

DECISION RECORD

RRT CASE NUMBER: 0807432

DIAC REFERENCE(S): CLF2008/112643 CLF2008/131100

COUNTRY OF REFERENCE: Sudan

TRIBUNAL MEMBER: Tim Connellan

DATE: 6 January 2010

PLACE OF DECISION: Melbourne

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

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

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of decisions made by a delegate of the Minister for Immigration and Citizenship to refuse to grant the applicants Protection (Class XA) visas under s.65 of the *Migration Act 1958* (the Act).
2. The applicants, who claim to be citizens of Sudan, arrived in Australia [in] January 2005 and applied to the Department of Immigration and Citizenship for Protection (Class XA) visas [in] July 2008. The delegate decided to refuse to grant the visas [in] October 2008 and notified the applicants of the decision and their review rights by letter [on the same date].
3. 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
4. The applicants applied to the Tribunal [in] November 2008 for review of the delegate's decisions.
5. The Tribunal finds that the delegate's decision is an RRT-reviewable decision under s.411(1)(c) of the Act. The Tribunal finds that the applicants have made a valid application for review under s.412 of the Act.

RELEVANT LAW

6. Under s.65(1) a visa may be granted only if the decision maker is satisfied that the prescribed criteria for the visa have been satisfied. In general, the relevant criteria for the grant of a protection visa are those in force when the visa application was lodged although some statutory qualifications enacted since then may also be relevant.
7. Section 36(2)(a) of the Act provides that a criterion for a protection visa is that the applicant for the visa is a non-citizen in Australia to whom the Minister is satisfied Australia has protection obligations under the 1951 Convention Relating to the Status of Refugees as amended by the 1967 Protocol Relating to the Status of Refugees (together, the Refugees Convention, or the Convention).
8. Section 36(2)(b) provides as an alternative criterion that the applicant is a non-citizen in Australia who is 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.
9. Further criteria for the grant of a Protection (Class XA) visa are set out in Part 866 of Schedule 2 to the Migration Regulations 1994.

Definition of 'refugee'

10. Australia is a party to the Refugees Convention and generally speaking, has protection obligations to people who are refugees as defined in Article 1 of the Convention. Article 1A(2) relevantly defines a refugee as any person who:

owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail

himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence, is unable or, owing to such fear, is unwilling to return to it.

11. The High Court has considered this definition in a number of cases, notably *Chan Yee Kin v MIEA* (1989) 169 CLR 379, *Applicant A v MIEA* (1997) 190 CLR 225, *MIEA v Guo* (1997) 191 CLR 559, *Chen Shi Hai v MIMA* (2000) 201 CLR 293, *MIMA v Haji Ibrahim* (2000) 204 CLR 1, *MIMA v Khawar* (2002) 210 CLR 1, *MIMA v Respondents S152/2003* (2004) 222 CLR 1 and *Applicant S v MIMA* (2004) 217 CLR 387.
12. Sections 91R and 91S of the Act qualify some aspects of Article 1A(2) for the purposes of the application of the Act and the regulations to a particular person.
13. There are four key elements to the Convention definition. First, an applicant must be outside his or her country.
14. Second, an applicant must fear persecution. Under s.91R(1) of the Act persecution must involve “serious harm” to the applicant (s.91R(1)(b)), and systematic and discriminatory conduct (s.91R(1)(c)). The expression “serious harm” includes, for example, a threat to life or liberty, significant physical harassment or ill-treatment, or significant economic hardship or denial of access to basic services or denial of capacity to earn a livelihood, where such hardship or denial threatens the applicant’s capacity to subsist: s.91R(2) of the Act. The High Court has explained that persecution may be directed against a person as an individual or as a member of a group. The persecution must have an official quality, in the sense that it is official, or officially tolerated or uncontrollable by the authorities of the country of nationality. However, the threat of harm need not be the product of government policy; it may be enough that the government has failed or is unable to protect the applicant from persecution.
15. Further, persecution implies an element of motivation on the part of those who persecute for the infliction of harm. People are persecuted for something perceived about them or attributed to them by their persecutors. However the motivation need not be one of enmity, malignity or other antipathy towards the victim on the part of the persecutor.
16. Third, the persecution which the applicant fears must be for one or more of the reasons enumerated in the Convention definition - race, religion, nationality, membership of a particular social group or political opinion. The phrase “for reasons of” serves to identify the motivation for the infliction of the persecution. The persecution feared need not be *solely* attributable to a Convention reason. However, persecution for multiple motivations will not satisfy the relevant test unless a Convention reason or reasons constitute at least the essential and significant motivation for the persecution feared: s.91R(1)(a) of the Act.
17. Fourth, an applicant’s fear of persecution for a Convention reason must be a “well-founded” fear. This adds an objective requirement to the requirement that an applicant must in fact hold such a fear. A person has a “well-founded fear” of persecution under the Convention if they have genuine fear founded upon a “real chance” of persecution for a Convention stipulated reason. A fear is well-founded where there is a real substantial basis for it but not if it is merely assumed or based on mere speculation. A “real chance” is one that is not remote or insubstantial or a far-fetched possibility. A person can have a well-founded fear of persecution even though the possibility of the persecution occurring is well below 50 per cent.

