

1210528 [2012] RRTA 1060 (28 November 2012)

DECISION RECORD

RRT CASE NUMBER:	1210528
DIAC REFERENCE(S):	CLF2011/168793
COUNTRY OF REFERENCE:	Libya
TRIBUNAL MEMBER:	Shahyar Roushan
DATE:	28 November 2012
PLACE OF DECISION:	Sydney
DECISION:	The Tribunal remits the matter for reconsideration with the direction that the applicant satisfies s.36(2)(a) of the Migration Act.

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Immigration to refuse to grant the applicant a Protection (Class XA) visa under s.65 of the *Migration Act 1958* (the Act).
2. The applicant, who claims to be a citizen of Libya, applied to the Department of Immigration for the visa on [date deleted under s.431(2) of the *Migration Act 1958* as this information may identify the applicant] October 2011.
3. The delegate refused to grant the visa [in] June 2012, and the applicant applied to the Tribunal for review of that decision.

RELEVANT LAW

4. 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. The criteria for a protection visa are set out in s.36 of the Act and Part 866 of Schedule 2 to the Migration Regulations 1994 (the Regulations). An applicant for the visa must meet one of the alternative criteria in s.36(2)(a), (aa), (b), or (c). That is, the applicant is either a person in respect of whom 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), or on other 'complementary protection' grounds, or is a member of the same family unit as a person in respect of whom Australia has protection obligations under s.36(2) and that person holds a protection visa.

Refugee criterion

5. Section 36(2)(a) provides that a criterion for a protection visa is that the applicant for the visa is a non-citizen in Australia in respect of whom the Minister is satisfied Australia has protection obligations under the Refugees Convention.
6. Australia is a party to the Refugees Convention and generally speaking, has protection obligations in respect of 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.
7. The High Court has considered this definition in a number of cases, notably *Chan Yee Kin v MIEA* (1989) 169 CLR 379, *Applicant A v MIEA* (1997) 190 CLR 225, *MIEA v Guo* (1997) 191 CLR 559, *Chen Shi Hai v MIMA* (2000) 201 CLR 293, *MIMA v Haji Ibrahim* (2000) 204 CLR 1, *MIMA v Khawar* (2002) 210 CLR 1, *MIMA v Respondents S152/2003* (2004) 222 CLR 1, *Applicant S v MIMA* (2004) 217 CLR 387, *Appellant S395/2002 v MIMA* (2003) 216 CLR 473, *SZATV v MIAC* (2007) 233 CLR 18 and *SZFDV v MIAC* (2007) 233 CLR 51.

8. 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.
9. There are four key elements to the Convention definition. First, an applicant must be outside his or her country.
10. 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.
11. 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.
12. 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.
13. 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 being persecuted 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.
14. In addition, an applicant must be unable, or unwilling because of his or her fear, to avail himself or herself of the protection of his or her country or countries of nationality or, if stateless, unable, or unwilling because of his or her fear, to return to his or her country of former habitual residence. The expression 'the protection of that country' in the second limb of Article 1A(2) is concerned with external or diplomatic protection extended to citizens abroad. Internal protection is nevertheless relevant to the first limb of the definition, in particular to whether a fear is well-founded and whether the conduct giving rise to the fear is persecution.

15. Whether an applicant is a person in respect of 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

16. 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 in respect of 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').
17. '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.
18. 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

19. The Tribunal has before it the Department's file relating to the applicant. The Tribunal also has had regard to the material referred to in the delegate's decision, and other material available to it from a range of sources.

Protection Visa Application

The Form

20. According to the information provided in the applicant's protection visa application, he was born in [Town 1], Libya in [year deleted: s.431(2)]. He has completed 20 years of education and holds graduate and post-graduate qualifications in [qualification deleted: s.431(2)]. He lists his profession before coming to Australia as '[Profession 2]'. He was employed in that position at the [employer deleted: s.431(2)] from February 2007 to December 2011. He resided in [Town 1] from July 2000 to January 2010.
21. In response to questions relating to his reasons for claiming protection in Australia, the applicant made the claims detailed below.
22. The applicant came to study in Australia in January 2010 after obtaining a scholarship. He comes from a poor family and has [siblings deleted: s.431(2)].

