

1204108 [2012] RRTA 820 (7 September 2012)

DECISION RECORD

RRT Reference: 1204108

Country of Reference: Yemen

Tribunal Member: Dominic Lennon

Date decision signed: 7 September 2012

Place: Melbourne

Decision: The Tribunal affirms the decision not to grant a protection visa to the applicant and makes a determination that the applicant is not a person to whom Australia owes complementary protection obligations.

In accordance with section 431 of the *Migration Act 1958* the Tribunal will not publish any statement which may identify the applicant or any relative or dependant of the applicant.

BACKGROUND

1. The applicant first arrived in Australia on [date deleted under s.431(2) of the *Migration Act 1958* as this information may identify the applicant] November 2006 on a student visa valid until [a date in] April 2007. He was granted further student visas and departed and returned twice. [In] October 2011 he lodged an application for a protection (class XA) visa with the Department of Immigration and Citizenship under the Migration Act 1958 (the Act). [In] March 2012 a delegate of the Minister for Immigration and Citizenship refused to grant a protection visa and on [the same day] the applicant applied for review of that decision.

THE LEGISLATION

2. Under s.65(1) of the Act a visa may be granted only if the decision maker is satisfied that the prescribed criteria for the visa have been satisfied.
3. Subsection 36(2) of the Act relevantly 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 Refugees Convention as amended by the Refugees Protocol. “Refugees Convention” and “Refugees Protocol” are defined to mean the 1951 Convention relating to the Status of Refugees and 1967 Protocol relating to the Status of Refugees respectively: s.5(1) of the Act. 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”

4. Australia is a party to the Refugees Convention and the Refugees Protocol and, generally speaking, has protection obligations to people who are refugees as defined in them. Article 1A(2) of the Convention 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.

5. The High Court has considered this definition in a number of cases, notably *Chan Yee Kin v Minister for Immigration & Ethnic Affairs* (1989) 169 CLR 379, *Applicant A & Anor v Minister for Immigration & Ethnic Affairs & Anor* (1997) 190 CLR 225,

Minister for Immigration & Ethnic Affairs v Guo & Anor (1997) 191 CLR 559, *Chen Shi Hai v Minister for Immigration & Multicultural Affairs* (2000) 201 CLR 293, *Minister for Immigration & Multicultural Affairs v Haji Ibrahim* (2000) 204 CLR 1, *Minister for*

Immigration & Multicultural Affairs v Khawar (2002) 210 CLR 1, *Minister for Immigration and Multicultural Affairs vs Respondents S152/2003* (2004) 205 ALR 487 and *Applicant S v Minister for Immigration & Multicultural Affairs* (2004) 217 CLR 387.

6. Sections 91R and 91S of the Act now qualify some aspects of Article 1A(2) for the purposes of the application of the Act and the regulations to a particular person.
7. There are four key elements to the Convention definition. First, an applicant must be outside his or her country.
8. 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.
9. 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.
10. 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.
11. 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.

12. 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.
13. 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.

Complementary protection criterion

14. If a person is found not to meet the refugee criterion in s.36(2)(a), he or she may nevertheless meet the criteria for the grant of a protection visa if he or she is a non-citizen in Australia to whom the Minister is satisfied Australia has protection obligations because the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the applicant being removed from Australia to a receiving country, there is a real risk that he or she will suffer significant harm: s.36(2)(aa) ('the complementary protection criterion').
15. 'Significant harm' for these purposes is exhaustively defined in s.36(2A): s.5(1). A person will suffer significant harm if he or she will be arbitrarily deprived of their life; or the death penalty will be carried out on the person; or the person will be subjected to torture; or to cruel or inhuman treatment or punishment; or to degrading treatment or punishment. 'Cruel or inhuman treatment or punishment', 'degrading treatment or punishment', and 'torture', are further defined in s.5(1) of the Act.
16. There are certain circumstances in which there is taken not to be a real risk that an applicant will suffer significant harm in a country. These arise where it would be reasonable for the applicant to relocate to an area of the country where there would not be a real risk that the applicant will suffer significant harm; where the applicant could obtain, from an authority of the country, protection such that there would not be a real risk that the applicant will suffer significant harm; or where the real risk is one faced by the population of the country generally and is not faced by the applicant personally: s.36(2B) of the Act.

CLAIMS AND EVIDENCE

17. 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.
18. The applicant gave the following information in his application form. He stated that his name is [name deleted: s.431(2)]. He was born on [date deleted: s.431(2)] in Riyadh, Saudi Arabia. In the event that he was required for an interview he would not need an interpreter and he could speak, read and write English well. He gave his religion as Islam (Sunni). He stated that he had never married. He stated that he was a citizen of Yemen and had the temporary right to enter into or reside in Saudi Arabia "and won't be able to enter it later". He stated that he had resided in Jeddah Saudi Arabia. He stated

that he had been educated for “all 12 years” in Jeddah. He indicated his past employment as [details deleted: s.431(2)] and [sports] coach. In relation to his travel to Australia, he stated that he travelled on a Yemeni passport and indicated that he currently possessed a different Yemeni passport.

19. Asked why he left Yemen, he stated:

Because of racism in both countries: Saudi Arabia and Yemen.

20. Asked what he feared if he went back to Yemen, he stated (errors in original):

In Yemen, I may be killed because of racism.