18. In addition, an applicant must be unable, or unwilling because of his or her fear, to avail himself or herself of the protection of his or her country or countries of nationality or, if stateless, unable, or unwilling because of his or her fear, to return to his or her country of former habitual residence.
19. Whether an applicant is a person to whom Australia has protection obligations is to be assessed upon the facts as they exist when the decision is made and requires a consideration of the matter in relation to the reasonably foreseeable future.

CLAIMS AND EVIDENCE

20. The Tribunal has before it the Department's file relating to the applicants
21. In support of his application, the primary applicant provided a statutory declaration which stated:
 1. I am a Sudanese citizen. I am of the Fur ethnicity and of the Muslim religion. I am married to [second named applicant] and have two children, [names]. My family and I arrived in Australia on [date] January 2005 as holders of student visas because my wife is studying for a Doctorate of Clinical Dentistry at [education provider]. Our student visas have been extended and currently expire [date] August 2009
 2. My wife and I have been living in Qatar for many years. [Son] was born in Qatar and [Son] was born in Australia. My wife, although born in Sudan, is a Qatari citizen. Because of the very restrictive immigration and citizenship laws of Qatar, my sons and I have been unable to obtain Qatari citizenship and in the past have relied on holding a series of temporary visas to be able to stay in Qatar. Neither I nor my sons currently hold visas for Qatar or any other country other than Australia, so we have no right to return to Qatar.
 3. I greatly fear that if I were to return to Sudan I would be in danger of being harmed by the Sudanese authorities because I am a professionally qualified Fur man, because of my political beliefs - I oppose the activities of the Bashir government in Sudan, particularly about the way it has treated people in Darfur - and because I have lived for many years outside Sudan, including several years in a Western country. The Sudanese government and security forces target anyone from Darfur who they suspect of being opposed to the government's campaign of violence and genocide in Darfur, or opposed to the government generally. I fear I could face arrest without charge, being beaten or even being killed if I were to return to Sudan because of this.
 4. I was born in [place], a village near Nyala in western Darfur. My family had a farm there, on which we grew crops to sell at market. My father is a member of the [name] tribe and my mother is a member of the [name] tribe. I studied at local primary schools and went to secondary school in Nyala. The current regime in Sudan took power during my final year at secondary school, on 3 June 1989. In early 1989, before the current regime took power, I had applied for a government scholarship to study in Egypt. The previous government had an agreement with Egypt that the Egyptian government would allow, and pay for, 2000 students to study at universities in Egypt. I was granted one of the scholarships - to study law at the [education provider] - before the current regime took power. The Sudanese students I went to study with in Egypt were the last group to be granted the scholarships as the agreement was not continued under the current regime. My family has strong connections with the former government. My father's brother had studied at Khartoum University and was one of the heads of the [Sudanese Government Department]. After

Bashir took power, my uncle was sacked and was never able to get another job. He died four or five years ago.

5. So I went to study law in Cairo at the beginning of 1990. I completed my law degree in late 1994. During my time in Egypt, I went back to Sudan once or twice for short holidays with my family. The Sudanese students would have to go to an office run by Sudanese people to collect the money given to us to pay for our food, books and course fees. I do not know whether this office was actually run by the Sudanese government or was an Egyptian government office just using Sudanese staff. In early 1993, the Bashir government announced that all Sudanese students overseas had to return to Sudan, even if we had not finished our courses, in which case we were to complete our studies in Sudan. The government said that if we did not return to Sudan as ordered, our studies in Egypt would no longer be paid for. I, like many other Sudanese students in Cairo at the time, decided not to go back to Sudan. Sudan was still very unstable and the universities were not running properly so we were not confident we would be able to complete our courses if we returned. This meant we had to find another way of paying to complete our courses in Egypt. The Islamic Society of Kuwait, which I think was part of the Kuwaiti government, offered scholarships for Sudanese people studying overseas. I applied to them and was granted a scholarship for my final two years of study.
6. There was a Sudanese students club at [education provider] as well as other student groups aligned with political factions in Sudan. Many of us were opposed to the Bashir government but I was not a member of any of the political groups at the University. However, everyone knew my political opinions. I attended meetings of the Sudanese Students Club and often discussed politics with other members of the club. We would debate about what was happening in Sudan. I was always arguing against the Bashir government, I criticised the Bashir government, saying it was racist because it discriminates against people from the South and that it gave people no freedom of choice: you either supported the government or got nothing-no jobs or help from the government. There were other Sudanese studying law in Cairo. Some of them were supporters of the pro-Bashir government group. I made friends with three girls. One of them was 100% against the Bashir government-she hated him-she stayed to study postgraduate law in Cairo and has never returned to Sudan. Another got married and now lives in the United States of America (USA).
7. I returned to Khartoum in late 1994, and started applying for jobs. I would travel to Khartoum for a few days at a time, attend interviews and wait for the result. I applied for many jobs but was never successful. I had many friends who were successful but not me. I applied at established law firms, and at newer law firms, and for government jobs. Whenever I was interviewed, I would be asked if I had been on a government scholarship when I studied in Cairo, and then why I had not returned to Sudan when the government had asked me to. I explained what I did, and then would later be told there were no jobs available, yet my friends and people I knew would get jobs at the same places straight away. I believe it was because I had not returned to Sudan when the government ordered us to, because I am from Darfur and because my family connections to the previous regime that I was passed over for other candidates for the jobs I applied for.
8. I spent about two years trying to get a job as a lawyer. During that time, I started working voluntarily as a teacher in the villages in our local area in Darfur. The condition of schools was extremely poor in Darfur at that time. There were no chairs and school buildings were very run down. I thought this was wrong-the central government in Sudan was clearly neglecting the people of Darfur and this was one example of this. I became very frustrated and angry with the way the government was treating us in Darfur, and particularly about the lack of resources for the education of our children. I think education is so important in