23. The applicant is a member of [Tribe 3]. Most members of the tribe are supporters of Colonel Gaddafi. [Tribe 3] is the only tribe that has remained loyal to and continues to fight with Gaddafi. The situation in Libya would lead to a civil war between different tribes. In around May 2011, members of [Tribe 3] had fought in Misrata killing 'some people' there.
24. He has been told by his brother that rebels 'hunt' anyone from [Tribe 3] because of the perception that all members of [Tribe 3] tribe are Gaddafi supporters. If one expresses an opinion against these groups it may result in his or her death. The country is 'dealing with vendetta' Tribes will take affairs into their own hands and no law can bring them under control.
25. The applicant fears being killed by other tribes, such as Misrata and Al Zawiya tribes, if he were to return Libya, simply because someone from [Tribe 3] may have killed someone from another tribe at some point. There is no government in Libya and there is no guarantee that he will be safe.
26. [In] February 2012, the applicant forwarded 2 news reports sourced from [journal deleted: s.431(2)] in relation to the situation in Libya. One of the reports relates to Gaddafi loyalists taking back [Town 1] and the other relates to rebels holding some 7000 detainees. In a covering letter, the applicant stated that many people are being killed by militias who can do whatever they want to do.
27. The applicant provided additional information in a statement submitted to the department [in] November 2011. He stated that although he comes from a poor family, he excelled in his studies and believed that this was enough to secure him an opportunity to study abroad. When he became aware that success in his studies was not enough and he needed to have a 'relation' with the government, he decided to join the Gaddafi regime's army. There were 500 recruits in his group and approximately 50 recruits lost their lives due to hardship. His experience in the army assisted him in securing a scholarship to study abroad. The applicant's intention was to return to Libya after completing his studies and help build his country.
28. When the 'revolution' started in Libya on 15 February 2010, he supported it but he was opposed to the NATO intervention as he wanted Libyans to effect change in Libya. He believed that NATO intervened in Libya to exploit Libya's natural resources. In early April 2011, he attended a rally organised by some Libyan students as well as others opposing NATO's intervention in Libya. Other Libyan students filmed the participants and accused them of being pro-Gaddafi. A copy of the video was sent to the 'new government'. He was told by one of his brothers that 'from time to time they come and ask for you when you wanna be back' (sic). The applicant provided a link to a YouTube video, depicting the demonstration.
29. The applicant repeated his claims relating to his tribal affiliation and his fears of being targeted by other tribes.

Departmental Interview

30. The applicant was interviewed by a delegate of the Minister [in] June 2012. The Tribunal has listened to the audio recording of the interview. The Tribunal notes that while a telephone interpreter was present at the interview, her services were used only infrequently. The applicant provided his evidence in broken English. What follows is a summary of the applicant's oral evidence to the delegate as understood by the Tribunal.

31. The applicant stated that he joined the army towards the end of 2007 and completed his service in May or June 2008. He spent six month training in the army. During his training, he spent time in Tripoli, Benghazi and Sirte. He joined the army as a volunteer and not a conscript. Because of his computer skills, during the six months he served in the army he was required to type certain documents. He was also required to put his name to the documents as he had to bear responsibility for any errors. As his name is on these documents, the rebels would be able to identify him. It was put to him that the letters in fact originated from higher ranked officers and the fact that his name was on the letters may not have meant anything. He stated that regardless of his rank, anyone whose name appears on military documents will be punished. It was put to him that it was not credible that a person of his rank would be able to place his signature on military documents. He stated that his name appeared at the bottom of the document as the person who had transcribed it. It was put to him that he was only in the army for 6 months, which is not significant. He stated that the Libyan thinking is different and Libyans are killing each other for any reason. He also stated that on one occasion he took a trip with Gaddafi as his 'protector' as he travelled from one town to another.
32. The applicant stated that he attended a protest at the [university deleted: s.431(2)]. The demonstration was recorded on video and placed on Facebook and other sites. As he had expressed an opinion against NATO's intervention in Libya, he will be punished. About 20 students had participated in the demonstrations and others had sent the names of the participants to Libya. Someone went to his house asking for him, but he was not sure if it was because of the protests. It was put to him that the video depicts a peaceful protest and the video has only been viewed 400 times. If one were to enter 'pro-Gaddafi' rallies in an internet search engine, hundreds of video results are returned with many comments. These videos also show Gaddafi supporters burning effigies. He was asked why anyone would care about a peaceful anti-NATO protest attended by 20 people. He stated that militias force Gaddafi supporters to eat the green flag. The video depicts him as a Gaddafi supporter and the militias don't like anyone who expresses an opinion against them.
33. The applicant stated that if he were to return to Libya, people might say things about his tribe and he would be unable to control himself. Militias belong to tribes. He would be identified by his surname as a member of [Tribe 3]. As a result he would be unable to travel to Misrata, Benghazi or Zawiya. As a member of [Tribe 3] he would be discriminated against and would not receive the same benefits bestowed on others.
34. The applicant stated that he continues to receive a study stipend from the Libyan government because they cannot stop the money. The embassy knows that he attended the rally, but they did not stop his stipend because they did not want to him to go to the Australian government.
35. The applicant was asked if before coming to Australia he was 'pro-Gaddafi or against Gaddafi' He stated that he was 'with outside political staff'. He did not find anything wrong with Gaddafi. He met him during the trip he took as Gaddafi's 'protector' and found him to be 'normal' and there was nothing wrong with him. There were many around Gaddafi who were corrupt. These people defected to the other side and now are working for the current government.