In Saudi Arabia, I was born there, I spent my life in Saudi Arabia, I studied there, total number of years spent in Saudi Arabia is about [number] years and the government doesn't allow me to live there permanently and doesn't allow me to work. That's racism I can't bear. If I can't work, how can I get money? If I don't gain money, how can I live there?? That's unfair!! Taking into account that I have never been to my own country (Yemen).

21. Asked who he feared might harm or mistreat him if he went back, he stated:

In Yemen, North Yemini people will harm/mistreat me because I come from South Yemen.

In Saudi Arabia, the government won't give me my rights to live permanently and work because I come from different nationality and I was born there and lived there some [number] years

22. Asked why he thought it would happen to him if he went back, he stated:

Because it already happened in Saudi Arabia. In Yemen, my older brother has been to Yemen and he faced racism there.

23. Asked if he thought the authorities of that country could and would protect him if he went back and if not, why not, he stated:

No because:

1- I live only temporarily in Saudi Arabia therefore I might be sent out to Yemen at any time.

2.- I don't even have permission to work.

3.- Everything is for Saudi citizens

Yemen can't protect us because the government is a failure!

24. [In] November 2011 the applicant submitted a letter from the “Agency of Central Political Security”. The letter was submitted together with an English language translation and is set out below:

In the name of Allah, the Compassionate, the Merciful

To whom it may concern,

We inform you that [name] holding a passport number ([number]), [name] holding a passport number ([number]) and [name] holding a passport number ([number]) are Yemeni citizens and their lives are in danger if they stay in Yemen as result of tribal conflicts and revenge that put them under the threat of being killed.

Therefore, we ask you to do what is needed to facilitate their lives with all the ease and simplicity.

[Rank and name]

Dated [date]/9/2009

Interview with the delegate

25. The applicant was interviewed by the delegate [in] November 2011. He gave the following information to the delegate.
26. His family resides in Saudi Arabia. They hold temporary residents’ visas which are renewable "under the table". His permit was issued in December 2010 and will expire in February 2012.
27. His father works in a [shop]. The delegate noted that a document on the file stated that his father was a [manager]. The applicant responded that it was his father's sponsor who would have put that information on the document as the sponsor wanted his father to renew his visa. His father is not really working for that organisation; he just used the name to make it look official to obtain a visa renewal. The salary indicated is also not true.
28. He has a [details of siblings deleted: s.431(2)]. His brother in Australia has applied for a subclass 457 visa and he is still waiting for a decision on that application.
29. His father has tried to apply for citizenship in Saudi Arabia. Indeed all his family members have all tried to obtain citizenship in Saudi Arabia but none have succeeded. They (the authorities) never said no but they just never reply and ignore everything.
30. He went to high school and University in Saudi Arabia. The delegate noted that he had been employed in Saudi Arabia since June 2007 until he came to Australia in late 2011 which indicated he could work in Saudi Arabia. He responded that he had to work

illegally. He has not been able to find a sponsor (despite looking for a sponsor including during his return trips to Saudi Arabia from Australia).

31. His temporary residence permit for Saudi Arabia has a “no work” condition.
32. The delegate asked the applicant about Yemen. He stated that he has never been to Yemen and he has no family in Yemen. The people in the government disapprove of him even though he is the holder of a Yemeni passport. The government in Yemen is a failure. There is racism against the people in Yemen and it is unfounded in his case because he holds a Yemeni passport. Once he visited the Yemeni consulate in Saudi Arabia to renew his passport. They would not renew his passport because they treated him as a foreigner due to the fact that he was born and had spent his whole life in Saudi Arabia.
33. His older brother went to Yemen in 2003 with the intention of living there. He was initially refused (Yemeni) citizenship even though he held a Yemeni passport because he was born and spent his whole life in Saudi Arabia. However, after a struggle, he was issued with a citizenship card. However, the government and the people disapproved of him and told him to leave. He was in the country for a couple weeks but couldn't stand the life there. The delegate suggested that a couple weeks was a very short time for his brother to have made a judgement about the country. He responded that no one would give his brother job and people told him to go back to Saudi Arabia
34. His father was born [in] South Yemen.
35. There is a big difference between North Yemenis and South Yemenis in culture, accent and everything. They hate each other. The northerners are Shia and the southerners are Sunni. Yemen has been unified but the old attitudes haven't changed.
36. He has fluent English but that won't help him obtain employment in Yemen-when his brother attempted to find work in Yemen he was accused of trying to steal a job from Yemenis.
37. If the Saudi authorities find him working they will deport him to Yemen.
38. The delegate noted that his father had worked and raised a big family in Saudi Arabia. He responded that the situation has become worse.
39. The delegate noted the delay between arrival in February 2011 and his lodgement of an application for a protection visa in October 2012. He stated that he had found a sponsor for an application for a subclass 457 visa – [details deleted: s.431(2)] – but it did not go well. His application for the subclass 457 visa was refused in September 2012. The sponsor advised and that it could not offer him full-time work, only part-time work so he could not qualify for the subclass 457 visa. He then decided to apply for a protection visa.
40. If he was returned to Yemen he would face racism. People will disapprove of him because he looks and sounds like a Saudi.

