others were facing similar problems as her family. She said that the Mullahs were against them and it was announced that the children and women should not leave the house. They were shouting slogans against the Ahmadis.

The applicant said that her husband did not have a passport and he had not travelled to any other country and that is why he did not travel to Australia. Since they came to Australia, he moves from place to place in Town C as he is afraid for his life. The applicant said that she feels safe in Australia but she is concerned about her husband.

The applicants' representative stated that there is considerable independent information that the religious tolerance had deteriorated in Pakistan in the past few years and this may be relevant to the claim that the family had not experienced harm prior to Year Y.

Evidence from other sources

The Ahmadiyya sect of Islam was founded by Mirza Ghulam Ahmad in the Indian state of Punjab in the 1880s. Ghulam Ahmad named the movement after the second name of the Prophet Mohammed and rejected the Islamic doctrine of *jihad* (holy war). Ahmad claimed that he had special spiritual powers and accepted a pledge of allegiance from a number of followers, who believed that he was a prophet. Ahmad went on to enunciate a doctrine that Jesus Christ had escaped death on the cross and had attained the age of one hundred and twenty before dying in Srinagar, India. After Ahmad's death in 1908, the Ahmadiyya sect split into two groups: the *Qadianis* and the *Lahorites*. Being the larger faction, the *Qadianis* retained control of the movement and both factions became known for the energetic proselytizing through missionaries, a technique adopted from the Protestants. After the partition of Pakistan in 1947, the headquarters of the movement moved from Punjab to the Pakistani city of Rabwah. In Pakistan, the Ahmadiyyas faced increasing hostility from other Muslim religious groups.¹

¹ Esposito, J.L. (ed) 1995, *The Oxford Encyclopedia of the Modern Islamic World*. Oxford University Press, Oxford, pp.54 – 57 – Attachment 1; Glasse, C. 2001, *The Concise Encyclopedia of Islam*. Tien Wah Press, Singapore, pp. 33 – 34

The Ahmadiyyas were attacked in Pakistan in 1949 by the Islamic *Ahrari* group, who called on the Pakistani government to declare Ahmadiyyas non Muslims. At first the government resisted calls to impose restrictions on the Ahmadiyyas but by 1953, the Sunni majority backed by the mullahs started an anti Ahmadiyya campaign. The new Pakistani constitution of 1973 included anti Ahmadiyya provisions that stipulated that holders of public office declare their belief in prophet Mohammed only. In 1974, anti-Ahmadiyya student demonstrations were organised in the Pakistani city of Rabwa, resulting in violence against the Ahmadiyyas throughout Pakistan. In April 1984, pressure from the Islamic fundamentalists led to the promulgation of the Martial Law Ordinance XX, which amended the Pakistani Penal Code. Under Section 298 (C), Ahmadiyyas calling themselves Muslims are liable for prosecution and imprisonment up to three years.²

In 1993 the Supreme Court of Pakistan heard a number of court cases against the Ahmadiyyas, who asserted that they were being deprived of their religious rights and freedoms, as guaranteed under Article 20 of the Pakistani constitution. The appeals were rejected because the court felt that granting the Ahmadiyyas equal rights would be against public order. The court stated that the Shiite or the Sunni Muslims consider the Ahmadiyya faith to be ideologically offensive. A majority opinion of the court stated that many Islamic phrases were, in effect, copyrighted trademarks of the Islamic faith and the use of these phrases by Ahmadiyyas was an infringement of the Pakistani Trademark Act of 1940. The courts also found that Ahmadiyyas were committing blasphemy when they spoke or wrote specific Islamic phrases.³

According to a Catholic organisation, National Commission for Justice and Peace, the Ahmadiyya community pointed out that there were about one thousand three hundred and thirty nine hate news reports in the Pakistani press during 2005. Amnesty International noted that the Pakistani state failed to protect members of religious minorities from abuse by private individuals. At least seventy two people were charged and arrested under blasphemy laws in 2005, including laws that make it a criminal offence for members of the Ahmadiyya community to practise their faith.⁴

According to the US State Department Report in 2005, the police failed in some instances to protect members of religious minorities, particularly the Ahmadiyyas from societal attacks.⁵ In July 2006, the Ahmadiyyas urged the Pakistani government to protect the community in the wake of extremist threats against the group at Sharishabari village in the Jamalpur district. The minority Ahmadiyyas also condemned the law enforcers for being silent and reluctant to act on two assault incidents on Ahmadiyyas on 29 July 2005 and on 16 June 2006. The apparent lack of action by the authorities to apprehend the attackers is alleged to have encouraged the Islamic extremists to be more aggressive towards the community.⁶

² Immigration and Refugee Board of Canada 1991, *Cultural Profile: The Ahmadiyya*, June

³ Parker, J.D. 2003, 'Religious Persecution in Pakistan: The Ahmadi Case at the Supreme Court', Webcom website, December <http://www.webcom.com/hrin/parker/ahmadi.html> – Accessed 22 January 2007; Khan, A.M. 2003, 'Persecution of the Ahmadiyya Community in Pakistan: An Analysis under international law and international relations', *Harvard Human Rights Journal*, vol. 16