The Delegate's Decision

36. The delegate found that the applicant had performed 'voluntary military service with AlGaddafi Army more commonly known as the [brigade]' He did not find it credible that as a low ranking officer in the Libyan army he could possibly be able to place his signature upon

important military documents issued by senior officers. He did not find it plausible that his attendance at a peaceful protest in Australia could possibly bring him to the attention of the Libyan authorities or the militia forces in Libya. He did not find it credible that the applicant could not live in another area within Libya, notably areas 'his tribe was associated with'. The delegate found that the applicant did not face a real chance of persecution for a Convention reason in Libya. He was also of the view that there were no 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 will be suffer significant harm.

Application for Review

37. The applicant was represented in relation to the review by his registered migration agent.

The Hearing

38. The applicant appeared before the Tribunal [in] November 2012 to give evidence and present arguments. The Tribunal hearing was conducted with the assistance of an interpreter in the Arabic and English languages.
39. The Tribunal explained to the applicant the complementary protection limb for the grant of a protection visa and that the Tribunal must also assess whether he would come within Australia's complementary protection obligations under other treaties not to return people to their country of origin.
40. At the outset, the applicant submitted a folder, containing news articles and reports relating to the recent armed campaign to capture [Town 1] and the impact of the campaign on civilians and residents of [Town 1]; human rights violations committed by armed militias in Libya; and the interim government's lack of control of the militias. He also submitted the following:
- Printouts of pages from a Facebook account, containing reposted photographs of some of those injured and killed as a consequence of the recent attempt to capture [Town 1]; photographs of the battered and lifeless body of a young boy, whom the applicant claimed to be his [relative deleted: s.431(2)] and photographs of the applicant at a small demonstration in Australia.
 - Copy and Google translation of *Law 37* prohibiting propaganda that 'glorifies' Gaddafi and his regime; and
 - Copy and 'Google translation' of an undated letter addressed to Colonel Gaddafi. The applicant explained that he had authored and sent the letter to a satellite channel and a newspaper at the beginning of the uprising. Essentially, in the letter the applicant praised Gaddafi and swore allegiance.
 - A USB flash drive containing images and video clips of civilians injured or killed during the recent armed campaign by the Libyan army to capture [Town 1].
41. The applicant was asked about the preparation of his application for a protection visa. He stated that he replied to the questions in the form while he was under much pressure. Nevertheless, he confirmed the accuracy of the information contained in the form. He added that he felt that he had not been treated fairly by the delegate and was interrupted by him when giving evidence. The delegate also referred to him as 'children'.