41. The delegate noted that there was a distinction between discrimination and persecution. The last two times he renewed his visa it was "under the table" because he was told that given that he is over 18 years of age and he had to be either working or studying. His employer was happy with him and wanted to sponsor him but was advised that businesses must have at least 25% Saudi employees. His sponsor would not have achieved that minimum quota if it sponsored him so they gave the job to a Saudi despite the fact that the Saudi did not have his skills and could not speak English.
42. The delegate suggested that his (the applicant's) father had [number of children deleted: s.431(2)] in Saudi Arabia and had been successful there. The applicant responded that the reason his father had stayed in Saudi Arabia was that he was committed to the Sunni religion.
43. [In] March 2012 the delegate decided to refuse to grant the applicant the protection visa.
44. [In] April 2012 the applicant lodged an application for review by the Tribunal.
45. On [a further date in] April 2012 the applicant lodged the following documents with the Tribunal:
 - media releases including undated New York Times articles entitled "New Leader Faces Threats in the South, "Yemeni Official Puts Uprisings Tolls At "Over 2000 Martyrs"" and an untitled article dated 27 March 2012
 - a document entitled "Written Arguments" which ends with "Yours faithfully [name] & [name]" but is not signed by them. The document is set out below verbatim:

We would like to get information about our protection visa applications.

In regards to what the case officer has indicated, he stated the following:

-That we may be killed in Yemen DESPITE NEVER HAVING BEEN THERE !!!

Well, how does he know that we are going to be safe DESPITE NEVER HAVING BEEN THERE!!!

-And the case officer said that our older brother left Yemen because of some reasons but not limited to these:

1. -He left Yemen because Yemenis have disapproved of him as a Yemeni by SAYING "stranger". Because he was born in Saudi Arabia and lived his entire life there.
2. -Because he is a southern Yemini, southern Yemeni people are mistreated badly.

3.-Because he couldn't have had most basics of human rights. Yemeni people disapproved of him as a Yemeni, and as we all have been disapproved of as a Saudi, and we have all been disapproved as a Saudi then WHAT ARE WE????

-The case officer said that our claims relate due to generalised violence. He said it's vague and unspecific.

Well, we can't just wait to be involved in a specific violence or be experienced a serious harm. We are trying to work something out before it's too late!!

Some additional information:

-we have faced difficulties receiving new Yemeni passports, our occupation in the passport is a "a student". The Yemeni consulate called us as we are strangers!!

The Yemeni consulate asked us to bring and evidence that we are students but the fact is that we are not students anymore. They said we either have to be students all be sponsored in Saudi Arabia!!!

So the right thing should be said, the case officer said that we are Yemeni nationals which means we should receive our passports no matter what we are, students or Sponsored, employed or unemployed but the Yemeni consulate still asks for evidence to receive new passports. Therefore they don't believe we are Yemenis nationals.

-We already submitted a paper from Yemeni government. It states that our lives are in danger if we go to Yemen. THIS PAPER CAN'T BE IGNORED!!!

-We are NOT a part of Yemen. We have never been there. We have no family there. We have Yemeni passports but that does NOT mean that we are Yemenis.

We come from where we are appalled which is Saudi Arabia NOT only born, we have lived our entire lives in Saudi Arabia. Therefore, Saudi Arabia, is where we come from!!

if there is anything required please let us know.

46. [In] July 2012 the Tribunal received from the applicant a request that the Tribunal convene a hearing in relation to his brother [Mr A] RRT 1204111 at the same time on the basis that "my case and his case are the same and have got the same claims".
47. [In] August 2012 the Tribunal received from the applicant a number of media releases including reports entitled "Al Qaeda Is Defeated Not Destroyed", "Secession calls re-emerge from South Yemen" (27 January 2012), "Yemen: 4 killed in southern secessionist march", an article in Yemen online dated 9 July 2012 The journalist also talks about the views of southerners, namely that they are being mistreated and discriminated against and an undated article in Yemen News with the heading "An uncertain future".

48. The applicant also lodged a CD-ROM with the words "Reason number 10" written on it which comprises:

- two NATO videos (they are the same) of three minutes and forty seconds duration which briefly describe 10 problems faced by Yemen, including water, poverty, unemployment, weak government control, the decline of oil resources and tourism, the experience of jihad and Al Qaeda and radical clerics. Reason no 10 is entitled "a country divided" and lasts 32 seconds- it refers to discrimination and the Al Houtha conflict in North Saada.
- footage of a news item including protest scenes and an interview with a separatist and the Governor of Aden. The journalist talks about the secessionists and separatists and the conflict between unionists and separatists in the south. The journalist also talks about the views of southerners, namely that they are being mistreated and discriminated against. The Governor of Aden talks about giving more power to local governors.

The Tribunal Hearing

49. A hearing was held [in] August 2012. Immediately before the start of the hearing the applicant provided the following documents:

- undated reference from [name and company deleted: s.431(2)] in relation to the applicant and his brother's contribution to the community as [sports] coaches
- character references from [names deleted: s.431(2)].

50. The applicant gave the following sworn oral evidence to the Tribunal.

51. He was born on [date deleted: s.431(2)] in Riyadh, Saudi Arabia. His mother and father were both born in [Yemen] and relocated to Saudi Arabia in the late 1970s. His father is now retired but previously worked as a [vocation deleted: s.431(2)]. His parents reside in Jeddah.

52. He has [details in relation to siblings deleted: s.431(2)].

53. He finished high school in [year deleted: s.431(2)] and first came to Australia in August 2006. He undertook an English language [course] for six months. He then returned to Saudi Arabia for about three and a half years.

54. He re-entered Australia in June 2010 and undertook a further English language [course]. He then undertook a course in TESL (Teaching English as a second language), graduating in late 2010.

55. In January 2011 he returned to Saudi Arabia for about a month. He returned to Australia in January 2011 and has been working as a part time [sports coach] since then.