⁴ Waqar, A. 2006, 'Hate mongering worries minorities', *Daily Times* website, 25 April http://www.dailytimes.com.pk/default.asp?page=2006%5C04%5C25%5Cstory_25-4-2006_pg7_26 – Accessed 19 January 2007; Amnesty International 2006, *Amnesty International Annual Report 2006 – Pakistan*, May ; Human Rights Watch 2007, *World Report – Pakistan*, January

⁵ US Department of State 2005, *Country Reports on Human Rights Practices – Pakistan*, March

The overseas visa

Communication was undertaken at the request of the Tribunal with regard to the entitlements of a holder of a multiple travel visitor visa for the relevant country. Subsequently, a request for written information on the entitlements of a multiple travel visitor visa was sent via its enquiry box. The officer replied by email:

...A person on a 5-year Type-C Multi entry visit visa may enter as many times as he wishes during that 5 year period. His maximum period of stay on any entry would be for 180 days. There are conditions on his stay in that he may not work or seek recourse to public funds. **On arrival in the [country] should an Immigration Officer believe his circumstances may have changed since the issue of the visa he may be refused entry.** For example if the Immigration Officer was satisfied that the person was entering for work purposes, or he may be entering to get married, or is seeking to settle permanently in the [country] are just a few that spring to mind.⁷

General guidance on the entitlements for a holder of the most common visitor visa to a particular country is available on their website. This visa type has an entitlement to remain for up to six months for any one visit, valid for periods of one, two, five, and ten years. It does not entitle the visa holder to paid work. The website states that the holder of the visa “has permission to enter the [country]” and that entry to the country “will not normally” be refused “unless...circumstances have changed, or you gave false information or did not tell us important facts when you applied for your visa”. The entitlements with regard to how long a person may remain in the country, their work rights, and what activities can be carried out as a visitor, as stated on this website are:

What is a visa?

A visa is a certificate that is put into your passport or travel document by an Entry Clearance Officer at a [country] mission overseas. The visa gives you **permission** to enter the [country]. **If you have a valid [country] visa we will not normally refuse you entry to the [country] unless your circumstances have changed, or you gave false information or did not tell us important facts when you applied for your visa.**⁸

FINDINGS AND REASONS

The applicants travelled to Australia on valid Pakistani passports and claim to be nationals of Pakistan. The Tribunal accepts that the applicants are nationals of Pakistan and has assessed their claims against Pakistan as their country of nationality.

Section 36(3) of the Act provides that Australia is taken not to have protection obligations to a non-citizen who has not taken all possible steps to avail himself or herself of a right to enter and reside in, whether temporarily or permanently and however that right arose or is expressed, any country apart from Australia, including countries of which the non-citizen is a national. The term “right” in subsection 36(3) refers to a legally enforceable right.

In determining whether these provisions apply, relevant considerations will be: whether the applicants have a legally enforceable right to enter and reside in a third country, either temporarily or permanently; whether they have taken all possible steps to avail themselves of that right; whether they have a well-founded fear of being persecuted for a Convention reason there; and whether there is a risk that the third country will return the applicants to another

country where they have a well-founded fear of being persecuted for a Convention reason, such as Pakistan.

As noted above, the applicants hold valid visitor visas for another country which permits up to 180 days stay there. The information about the visas, cited above, indicates that such visas do not confer an *entitlement* upon visa holders to enter into the country, rather it is merely a *permission* to enter the country and entry may be refused by immigration officers in certain circumstances. Accordingly, the Tribunal finds that the visas held by the applicants do not confer a *right* to enter that country. For this reason it is unnecessary for the Tribunal to consider whether a residence of 180 days and the entitlements associated with the type of visas held by the applicants, constitute a 'right to reside' in another country and whether the applicants have a well-founded fear of persecution there.

The Tribunal will now consider the applicants' claims with respect to their country of residence, Pakistan.

The applicants' principal claim is that they are of Ahmadi faith and that they fear persecution due to their religion. Having regard to the statement from the Ahmadiyya Muslim Association in Australia and the applicants' passports, the Tribunal accepts that the applicants are of Ahmadi faith.

Country information from a wide range of reliable sources, cited above, indicates long-term widespread intolerance towards, and harassment of, Ahmadis in Pakistan. This has included physical violence, threats as well as various restrictions on their religious practice. Reports also refer to attacks on members of the Ahmadiyya community. Of particular note are the specific government policies of discrimination entrenched in the 1974 constitutional amendment and 1984 changes to the Penal Code Section 298(c), the so-called 'anti-Ahmadi laws', that single out Ahmadis on the basis of their religion – prohibiting them from calling themselves Muslim or posing as Muslims; from referring to their faith as Islam; from preaching or propagating their faith; from inviting others to accept the Ahmadi faith; and from insulting the religious feelings of Muslims. The reports indicate the use of such laws to bring religion-motivated criminal charges against Ahmadis.