giving our children a chance of a better future and the government was not interested in giving children in Darfur this chance.

9. So, in June 1996, I led a group of people from our village to the nearest Education Department office, which was in [place], to ask for more materials for our school. The official I met with said we had never asked for this sort of thing before, and asked why we wanted these things now. He told us to leave and not come back. He said, “these people are not for studying” and said we would be in trouble if we came back asking for these things. As we left, a government official came out and asked for my details: my name and address, that sort of thing. Three or four days later at about midday, I was at the village school when one of the villagers came to me and told me that a military car was in the village and that there were people in the car asking where I was. I knew I was in great danger. The military had come asking for other people in our area who had been complaining about the government. They would be taken away for questioning and would be beaten and tortured, even sometimes killed. The Justice and Equality Movement (JEM) and the Sudanese People's Liberation Army (SPLA) were active by that time and the government suspected us all of supporting them. I have never been a member of the JEM or SPLA. So my neighbours hid me for a while. The military in the car came to my family home and asked where I was and were told I had left but that no one knew where I was. The military left and straight afterwards my father decided we should leave our village for a while.
10. We went to live in a neighbouring village for a couple of months. During that time, the military came back to [place] three or four times asking after me and so we realised there was no way I could return to our village. We decided I was going to have to leave the country as soon as possible. We contacted a family friend who was working in Qatar, called [Person 1], to get him to arrange a visitor visa to Qatar for me. We knew we would have to move fast because the report from the government authorities in [place] about me would eventually be sent back to Khartoum which would make it difficult for me to leave Sudan. People in my situation would end up on a black list at the airport and so be unable to leave. This was happening all the time. But because the government was badly run, it could take a while for the military reports about people to reach Khartoum and be processed.
11. I travelled to Khartoum where I stayed with a family friend who ran a bakery. He told me I needed to get a new passport, because the old one was too worn and I couldn't use it. He said if I paid enough bribes I could get a new one, so I returned to the village when my parents were staying. Our friend in Khartoum got me the new passport and we send the details to [Person 1] in Qatar who got me the visitor visa. The passport says I was working as a sales officer but I was actually unemployed at the time. I had to have a job recorded on my passport to get the visa to Qatar. I left Sudan on [date] September 1996 and have never been back. Once I got to Qatar, I stayed with [Person 1] for about seven months. I was not working during that time. By then, I was able to get a job as a lawyer at the [employer]. In June 1997, I had to get another visa to stay in Qatar. I was able to get a work visa by then, because of my job, but I had to leave Qatar to get it. I fled to Bahrain at 11:30 p.m. on [date] June 1997, and then flew back into Qatar three or four hours later. I was then granted the work visa on [date] July 1997
12. I then lived in Qatar until I came to Australia in 2005. At first, I had to keep applying for temporary working visas based on my jobs. I also had to keep renewing my passport to do this. I felt I had no choice. As far as I knew, I couldn't apply for refugee status in Qatar because Qatar does not give visas to refugees. I met my wife in Qatar in early 2002 and we married in May 2002. She had been living there since she was two years old and had become Qatari citizen in 1994. She works as a dentist. She had actually gone back to Sudan to study dentistry at the [education provider] on a Qatar government scholarship.

She graduated in 2000 and then returned to Qatar. Our son, [name], was born in 2004, and added to my passport in 2003 (sic) In Qatar, because his father is not a Qatari, he does not become a Qatari citizen by birth. In 2004, I was finally granted a visa to stay in Qatar on the basis of my relationship with my wife. This was preferable to the work visas because I would lose those visas if I lost my job. The visa I was granted on the basis of my relationship with my wife expired on [date] October 2006. It is very difficult for us to get another visa for me from outside Qatar. When my wife wanted to return to Qatar for a holiday from Australia in December 2005, it took months to get permission for [son] to re-enter Qatar. The Qatar government refused to give him an entry permit because he had been outside Qatar for more than six months. In the end we had to get him a 14 day tourist visa to get him back into Qatar with my wife. My wife and [son] returned to Qatar for a holiday from [date] December 2005 to [date] January 2006. During that time, we extended [son]'s visitor visa for another 14 days. My wife and [son] visited Qatar a second time between [date] December 2006 and [date] January 2007. This time, my wife's brother sponsored [son] for a one-month visa.