56. He is a citizen of Yemen by virtue of the fact that his parents are citizens. He travelled on a Yemeni passport. He has never been to Yemen.
57. Asked why he asserted that he was a refugee, he stated that he would face racism and discrimination in Yemen and Saudi Arabia.

Yemen

58. Asked why he believed that of Yemen, he stated that in 2003 his older [brother] visited Yemen to settle there but they (the Yemenis) disapproved of him. He stayed for a couple of weeks and then returned to Saudi Arabia because of the discrimination he faced just because of the way he talked and his accent, which identified him as someone who had lived in Saudi Arabia. He was called a stranger even though he held a Yemeni passport and this is really offensive. Asked if anything else happened to his brother, he stated no.
59. Racism has increased since unification. The northerners disparage southerners as immigrants and complain about them. All the natural resources are in the south.
60. In 2011 he and his brother applied for new passports at the Yemeni Consulate in Saudi Arabia but they were not treated properly. The passport office initially called them strangers and then told that they would not be issued with passports unless they were students. Even though they were no longer students, they were required to produce false documents to substantiate that they were either a student or a sponsored employee. His father's sponsor fabricated documents that purported to show that he was a student. Saudi Arabia issues temporary residents visas which are renewable every two years whilst you are in Saudi Arabia. However, the visa must be renewed yearly if you live outside Saudi Arabia.
61. The Tribunal asked the applicant how he got his first passport in 2006. He stated that, on that occasion, the process was normal.
62. The Tribunal asked the applicant if he had any fears other than fears of discrimination and racism. He stated that that was all.
63. The Tribunal suggested that the applicant a fear based on his brother's experience of a couple of weeks' duration nine years ago of people being unkind to him does not give rise to a well-founded fear of persecution now. He stated that the time his brother spent in Yemen was more like a month. He stated that racism is hatred and that can lead to harm or the possibility of harm. People in the Yemeni Consulate in Saudi Arabia called them strangers.
64. The Tribunal asked if he had (other than his brother's account of his experiences during his visit in 2003 and treatment he, the applicant, got from the Yemeni Consulate in Saudi Arabia) any other basis for his assertion that he will face racism in Yemen. He stated that there are some videos and recently people were killed at Eid so, if he went to pray in celebration of Eid, it could happen to him.

Saudi Arabia

65. The applicant stated that he is not a national or a citizen of Saudi Arabia and does not have permanent residence there.
66. He was on a temporary visa which was renewable every two years when he resided there and when you travel outside you have to come back every year to renew the visa. Since leaving high school renewal of his visa has been subject to his providing evidence that he was a student or sponsored by a Saudi business.
67. When he returned to Saudi Arabia in 2007 he worked as a [details of employment deleted: s.431(2)] for two years and he asked [the company] to sponsor him. It could not as it did not have a place for him. He does not have the right to return to Saudi Arabia.
68. The Tribunal asked the applicant why he went back to Saudi Arabia in 2007. He stated that he had good English and thought he would get a good job there. He got a good job and asked [the company] for sponsorship but they refused, saying that the position should go to a Saudi.
69. He returned to Australia in January 2011 His student visa expired in March 2011 and he applied for a subclass 457 visa. However, his sponsor could not offer him a full time position and, as a result, his application for a visa was refused in October 2011. He then applied for the protection visa.

Complementary Protection

70. The Tribunal suggested that Law no 6 of 1990 Concerning Yemeni Nationality Art 3 suggested that he was a national of Yemen and that, accordingly, the “receiving country” for the purposes of assessing if he was entitled to complementary protection was Yemen.
71. The Tribunal asked the applicant if he would be at risk of significant harm in Yemen. He replied that he wants to stay in Saudi Arabia but he is not eligible to stay. His brother ([Mr A]) even produced to the Saudi authorities a piece of paper from Yemen (referred to in paragraph 24 above) which showed that they cannot go to Yemen.
72. The Tribunal suggested that his claims of being fearful of persecution were tenuous given that he had never been to Yemen and was basing his claims on anecdotal evidence from his brother and general country information which related to generalised violence. He replied that it was really offensive to be called a stranger (by the Yemeni Consulate in Saudi Arabia). The Tribunal suggested that he had not been treated as a stranger because they issued a passport to him. He responded that he had had to produce false documents showing that he was a student.
73. The Tribunal asked the applicant whom he feared in Yemen, he stated the North Yemenis. Asked why he feared the North Yemenis, he stated that they do not recognise the southerners as legitimate Yemenis. They regard the southerners as “immigrants”

and hold the view that there is no place for them and that all the oil and resources, which is all located in the South, belong to the North Yemenis.

Delay

74. The Tribunal noted the delay between his arrival and his lodgement of an application for a protection visa. He responded that he believed it was better to apply through the “proper channels” for a subclass 457 visa than apply for a protection visa. The Tribunal noted that there was a lot of information about asylum seekers in the Australian media and asked the applicant why he did not attend the office of the Department and ask the departmental officers about the process of applying for asylum. He replied that he had the opportunity to apply for a subclass 457 visa and he had a [sponsor].
75. The Tribunal observed that, nevertheless, a subclass 457 visa is only a temporary visa and has a range of evidentiary requirements and then after four years there were a lot of further requirements to obtain permanent residence. He reiterated that he had had an opportunity to be sponsored and pursued that opportunity.
76. The Tribunal suggested that if he did have a fear of persecution he would have made inquiries about a protection visa. The Tribunal noted that there was frequent discussion of the issue in the media. The Tribunal again asked the applicant why he did not inquire at the Department of Immigration about the way to seek protection. He reiterated that he had the opportunity to be sponsored and, although a protection visa was in his mind, it is a better situation to be sponsored and work for your sponsor and then (if that was unsuccessful) apply for asylum.
77. [In] September 2012 the Tribunal received a character references from [name deleted: s.431(2)], the father of a child whom the applicant [coaches].