The Tribunal accepts the evidence of the applicants. The Tribunal accepts their description of events in Year Y and in Year Z and that the family received threats of harm and threats that they may be reported for preaching their religion. The Tribunal also accepts that the primary applicant's relative was killed. The applicants' claims concerning the past mistreatment appear to be broadly consistent with the available county information, which also supports the applicants' claims of a real chance of future harm.

Despite this, the Tribunal is concerned about the applicants' delay in leaving Pakistan. The primary applicant stated that prior to early Year Y the family had not considered leaving the country because despite the problems, these were not of such a significant nature as to cause them to consider departure. This is consistent with the applicants' evidence that the primary applicant's husband was able to operate a successful business in Town C. The primary applicant also stated that despite deciding to leave Pakistan after the Year Y incident, little action was taken for the departure other than to apply (unsuccessfully) for visas to another country. The primary applicant explained the delay by stating in oral evidence that her husband was ill and required an operation. She also stated that an invitation from a sponsor, which was a requirement for a visa to other countries, would take considerable time. This evidence reduces, but does not completely allay the Tribunal's concerns about the delay in

the applicants' departure from Pakistan. The Tribunal does not accept that the family made the decision to leave Pakistan in early Year Y.

However, the Tribunal does accept that the problems for the family were exacerbated by the events in Year Z, including the threats the family received and the attack on the primary applicant's husband. The Tribunal finds that at least at that time the family made the decision to leave Pakistan and had taken steps to do so expeditiously.

The Tribunal finds, on the material before it, that there is a real chance that the applicants would face prospective persecution for reason of their religion if they were to return to Pakistan now or in the reasonably foreseeable future. In reaching this finding, the Tribunal accepts the evidence of the applicants and also places significant reliance on the country information, cited above, indicating a high degree of volatility in both societal and official attitudes and actions toward Ahmadis.

The Tribunal has considered whether the authorities or the government of Pakistan would be able to provide the applicants with effective protection. As noted above, the authorities have failed in some instances to protect members of the Ahmadiyya community. The US State Department report suggests that there have been instances in which the Government has failed to intervene in cases of societal violence directed at minority religious groups and that the lack of an adequate government response has contributed to an atmosphere of impunity for acts of violence and intimidation against religious minorities including the Ahmadis. Further, the State's involvement in devising and implementing harsh discriminatory anti-Ahmadi laws raises serious questions about the willingness of the State to protect Ahmadis from harm inflicted by others. Having regard to this evidence, the Tribunal is satisfied that the State would not provide adequate and effective protection from such harm. The Tribunal finds that the applicants' fears are therefore well-founded.

For this reason also, the Tribunal is satisfied that the harm feared by the applicants is not localised and that it would not be avoided by the family relocating to another part of Pakistan.

The Tribunal accepts that if the applicants return to Pakistan now or in the reasonably foreseeable future, there is a real chance that they will face persecution involving 'serious harm' as required by s 91R(1)(b) of the Migration Act in that the persecution they face involves a threat to life, significant physical harassment or ill-treatment and serious restrictions on religious practice. The Tribunal finds that the applicants' religion is the essential and significant reason for such persecution, as required by s 91R(1)(a), and that the persecution involves systematic and discriminatory conduct, as required by s 91R(1)(c), in that it is deliberate or intentional and involves selective harassment for a Convention reason, namely their religion.

As noted above, there is no evidence that the applicants have a legally enforceable right to enter and reside in any country other than their country of nationality, Pakistan. The Tribunal therefore finds that the applicants are not excluded from Australia's protection by subsection 36(3) of the Act.

The Tribunal finds that the applicants are outside of their country of nationality, Pakistan. For reasons given above, the Tribunal finds that the applicants have a well-founded fear of being persecuted for reasons of their religion if they returns to Pakistan now or in the reasonably foreseeable future. The Tribunal finds that the applicants are unwilling, owing to their fear of persecution, to avail themselves of the protection of the Government of Pakistan and that they

are not excluded from Australia's protection by subsection 36(3) of the Act. It follows that the Tribunal is satisfied that the applicants are persons to whom Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol. Consequently the applicants satisfy the criterion set out in paragraph 36(2)(a) of the Migration Act for the grant of a protection visa.

CONCLUSIONS

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

No specific claims were made by or on behalf of the other applicants. The Tribunal is satisfied that they are dependent children of the first named applicant for the purposes of s.36(2)(b)(i). The fate of their application therefore depends upon the outcome of the first named applicant's application. They will be entitled to protection visas provided they satisfy the criterion set out in s.36(2)(b) and the remaining criteria for the visa.

DECISION:

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

- (i) that the first named applicant and the second-named applicant satisfy s.36(2)(a) of the Migration Act, being persons to whom Australia has protection obligations under the Refugees Convention; and
- (ii) that the other named applicants satisfy s.36(2)(b)(i) of the Migration Act, being the dependants of 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