13. In 2004, my wife decided she wanted to undertake further dentistry studies before we had any more children. There is no university in Qatar specialising in dentistry and the Qatar government strongly encourages people to study overseas, particularly at western universities. My wife won a government scholarship to continue her studies and started applying to universities in Canada, the USA and Australia. In Australia, she applied to the University of Western Australia, University of Sydney and the [education provider] The [education provider] was the only university that accepted my wife's application so we came to Melbourne to undertake her postgraduate studies.
14. After I left Darfur, my family stayed in the village they had moved to for three or four years. My two brothers worked on a farm in another village and supported my parents. Then the tribal clashes started to get worse so my family had to start moving from place to place. When the tribes clash, there is no more food or work. Between 2000 and 2003, my family moved three or four times. Sometimes they were just sleeping under covers in the bush. One of my nieces died from illness. My father is almost blind. Since 2003, they have had to keep moving constantly. They are now living in a village in Darfur but I do not know the name. My brothers call me very occasionally-once every few months. There is no way my family could support me in Sudan. I have no family and Khartoum and there is no way I could get a job there because of the problems I had in the past. In any event, it would not be safe for me in Khartoum for the reasons I give above.
15. In light of the above, I fear that if I were to return to Sudan I would be harmed by the Sudanese government and military because of my anti-Sudanese government political opinion, as a result of me having not returned from my studies in Egypt when ordered, having criticised the government while in Egypt, having complained about the lack of resources in Darfur and having fled to Qatar. I will also be seen to be against the Sudanese government because I am a professionally educated man, and specifically a lawyer, from Darfur. Also be harmed because I am of the Fur ethnicity and from Darfur.
16. Australia is a welcoming place-there is no discrimination and it is a peaceful country. I feel it is a safe place for me and my children.
17. In light of the above I believe I am a refugee and Australia owes me protection obligations.
22. [In] November 2008, the primary applicant was advised the Tribunal was unable to make a favourable decision on the information before it in regard to the application for review for himself, his wife and two children. He and his family were invited to appear before the Tribunal to give oral evidence and present arguments [in] December 2008. At the request of the applicant's migration agent, the Tribunal date was brought forward [in] December 2008.

23. [In] December 2008 the Tribunal received a response to the hearing invitation by facsimile from the applicant's agent which stated that the applicant would be in attendance.
24. [In] December 2008 the Tribunal received a submission from the applicant's migration agent which contained statutory declarations from the review applicant and from his wife, a secondary applicant. The Statutory declarations stated:

[First named applicant]

1. I am a Sudanese citizen and the main applicant in an application before the Refugee Review Tribunal for review of the decision of the Department of Immigration and Citizenship (DIAC) to reject an application for protection (Class XA) visas for myself, my wife and our two children, [names]. Our application was refused by the Department because I was found to have a right to re-enter and reside in Qatar due to the fact that my wife is Qatari citizen. I make this statement in order to provide further information about the difficulties I faced obtaining my previous visas to reside in Qatar and why I do not believe that I have a right to re-enter and reside in that country. In doing so, I continue to rely on all the information that I have provided in my previous statutory declaration, dated [date] July 2008, and in my application for a protection visa.
2. I fled Sudan and first arrived in Qatar on [date] November 1996, on a business visitor visa sponsored by the [business name], arranged through a friend who lived in Qatar. The visa was valid for a total of six months but you could choose to either get the visa for the entire six-month period at once or you can renew your visa every month or two until you reach the six months limit. I did the latter because, as the Visa allowed me to look for work, I was hoping to find a job within the first couple of months. I did not want to lose money by paying a large application fee for the entire six-month period.
3. The six-month period of my visit visa was due to expire on [date] May 1997. A few months beforehand, I had applied for a legal position at [employer] and was told that my application was accepted, but that it would take some time to sort out the paperwork. I therefore applied for a one-week extension of my visitor visa (which could be renewed for a further week). In order to be granted an extension, I had to exit Qatar and so on the [date] of May 1997 I flew the Bahrain airport and returned to Qatar on the same day I did not actually enter Bahrain.
4. My one-week visa was renewed for a further week. I still had not heard anything from [employer] so I arranged to obtain another one-week visa under the sponsorship of a clothing company that a friend of mine worked for. Again, I had to exit Qatar in order to obtain this visa so I travelled to Bahrain airport on [date] June 1997 and returned a few hours later, on [date] June 1997. Once in Qatar, I renewed my one-week visa for a further week. On [date] July 1997, the Qatar government approved the [employer] request to change my visitor visa to a work visa and I started working at the company soon after. The work residence permit was not actually stamped into my passport until [date] August 1997. The permit was valid for three years that is, until [date] August 2000.
5. I worked at [employer] as a lawyer for two years. I then commenced employment as a lawyer at [employer], where I worked until [date] April 2004. I did not have to apply for a new work visa, but my new employer became my sponsor. After my initial work visa expired, I was issued with a further visa on [date] October 2000, valid until [date] August 2001 (work visas could be granted for a three-year period or could be renewed every year or every two years). On [date] June 2001, my work visa was renewed until [date] August 2002. It was renewed for a further period, which expired on [date] October 2004.
6. I married my wife, [second named applicant], in May 2002. It is my understanding that there is no such thing as a 'permanent spouse visa' in Qatar, but that you can be granted a

temporary residence permit based on sponsorship by your Qatari citizen spouse (similar to sponsorship by an employer in the case of my work visas). On [date] April 2004, I transferred the sponsorship for my residence permit from my employer [employer's name] to my wife. I was given a family residence permit valid until [date] October 2006. My family residence permit could only be granted for two years at a time and had to be renewed.