FINDINGS AND REASONS

Refugee Convention

78. The Refugee Convention requires decision makers to determine if the applicant has a well-founded fear of persecution in their country of nationality. The Tribunal must, as a threshold question, identify the applicant’s country of nationality for the purposes of assessing whether he has a well-founded fear of persecution in their country. Two possibilities arise: Saudi Arabia and Yemen.

Saudi Arabia

79. The applicant was born in Saudi Arabia and has spent his whole life in that country apart from a brief period in Australia in 2006 and a second period in Australia from June 2010 until the present time. The applicant stated that he is not a national or a citizen of Saudi Arabia and does not have permanent residence there. His parents and siblings all reside in Saudi Arabia. His father is/was sponsored by a Saudi business. The rights that attach to the family members’ visas are uncertain. The applicant claims

that the visa merely conferred the right to temporarily reside in Saudi Arabia and was, and is, required to be renewed every two years. He further claims that his father had to demonstrate ongoing sponsorship by a Saudi business. He further claims that his visa status lapsed upon finishing study and that any further renewal of his visa status was dependent upon him either being a full-time student in Saudi Arabia or being sponsored by a business in Saudi Arabia. He further claims that he was on a temporary visa which was renewable every two years when he resided there and when you travel outside you have to come back every year to renew the visa. After leaving high school the renewal of his visa was subject to his providing evidence that he was a student or sponsored by a Saudi business.

80. He presented for a medical examination for his student visa and indicated (or it was indicated on his behalf) that he had presented passport no [number deleted: s.431(2)] which was described as Saudi passport. However, movement records indicate all movements were on Yemeni passports- passport numbered [number deleted: s.431(2)] and, from 2011, passport numbered [number deleted: s.431(2)]. Accordingly, the reference to Saudi Arabia must be an error by the examining doctor.

Yemen

81. The applicant was born to parents who were themselves both born in Yemen. They moved from Yemen to Saudi Arabia and the applicant and his siblings were born in Saudi Arabia. As indicated above, the applicant spent his whole life in Saudi Arabia and has not set foot in Yemen.
82. The applicant insists that the reality is that his home country is Saudi Arabia and it is artificial to consider his claims against Yemen.
83. Whilst the Tribunal agrees that, in the unusual circumstances in this case, it may appear artificial to assess the applicant against Yemen, the Tribunal notes that the plain wording of the Refugee Convention indicates that it is the country of nationality rather than the country of residence, irrespective of how long term that residence might have been, which is the country against which an applicant must be assessed.
84. The Tribunal notes that assessing nationality for the purposes of the Refugees Convention involves an assessment of a number of factors (identifying the analogous “receiving country” for the purposes of Complementary Protection is made easier by a definition of that term in the Migration Act – this is discussed below).
85. “Nationality” is a somewhat nebulous term and is not determined merely by reference to the period of residence in a country or even citizenship of a country. Whilst citizenship will be a strong indicator of nationality it is not determinative.
86. The Tribunal notes that that the applicant is recognized under Yemeni law as a national of Yemen, had been issued twice with a Yemeni passport and has described himself as a citizen of Yemen. In light of these circumstances, the Tribunal considers that the applicant’s country of nationality for the purposes of the Convention is Yemen and

accordingly assesses whether he has a well-founded fear of being persecuted for a Convention reason in that country.

Claims under the Refugee Convention

87. As indicated above, [in] July 2012 the applicant advised the Tribunal, in relation to the application brought by his brother [Mr A] RRT1204111, that “my case and his case are the same and have got the same claims”. However, whilst there is a large degree of commonality (their written claims are almost verbatim), the Tribunal found that [Mr A]’s evidence gave rise to a claim based on political opinion whereas it did not find that this applicant’s evidence gave rise to a claim based on political opinion. Where the claims are identical the Tribunal has used the same reasoning.
88. The applicant initially made the broad claim that he faced racism in Yemen from the North Yemenis, and that there is no state protection in Yemen because Yemen was a failed state.
89. The claimed reasons for the claimed fear of racism included the experiences of his older [brother] during a brief [visit] to Yemen in 2003. [His brother] had faced disapproval and could not get a job. A further reason for his fear of racism in Yemen was his own experience with the Yemeni consulate in Saudi Arabia when he (the applicant) applied to renew his passport in 2011. The officials forced him to adduce evidence of Yemeni citizenship despite the fact that he already had held a Yemeni passport. The applicant also referred to country information about the enmity between North Yemenis and South Yemenis in support of his claimed fear of racism.
90. In the hearing before the Tribunal the applicant reiterated his concerns about racism. He again referred to the 2003 visit by his older brother to Yemen, his (the applicant’s) 2011 passport problems and country information including country information in relation to recent events in Yemen.
91. The Tribunal has had some difficulty in identifying the Convention grounds raised by the applicant’s evidence.
92. As indicated above, the Convention grounds include race, religion, nationality, membership of a particular social group or political opinion.
93. The applicant referred to nationality: “the government won't give me my rights to live permanently and work because I come from different nationality”. However, this was in the context of Saudi Arabia which, for reasons already indicated above, is not the “Country of Nationality” against which to assess the applicant’s claimed fear of persecution.
94. The applicant referred to “Racism”. “Racism” ostensibly invokes the convention ground of “Race” but the applicant did not indicate what race he belonged to and how his race would attract a well-founded fear of persecution. Under “ethnic group” on his protection visa application form, he indicated “Yemen” but did not indicate what, if any, race he

belonged to. In considering if there has been a race-based claim the Tribunal noted that there would not appear to be any evidence or claim of a *racial* differentiation between with the putative racist (North Yemenis who are hostile to southerners and Yemenis in general who resent people who have not lived in Yemen) and the would-be victim (the applicant). It is not clear on the evidence before it, that the applicant has a well-founded fear of persecution by reason of his race.