7. As I mentioned in my previous statement, having my wife sponsor my residence in Qatar was in some ways preferable to the work visas I held previously because if I lost my job, I lost my visa. Also, the company whose sponsor you for a visa generally keeps your passport so if you need it for anything such as travel or for identification purposes you had to ask your employer to return your passport to you and then return it once you have finished using it. This was very restrictive and I felt much freer being sponsored by my wife rather than my employer. However, the downside of having a residence permit based on my marriage is that it is hard to find a job if you are sponsored by a spouse-companies want to have the control over their employees that a work visa gives them.
8. Our son [name] was born in Qatar on [date] 2003 Qatari citizenship is only passed through the father and so neither [name] nor our youngest son [name] who was born in Melbourne on [date] 2007 are entitled to Qatari citizenship and are therefore citizens of Sudan. When [son] was born, we had to apply for a Qatari family residence permit for him on the basis of my sponsorship, not his mother's. His first residence permit was granted from [date] May 2003 until [date] March 2005. Before we left Qatar for Australia in January 2005, we obtained and new residence permit for [son], which expired on [date] March 2007.
9. It was my wife's and my intention to return to Qatar after she finished her graduate studies in Melbourne. However, we had no idea of the difficulties our family would face trying to re-enter Qatar. On [dates] December 2005, my wife and [son] travelled to Qatar to visit my wife's relatives. I called my wife's brother in Qatar to check whether [second named applicant] and [son] had arrived safely. He told me that they were still inside immigration at the airport and that [second named applicant] was allowed to enter Qatar but not [son]. Although [son]'s residence permit did not expire until [date] March 2007, his residence permit became invalid because he had been out of Qatar for more than six months. Eventually, through my brother-in-law's contacts [son] managed to obtain a 14 day tourist visa to enter Qatar His visa was renewed for a further 14 days once he was in Qatar. My wife and son returned to Australia on [date] January 2006.
10. In my previous statutory declaration, dated [date] July 2008, I stated that it took months to get permission for [son] to enter Qatar when he travelled with my wife in December 2005. I was actually referring to the second time [son] went to Qatar, in December 2006, not the first time. Prior to the first time that [son] returned to Qatar, we never imagined that he could be refused entry.
11. On [date] December 2006, my wife and [son] travelled to Qatar again. We had originally hoped that all of us could go to Qatar together as a family. My wife's brother, who has a power of attorney over my wife's affairs in Qatar, applied for a family residence permit for me and [son] several months in advance. This application was refused and my brother-in-law was also told that [son] could not get his own residence permit because he is outside of Qatar and because his father does not have a residence permit. Is my understanding that no written reasons were provided for the decision although I believe that my application was refused because Qatar has put a halt to granting visas to Sudanese for the next few years. The government does this in order to have a balance of nationalities living in the country. We thought it would be easier if only [son] travelled with my wife to Qatar and so my wife's brother sponsored [son] for a one-month visa. My wife and son returned to Australia on [date] January 2007.

12. My last residence permit expired on [date] October 2006 and I have no right to re-enter Qatar. I am not aware whether it is possible to obtain a new family residence permit while I am outside of Qatar. Furthermore, there is no guarantee that I would be granted a residence permit and in any case, I would need to renew it every couple of years. I would only be allowed to remain in Qatar as long as my wife continued to sponsor me. Qatar's strict citizenship laws make it very difficult to obtain citizenship. Moreover, even if I could obtain a residence permit for myself and my sons, the Qatari government will not issue a residence permit to someone who does not hold a valid passport. Both [son] and my passports have expired and I am afraid to contact the Sudanese embassy to renew them. My youngest son [name] does not have any travel documents and would also need to apply for a Sudanese passport.
13. I therefore do not believe that I can obtain a new residence permit to allow me and my children to re-enter Qatar and even if I could, I would not have any rights to reside in Qatar permanently. If I am not granted protection in Australia, this would mean that I would be forced to return to Sudan, where I would gravely fear for my safety. The situation in Sudan is not stable and is only getting worse. My family continues to suffer in Darfur, where there is constant fighting.
14. In light of the above, I do not believe that I have a right to re-enter and reside in Qatar and believe that Australia is the only place where I can seek protection.

In her Statutory Declaration, his wife stated:

1. I am the wife of [first named applicant] and secondary applicant in an application before the refugee review Tribunal for review of the decision of the Department of immigration and citizenship (DIAC) to reject the application for protection (Class XA) visas for my family. I make this statement in order to provide information on the difficulties that [first named applicant] has faced in obtaining temporary visas in Qatar and why I do not believe that he has a right to re-enter Qatar.
2. I was born in Sudan but my family and I moved to Qatar when I was very young. I became a naturalised Qatari citizen in June 1994. Gaining citizenship in Qatar is very difficult and there are strict requirements to satisfy. However, satisfying these requirements is not enough. You also have to be nominated by someone in the Qatari royal family. My father, who worked for the government of Qatar, was able to get a nomination by a member of the royal family and this is how my family obtained citizenship. Since those days, the citizenship and immigration laws in Qatar have become even stricter.
3. My two sons, [names], are not eligible for Qatari citizenship because their father is not a citizen of Qatar. Although her eldest son [name] was born in Qatar, he was only able to get a family residence permit valid for two years and on the grounds of being sponsored by my husband. The only case when a child whose father is not a Qatari citizen can get residence on the basis of the mother's Qatari citizenship is if the father and other close male relatives are deceased.
4. We arrived in Australia on [date] January 2005 so that I could undertake graduate studies in dentistry at the [education provider]. In December 2005, I travelled back to Qatar with [son] for a holiday. At that time, [son] had a residence permit that expired on [date] March 2007. I was aware that Qatari residence permits expire if the holder is outside of Qatar for more than six months but I did not think that this would apply in [son]'s situation because he was a minor and because he was travelling with his mother. When we arrived at Doha airport, an immigration official informed me that [son], who was only two years old at the time, could not enter Qatar and that there was nothing that the officer could do. I was completely shocked by this and had no idea what to do. Finally I called my brother, who had a contact in

the immigration section of the airport. My brother arranged for [son] to be granted a 14 day tourist visa, which we later renewed once. We spent five to seven hours in the airport and they were some of the worst hours of my life.

5. The following year, [first named applicant] and I wanted to go to Qatar for holidays in December 2006 with [son]. I had given my brother power of attorney before I left Qatar so that he could handle my affairs there. I asked my brother to apply for a family residence permit for [first named applicant], who could then sponsor [son] for a residence permit. That application was refused. From memory, my brother informed me that he was also told that if a child is not present in Qatar and if the father does not have a residence permit, then the child is not entitled to get a residence permit. My brother suggested that it would be easier to try to get only [son] a visa to enter Qatar and in the end, he managed to get a one-month visa for [son] through a contact he had who worked in the Qatari immigration Department. My brother took care of these issues for me so I am not sure upon which basis [son] was granted a one-month visa.
 6. Although my brother told us that he was not given a reason why [first named applicant]'s family residence permit application was refused, I believe that the reason is the Qatari government's policy of excluding certain nationalities from obtaining residence permits at certain times. I believe that it is now impossible for Sudanese nationals to enter Qatar. A similar situation happened with my uncle, who is a Sudanese National. He lived in Qatar for 15 years on work residence permits based on his work for the government. He left Qatar for two years and has not been allowed to re-enter the country despite having lodged about 10 applications to get his residence permit back. The last residence permit that he lodged was only a few months ago.
 7. In light of the above I do not believe that [first named applicant] or my two children would be allowed to enter and reside in Qatar.
25. By facsimile dated [in] December 2008, the agent made a substantial submission which included:
- A summary of previous submissions
 - Detailed claims of the first named applicant's membership of particular social groups 'Professionals of Fur ethnicity', 'Lawyers of Fur ethnicity' and 'Sudanese who have lived outside of Sudan, including in a Western country'
 - Country information in support of the applicant's claims
 - Relocation considerations with Sudan
 - Right to enter and reside in another country
26. [In] December 2008 at the time of the scheduled hearing, [second named applicant], a secondary applicant and the primary applicant's wife attended the Tribunal with their representative/ migration agent.
27. The representative addressed the Tribunal and stated that [second named applicant] spoke excellent English, and that she was in Australia studying a PhD in dentistry at [education provider].

28. He explained that the primary applicant was not in attendance as a result of stress related illness. He said the primary applicant had been unstable in recent days and had left home this morning expressing his inability to cope. The agent told the hearing he had been unable to contact the primary applicant but had left messages on his phone. He explained there were concerns for his mental well-being and referral for psychiatric assessment and counselling was being investigated.
29. The representative requested an adjournment of the hearing.
30. The Tribunal agreed to the adjournment request, noting the exceptional circumstances of this case and agreeing that the health and well-being of the first named applicant was the primary concern. It was agreed that an initial adjournment of six weeks be granted to be reviewed subject to the condition and availability of the primary applicant.
31. Following the hearing, the Tribunal received a facsimile from the migration agent dated [in] December 2008 which stated in part:

... we refer to the Tribunal's decision to adjourn the hearing in relation to this application. We confirm that, unfortunately, as a result of urgent emotional and mental health problems, [first named applicant] was unable to attend the hearing as planned.... [first named applicant] will be referred for psychiatric assessment and support as soon as possible ... as submitted at the hearing, we suggest we should be guided by the outcome of that process as to the timing of when to resume the hearing.

32. By facsimile dated [in] January 2009, the representative advised the Tribunal as follows:

We refer to the Tribunal's decision to adjourn the hearing in relation to this application and to our letter dated [date] December 2008.

We advise as a result of his ongoing emotional difficulties, [first named applicant] feels he is unable to attend a hearing in relation to this application and under s.425(2)(b) of the Migration Act 1958 consents to the Tribunal making a decision on his application without holding a further hearing. In doing so, [first named applicant] continues to rely on all submissions previously provided as to why he is a refugee and, in particular, as to why section 36 (3) of the Act does not apply to him.