95. The Tribunal considers that the applicant's reference to racism, despite being couched in terms of race was, in substance, an invocation of the Convention nexus of Particular Social Group. Possible Particular Social Groups include:
 - South Yemenis (including persons who never lived there but whose families originate from there) who have been and will be persecuted by North Yemenis
 - South Yemenis who have spent their lives outside Yemen who will be persecuted by Yemenis as "strangers"
 - Yemeni nationals who have resided in Saudi Arabia and "look and sound" like Saudis, who will be persecuted by Yemenis as "strangers"
96. The Tribunal would have some reservations about finding that any of these groups implicitly raised by the applicant as particular social groups in fact constitute a "particular social group" as that term has been elucidated through the case law.
97. The Tribunal nevertheless proceeds for the purposes of the analysis on the assumption that these groups constitute particular social groups.
98. As indicated above, to establish the well-founded-ness of his claimed fear of persecution the applicant relies the experiences of his older brother during a visit to Yemen in 2003, his own experiences with the Yemeni consulate in Saudi Arabia in 2011, a letter received the Yemeni government and country information.

The 2003 visit by his older brother to Yemen

99. In relation to the 2003 visit by his older brother to Yemen, the Tribunal notes that no statement from [his brother] was submitted but he was said to have experienced societal disapproval and a denial of work opportunities.
100. In relation to the disapproval, whilst unreasonable disapproval is unpleasant, the Tribunal is not satisfied on the evidence before it that the disapproval endured by [his brother] constituted serious harm. Nor does the Tribunal consider that it can be extrapolated, from disapproval endured by [his brother] for two or perhaps three weeks nine years ago, that the applicant would face societal disapproval if he resided in Yemen now.
101. In relation to the claim that [his brother] was discriminated against when he attempted

to find employment, the Tribunal accepts that a denial of a person's right to secure a means of subsistence can constitute persecution. However, the Tribunal considers that the attempt by [his brother] of two or three weeks to find employment is not a long enough period to act as a barometer of entrenched discrimination in the employment market in Yemen. The Tribunal also considers that the fact that this experience occurred nine years ago under a different regime weakens its probative value as to whether it might happen to the applicant.

102. Furthermore, the claimed denial of the right to work is not reflected in the 2001 Constitution of Yemen which stipulates that every Yemeni citizen 'has the right to participate in the political, economic, social and cultural life of the country' without excluding Yemenis who have lived abroad. In addition, the 2001 Constitution of Yemen and the Labor Code 1995, does not impose any restrictions on Yemenis who have lived abroad to work in Yemen. Article 29 of the Constitution states that '[e]very citizen has the right to choose the appropriate work for himself within the law'. Article 5 of the Labor Code 1995 states that '[w]ork is a natural right of every citizen and a duty for everyone who is capable of working, on the basis of equal conditions, opportunities, guarantees and rights without discrimination on grounds of sex, age, race, colour, beliefs or language".

The applicant's experiences with the Yemeni Consulate in Saudi Arabia in 2011

103. The Tribunal notes the applicant's evidence that he obtained his first passport in 2006 without any difficulty but when he applied for a fresh passport in 2011, he encountered difficulties. The Tribunal accepts that in 2011 he may have been requested to provide evidence of his enrolment in a course or his employment in a Saudi-sponsored position.
104. The applicant asserts that at the relevant time in 2001 he was neither a student nor a sponsored employee and to obtain a passport he was forced to suffer the indignity of posing as an employee in order to satisfy the Yemeni officials at the Yemeni Consulate in Saudi Arabia. The Tribunal accepts that this would have been frustrating and unpleasant and that an honest person would feel some disquiet in making false statements and producing bogus documentation in order to obtain a passport from the country of which he is a national. However, the Tribunal does not regard the bureaucratic processes or evidentiary requirements followed by the Yemeni consulate in 2011 in relation to the applicant's application for a passport constitutes persecution.

The letter from the Yemeni government

105. In relation to the letter from the Yemeni government (see paragraph 24), the Tribunal notes that [name deleted: s.431(2)] asserts that the applicant (and his brothers) would, if they were required to live in Yemen, be exposed to "the threat of being killed" by reason of "tribal conflicts and revenge". In his claims the applicant mentioned problems he would encounter as someone (whose family was) from South Yemen but, whilst [name deleted: s.431(2)] mentioned "tribal conflict", he did not identify a "tribe" or "tribal conflict". Furthermore, neither the author of the letter nor the applicant indicated who would be seeking revenge or why they would be seeking revenge.