Country Information

33. The UNHCR Amnesty International Report of 23 May 2008 stated:

Amnesty International is gravely concerned by the Sudanese security forces' crackdown following the incursion into Khartoum, by an armed group. The crackdown has been characterized by serious human rights violations including hundreds of arbitrary arrests, cases of ill-treatment, as well as extra-judicial executions. These violations have mostly been targeted at Darfuris.

On Saturday 10 May 2008, the Justice and Equality Movement (JEM), a Darfur based armed opposition group launched a military attack on the outskirts of Khartoum. The attack marked the beginning of a new phase of the conflict in Darfur, with an armed opposition group reaching the edges of the capital for the first time since the conflict's inception in 2003. Many members of the JEM were reportedly killed during the attack and scores were arrested.

The government's response to this military attack has since included hundreds of arbitrary arrests and some cases of extra-judicial executions. These have been carried out by the Sudanese police and National Intelligence and Security Services (NISS) and targeted at Darfuris, particularly from the Zaghawa ethnic tribe. Since the Sudanese forces repelled the attack a curfew was installed in Omdurman and check points were set up throughout the streets of the capital, allowing the arrest and detention of people travelling in buses and cars, while the NISS and the police have been raiding houses of Darfuris and their families.

"Civilians, mainly youths, have been brutally arrested in the streets, in their homes, and taken to yet unknown places of detention. The arrests in public places have been mostly based on their appearance, age, accent, and the colour of their skin." With these words, a prominent Sudanese lawyer expressed his concerns to Amnesty International over the arbitrary nature of arrests - with individuals arrested on the basis of their ethnicity and age -, the associated ill-treatment and the lack of information about the places of detention. He told Amnesty International that young men, including minors, were more at risk because the JEM is known by the government to partially rely on young recruits. Eyewitnesses reported that those under threat of arrest were asked to pronounce certain words, to judge whether they were Darfuris or not.

The arrests include Darfuri men and women as well as entire families. Amnesty International further received reports of lawyers, journalists and at least one human rights activist having been arrested over the past week.

34. The February 2009 US Department of State Country Reports on Human Rights Practices – Sudan 2008 stated:

Conflict in Darfur continued despite the 2006 Darfur Peace Agreement (DPA) between the government and Minni Minawi's faction of the Sudan Liberation Movement/Army (SLM/A). Civilians in Darfur continued to suffer from the effects of genocide. Government forces bombed villages, killed civilians including internally displaced persons (IDPs), and collaborated with janjaweed militias and tribal factions to raze villages and perpetrate violence against women. The government supported Chadian rebel groups. During January and February, violence in West Darfur displaced tens of thousands of persons; approximately 12,000 persons were displaced to Chad. Darfur rebel groups continued to commit serious abuses. On May 10, the Justice and Equality Movement (JEM), a Darfuri rebel movement, mounted an attack on Omdurman, near the capital. Intertribal conflict also killed civilians. According to the UN, nearly 2.7 million civilians have been internally displaced, and approximately 250,000 refugees have fled to neighboring Chad since the conflict in Darfur began in 2003. During the year approximately 315,000 civilians were displaced within Darfur and to Chad. Estimates on the number of deaths vary. In 2006 the UN estimated that 200,000 persons had died as a result of the conflict.

The government's human rights record remained poor, and there were numerous serious abuses, including: abridgement of citizens' right to change their government; extrajudicial and other unlawful killings by government forces and other government-aligned groups throughout the country; disappearances, including of hundreds of Darfuris in Omdurman and Khartoum following the May 10 JEM attack; torture, beatings, rape, and other cruel, inhumane treatment or punishment by security forces; harsh prison conditions; arbitrary arrest and detention, incommunicado detention of suspected government opponents...

FINDINGS AND REASONS

35. The responsibility of the Tribunal is to consider all available evidence in making a finding as to whether the first named applicant is a person to whom Australia has protection obligations under the Refugees Convention.
36. [In] November 2008 the Tribunal faxed the first named applicant, via his migration agent and authorised recipient, advising that it had considered all the material before it but was unable to make a favourable decision on that information alone. The Tribunal invited all applicants, being [first named applicant] and his family members, to a hearing [in] December 2008 to give oral evidence and present arguments
37. In response to a request from the migration agent, the hearing was rescheduled [to a date in] December 2008 however on the scheduled date while the first named applicant's wife and their migration agent attended, [first named applicant] did not appear. His representative advised that he had left home and was suffering ill-health. The Tribunal agreed to adjourn the hearing pending an assessment of his health problems which were primarily mental and emotional.
38. By facsimile dated [in] January 2009, the Tribunal was advised that as a result of his ongoing emotional difficulties, the primary applicant felt unable to attend a hearing in relation to the application and consented to the Tribunal making a decision without a further hearing but relying on all previously provided submissions.
39. The Tribunal considers that [first named applicant]'s decision to exercise his right under s.425(2)(b) of the Migration Act to have the Tribunal conduct the review without him appearing before it, despite the Tribunal's offer to indefinitely defer the hearing subject to his health improving, deprives the Tribunal of the opportunity to question him about a number of issues and raises questions of his credibility
40. In assessing the application, the Tribunal has considered two primary issues:
 - a. Whether the primary applicant had a well founded fear of persecution should he be forced to return to Sudan now or in the foreseeable future, and
 - b. Whether the primary applicant has a legally enforceable right to enter and reside in Qatar, his previous country of residence.
41. From the certified copy of his Sudanese passport provided, the Tribunal accepts that the applicant is a Sudanese national and therefore assesses his claims against that country.
42. Mindful of the ruling in *Moges Eshetu v MIEA* [1997] FCA 19 in which the Court held that where the Tribunal refuses to accept an applicant's claims unless there is some independent corroboration would result in an error of law, stating:

"I can not emphasise too strongly that the Tribunal must not approach its task of merits review on the basis that it will not accept what an applicant for refugee status says, unless there is some independent corroboration. To do so would involve a gross error of law. It would entitle an applicant, in my view, to have the Tribunal's decision set aside on the grounds either of s476(1)(a) or perhaps s476(1)(e)." per Hill J

The Tribunal accepts the applicant's claim that he is of Fur ethnicity.

43. The applicant claims to fear persecution should he be forced to return to Sudan. He claims to fear if he would face persecution from the Sudanese authorities or state-sponsored agents because of his Fur ethnicity, his political opinions both real and imputed and his membership of particular social groups, 'Professionals of Fur ethnicity', 'Lawyers of Fur ethnicity' and 'Sudanese who have lived outside of Sudan, including in a Western country'.
44. The Tribunal accepts that independent country information, particularly the previously mentioned, *the UNHCR Amnesty International Report of 23 May 2008* and the *February 2009 US Department of State Country Reports on Human Rights Practices – Sudan* support the applicant's claims that his fears of persecution are well founded.
45. The Tribunal therefore finds that the applicant faces a real chance of persecution for convention related reasons should he be forced to return to Sudan now or in the reasonably foreseeable future.
46. In the primary decision the delegate considered the primary applicant's position in relation to section 36(3) of the Act which states:

s36 Protection visas

Protection obligations

- (3) Australia is taken not to have protection obligations to non-citizen who has not taken all possible steps to avail himself or herself of the rights to enter and reside in, whether temporarily or permanently and however the right arose or is expressed, any country apart from Australia, including countries of which the non-citizen is a national.
47. The delegate found that the primary applicant could avail himself of a "right to enter and resided in Qatar" on the basis of his marriage relationship with the second applicant, his wife, a Qatari citizen.
48. In considering whether or not [first named applicant] would be able to return and live in Qatar, the Tribunal looked at what had happened in the past. [First named applicant] was professionally employed as a corporate lawyer in Qatar for a number of years on successive work visas before being granted a visa to stay in Qatar on the basis of his marriage to a Qatari citizen.
49. He and his children accompanied his dentist wife to Australia when she had been granted Qatari government funding to study her PhD in dentistry at the [education provider].
50. Logic suggests that the government having paid for his wife to undertake overseas doctoral study would welcome her return to benefit from her new-found professional expertise and as they had in the past, would grant her family visa status to enable them to return with her.
51. However, the question that must be addressed is whether [first named applicant] has a "legally enforceable right" to enter and reside in Qatar.
52. Despite considerable enquiries, the Tribunal has been unable to establish whether or not such a right exists and therefore on this critical point, the Tribunal is not satisfied that such a right exists

53. As the Tribunal is not satisfied [first named applicant] has a legally enforceable right to enter and reside in Qatar and there is no evidence that he has the right of entry or residence in any country other than Sudan, the Tribunal finds he does not have a right to enter and reside in another country
54. In the light of the above, the Tribunal finds that the first named applicant, [named] is a refugee as defined in Article 1 of the Refugees Convention in that he has a well founded fear of persecution for reasons of his race, political opinion and membership of political social groups and because of such fear is unable or unwilling to return to his home country, Sudan.
55. The Tribunal further finds that he does not have a legally enforceable right to enter and reside in any other country including Qatar.

CONCLUSIONS

56. The Tribunal is satisfied that the first named applicant is a person to whom Australia has protection obligations under the Refugees Convention. Therefore the first named applicant satisfies the criterion set out in s.36(2)(a) for a protection visa and will be entitled to such a visa, provided he satisfies the remaining criteria.
57. The other applicants applied as members of the first named applicant's family. The Tribunal is satisfied that they are the wife and two sons of the first named applicant and are the spouse and dependents of the first named applicant for the purposes of s.36(2)(b)(i). The fate of their applications depends on the outcome of the first named applicant's application. As the first named applicant satisfies the criterion set out in s.36(2)(a), it follows that the other applicants will be entitled to protection visas provided they meet the criterion in s.36(2)(b)(ii) and the remaining criteria for the visa.

DECISION

58. The Tribunal remits the matter for reconsideration with the following directions:
 - (i) that the first named applicant satisfies s.36(2)(a) of the Migration Act, being a person to whom Australia has protection obligations under the Refugees Convention; and
 - (ii) that the other named applicants satisfy s.36(2)(b)(i) of the Migration Act, being the spouse and 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: PRMHSE