106. The Tribunal also notes that the letter is dated [in] September 2009 i.e. nearly three years ago and before the removal of the Saleh regime. The Tribunal also notes that the letter was issued by [name deleted: s.431(2)] of the Agency of the Central Political Security. [Name deleted: s.431(2)] would, by rank and office, seem to be a high ranking member of the State machinery and his preparedness to provide a letter of support is somewhat at odds with the claim that southerners (including those who have never lived in Yemen but who hail from a family who originally lived in south Yemen) are denied access to State protection.
107. The Tribunal also notes that the applicant's passport number is [number deleted: s.431(2)] not, as indicated in [the] letter [number deleted: s.431(2)]. Furthermore, passport [number deleted: s.431(2)] was not issued to the applicant until [a date in] January 2011 whereas the [letter] is dated [in] September 2009. [Name deleted: s.431(2)] is therefore referring, purportedly [in] September 2009, to a passport – passport number [number deleted: s.431(2)] (sic [number deleted: s.431(2)]) –which did not exist until [a date in] January 2011.
108. In any event, given the letter's age and lack of detail and the changes that have taken place in Yemen since its apparent date of issue ([in] September 2009), the Tribunal does not accept that it establishes that the applicant is personally at risk of acts of revenge in Yemen as he has never been to Yemen (it is implausible and has not been put by the applicant that he might be exposed to an act of revenge in relation to the 2003 visit to Yemen by his older brother) . Presumably, the letter is intended to substantiate the applicant's claim that he faces harm by virtue of hailing from a family who originally lived in south Yemen and that the North Yemenis are resentful of southerners. This is discussed below.

Country information

109. In relation to the country information the Tribunal notes that in his decision the delegate referred to the elections held in Yemen for a successor to President Ali Abdullah Saleh on 21 February 2012 which was won (there being only one candidate) by former Vice President Abdu Rabu Masour Hadi. The delegate referred to a report from the Integrated Regional Information Network of the United Nations which cited the challenges for the new president including ensuring stability and resolving opposition from rebels in the Saa'dah and Hajjah governates and resolving tensions with southern separatists.
110. The Tribunal also considered the country information provided by the applicant the Tribunal (see paragraphs 45, 47-48).
111. In terms of a Yemeni citizen's right to live in Yemen, the 2001 Constitution of Yemen stipulates that every Yemeni citizen 'has the right to participate in the political, economic, social and cultural life of the country' As already indicated, according to the 2001 Constitution of Yemen and the Labor Code 1995, there are no restrictions on the right of a Yemeni citizen to work in Yemen. Article 29 of the Constitution states that

‘[e]very citizen has the right to choose the appropriate work for himself within the law’. Additionally, Article 5 of the Labor Code 1995 states that ‘[w]ork is a natural right of every citizen and a duty for everyone who is capable of working, on the basis of equal conditions, opportunities, guarantees and rights without discrimination on grounds of sex, age, race, colour, beliefs or language’.

112. The Tribunal accepts that Yemen is in a state of turmoil. The ouster of Saleh released long-standing regional grievances in the south (as well as other religious and tribal conflicts). The new president recently appointed a new head of security and new governor in the southern province of Aden which is seen by southerners as a step that could improve their situation in the long-term. There have also been increasing tensions over scarce resources and the rise of radical Islamism.

Well-founded fear of persecution

113. The Tribunal accepts that it is not incumbent upon an applicant to produce evidence of past persecution, or even claim past persecution, to substantiate a well-founded fear of persecution. The Tribunal also accepts that a history or even a single incident of past persecution in Yemen (as opposed to Yemeni consular offices abroad) is impossible in the applicant’s circumstances of never having set foot in Yemen. The Tribunal nevertheless considers that none of the matters raised by the applicant give rise to a well-founded fear that there is a real chance that, if sent to Yemen, he would be persecuted for any of the claimed Convention grounds. Whilst accepting that the current atmosphere in Yemen is highly unstable and there is a risk of generalised violence, the Tribunal does not consider that the country information supports the proposition that members of the particular social groups mentioned above face a well-founded fear of persecution by reason of their membership of those groups.
114. This disposes of the Tribunal's consideration of whether the applicant is entitled to relief under the Refugee Convention. The Tribunal nevertheless makes a passing reference to the applicant's delay in lodging his application for protection. The applicant first arrived in Australia in 2006 and then returned to Saudi Arabia. He re-entered Australia in June 2010 yet did not apply for protection until November 2000. His reasons are set out at paragraphs 75-77 above. However, the applicant did not attribute the delay to a lack of a fear under Saleh and a fear only arising when it became apparent that Saleh might be deposed. Whilst he refers to the escalation of violence in recent times, he cites a long standing problem for southerners. The Tribunal also notes that the applicant is an educated intelligent man and would have, had he been genuinely fearful of persecution in Yemen, made inquiries, if not, in 2006 promptly upon his return to Australia in 2010. Although the applicant was the holder of a student visa that visa was temporary and, had he been genuinely fearful of persecution in Yemen, he would have made inquiries about protection. The Tribunal’s finding that the applicant does not have a well-founded fear of persecution for a Convention reason is reinforced by the applicant's delay in lodging his application for protection.

Accumulation

115. The Tribunal has also considered if the applicant has a well- founded fear of persecution by reason of a combination of his membership of the particular social groups (1) “South Yemenis (including persons who never lived there but whose families originate from there)”, (2) “South Yemenis who have spent their lives outside Yemen and (3) “Yemeni nationals who have resided in Saudi Arabia and “look and sound” like Saudis. On the evidence before it, the Tribunal is not satisfied that the applicant has a well- founded fear of persecution by reason of a combination of his membership of these particular social groups.

Complementary Protection

116. The threshold question is to identify the “receiving country” for the purposes of assessing whether the applicant is a person to whom Australia owes complementary protection obligations.

117. As indicated above, “receiving country” is defined by Section 5 of the *Migration Act*:

receiving country, in relation to a non-citizen, means:

- (a) a country of which the non-citizen is a national; or
 - (b) if the non-citizen has no country of nationality — the country of which the non-citizen is an habitual resident;
- to be determined solely by reference to the law of the relevant country.

118. The relevant “law of the relevant country” is the “*Law Number 6 of 1990 Concerning Yemeni Nationality*”:

Article (3):

Yemeni nationality shall be enjoyed by:

- (a) Whoever is born to a father enjoying this nationality.
- (b) Whoever is born in the Yemen of a mother who holds this nationality and a father whose nationality is unknown or who has no nationality.
- (c) Whoever is born in the Yemen of a mother who holds this nationality and his kinship to his father has not been legally established.
- (d) Whoever is born in the Yemen to un- known parents and the infant who is found in the Yemen shall be deemed to be born in the Yemen, unless proof to the contrary thereof is established.
- (e) The emigrant who, when leaving the territory of the homeland, was enjoying Yemeni nationality and has not relinquished such nationality in accordance with the law and upon an explicit request from him, even though he may have acquired the nationality of the country in which he is domiciled and in accordance with its

laws.

Article (4):

By Republican Decree and upon the submission of the Minister, Yemen nationality may be granted in the following cases:

- a) Whosoever is born abroad of a mother who holds this nationality and a father of unknown nationality or who has no nationality, provided that he has made his ordinary domicile in the Yemen in a legitimate manner for a period of ten successive years at least before attaining the age of adulthood and his application choosing the Yemeni nationality has been submitted during one year from his attaining adulthood.
- b) Whosoever is born in the Yemen to foreign parents, has domiciled there in until attaining the age of adulthood, is proficient in the Arabic language, of sound mind, not afflicted with a disablement rendering him a burden upon society, is of good character and conduct and has not been adjudged with a punishment for criminal offence or a penalty restricting libel1y in a crime violating public order and public morals, unless he has been rehabilitated, and provided that he submits an application to en- join Yemeni nationality within a year of attaining adulthood.
- c) Whosoever is born in the Yemen to a foreign father also born in the Yemen.
- d) Whosoever has rendered to the state or the Arab nation a great service.
- e) Whosoever belongs to the Yemeni origin whenever he applies to obtain Yemeni nationality after five years elapse over his making the Yemen his domicile, provided that the grand father from the father's side domicile in the Yemen is established and he relinquishes being related to any other nationality when he is granted nationality.

119. As indicated above, the applicant told the Tribunal that his father was a national of Yemen. The Tribunal is therefore satisfied that the applicant is himself a national of Yemen by operation of (Article 3).

120. When asked about the risk he faced in Yemen the applicant traversed the same claims he had made in support of his claims for refugee status. He asserted that he would face significant harm by reason of his Saudi accent, being a foreigner (a stranger) and the attitude of North Yemenis towards Southern Yemenis.

121. The Tribunal has considered if:

- it has substantial grounds for believing that,
- as a necessary and foreseeable consequence of the applicant being removed from Australia to Yemen

- there is a real risk that he will
- suffer significant harm: A person will be taken to have suffered ‘Significant harm’ vis if he will be:
 - arbitrarily deprived of his life; or the death penalty will be carried out on him;
 - or he will be subjected to:
 - torture;
 - cruel or inhuman treatment or punishment; or
 - degrading treatment or punishment.

122. On the evidence before it, the Tribunal is not satisfied that there is a real risk that the applicant would face arbitrary deprivation of his life; the death penalty, torture, cruel or inhuman treatment or punishment or degrading treatment or punishment by reason of his Saudi accent, being a foreigner (a stranger) and the attitude of North Yemenis towards Southern Yemenis or a combination of those characteristics or for any other reason.

The death penalty

123. The Tribunal considers that, far from having “substantial grounds for believing that there is a real risk to the applicant that he will be tortured there is no basis for finding that he will be subjected to the death penalty.

Torture

124. The Tribunal considers that, far from having “substantial grounds for believing that there is a real risk to the applicant that he will be tortured there is no basis for finding that he will be subjected to torture.

Cruel or inhuman treatment or punishment or degrading treatment or punishment

125. The applicant asserts that he will be treated badly but there is no basis for finding that he will be subjected to cruel or inhuman treatment or punishment or degrading treatment or punishment. He declared himself as a citizen (in his protection visa application form) and the Yemeni Law of Nationality confers Yemeni nationality on him. Whilst there is view that southern Yemenis are marginalised, no persuasive evidence was presented of the forms that marginalisation took on or that any such marginalisation would amount to cruel or inhuman treatment or punishment or degrading treatment or punishment.

Arbitrary deprivation of his life

126. Given the turmoil in Yemen it is possible that the applicant could be killed but the Tribunal does not consider that there is a real risk of that happening. Even if the Tribunal were prepared to accept that (which it is not) the applicant faced a real risk of the arbitrary deprivation of his life during an outbreak of civil strife or a random act of violence, this would be a risk that is one faced by the population of the country generally and not to him personally. This is excluded by section 36(2B) of the Act.

DECISION

127. The Tribunal affirms the decision not to grant a protection visa to the applicant and makes a determination that the applicant is not a person to whom Australia owes complementary protection obligations.