42. The applicant stated that he was born in Tripoli, Libya in [month and year deleted: s.431(2)]. He resided in Tripoli until the completion of his schooling at the preparatory level. When he was [age deleted: s.431(2)] he moved with his family to [Town 1] where he completed his secondary schooling. He then enrolled in [university deleted: s.431(2)] in [Town 1] where he studied [qualification deleted: s.431(2)]. He obtained his degree in mid-2007. He then began working as a [profession deleted: s.431(2)] at the same university. He remained in that position until he came to Australia in January 2010.
43. The applicant explained that in October or November 2010 he joined Gaddafi's *Al-Haras Al Thawri* (the Revolutionary Guard), which was responsible for protecting 'the Leader', promoting the contents of the Green Book, encouraging civilians to attend Revolutionary Committees and monitor anti-Gaddafi movements outside of Libya. As a member of the Revolutionary Guard he put on a soldier's uniform and trained as a soldier. He stated that not everyone could join the Revolutionary Guard. Volunteers were thoroughly vetted and if any member of a volunteer's family had a history of opposing the regime, he was dismissed.
44. The applicant explained that he joined the Revolutionary Guard because initially he wanted to take advantage of certain benefits, such as studying and working overseas. However, when he joined the Revolutionary Guard and read the Green Book, he found the contents to be full of good ideas. He trained in and served with the Revolutionary Guard for 6 months. In the first 3 months he underwent military training. Subsequently, 20 entrants who could type were chosen to transcribe handwritten military orders. They had to put their names to the typed documents to prevent the documents from being altered. In the last 3 months of his service he underwent further military training. After being discharged he returned to the university. Subsequently he had to report for duty for a period of one month once a year. Before coming to Australia, the applicant reported for duty on one occasion only in February 2009. At that time he reported to the base of the Revolutionary Guard in [location deleted: s.431(2)], Tripoli. During this month he either guarded the gates or typed letters. He was asked if he had served in any other capacity during his term of service with the Revolutionary Guard. He stated that on one occasion he travelled in a convoy with Gaddafi from Tripoli to Sebha. He was chosen because of his tribal affiliation and also because his brother was a Captain in the army and his [relative and occupation deleted: s.431(2)] wrote about Gaddafi and his politics.
45. In the course of taking evidence from the applicant, the Tribunal observed that the communication between the interpreter and the applicant was not fluent. This appeared to be due to the applicant's Libyan accent. To ensure that the applicant was able to give his evidence without hindrance, the Tribunal decided to adjourn and resume the hearing with a different interpreter. Before adjourning the hearing, the applicant's representative confirmed that she had no objections to the evidence given thus far and that the applicant's evidence had been communicated accurately to the Tribunal.
46. The hearing resumed [in] November 2012. On resumption, the applicant submitted further country information in relation to the situation in Libya. He also submitted untranslated printouts of pages from a Facebook account. He stated that the information in these pages suggest that 3 students who had been studying in Europe and the US had been killed upon returning to [Town 1]. He added that according to the Libyan Observatory of Human Rights 11 supporters of the former regime had also been killed in [Town 1]. The Tribunal asked the applicant to provide the relevant reports in relation to these incidents, noting that further information in relation to the circumstances surrounding the death of the 3 students or the 11 who were allegedly killed would assist the Tribunal in being able to determine how these

incidents relate to the applicant's case. He undertook to provide further information to the Tribunal.

47. The applicant was asked about his family. He stated that his parents currently reside in [Town 1]. He explained that during the recent armed incursion into [Town 1], his house was hit by the Misrata militia and partially destroyed. Consequently, his parents reside with his [relative deleted: s.431(2)].
48. The applicant stated that he has [brothers deleted: s.431(2)] ([Mr A, Mr B, Mr C, Mr D, Mr E]) and [sisters and names deleted: s.431(2)]. [Mr A, Mr B, Mr C, and Mr D] resided in an apartment building next to his parents' house. He stated that [in] October 2012, his parents, [Mr A, Mr B, Mr C and Mr D]'s wife decided to escape the random bombardment of [Town 1] for a camp in [location deleted: s.431(2)]. On the way they were intercepted by the militias who arrested [Mr A, Mr B and Mr C] [Mr A] suffers from [conditions deleted: s.431(2)] and his condition deteriorated after the arrest. He was taken to the hospital. However, [Mr B and Mr C]'s fates are unknown. They let the rest of the family go. The applicant stated that [Mr D] and his family are currently residing in [Town 1]. In relation to [Mr E], he stated that he was a [officer deleted: s.431(2)] in Gaddafi's army. When the uprising began, he fought against the militias with Gaddafi's army. After the defeat of Gaddafi's forces, he retreated to [Town 1]. During the most recent armed campaign in [Town 1] he took up arms and fought against the militias. The family is unaware of his fate.
49. The applicant stated that all his sisters reside in [Town 1] and 3 are married. One of his brothers-in-law was fighting against the militias and after the battle ended on 24 October he is hiding in an area close to [Town 1].
50. The applicant was asked whether he was ever a member of or associated with any political party, movement or organisation. He stated that he was with the Revolutionary Guard and a member of the Revolutionary Committees. He was asked why he had not mentioned this previously. He stated that one would be unable to join the Revolutionary Guard unless one is a member of a Revolutionary Committees. As a member of the Committee, he had to advance the objectives of the Committees. He also participated in activities in [Town 1], including celebrations, events and meetings arranged to explain the contents of the Green Book.
51. He was asked if any member of his family was ever involved or associated with any party, movement or organisation. He stated that [Mr B and Mr E] were both members of Revolutionary Committees.
52. The applicant was asked about his tribal affiliation. He stated that he belongs to the Warfalla tribe of [Tribe 3] and the small sub-tribe of [name deleted: s.431(2)], which is his family name.
53. The applicant was asked why he did not want to return to Libya. He stated that he was a supporter of the Gaddafi regime and he participated in a protest in April 2011 in [university deleted: s.431(2)]. The protest was filmed and posted on the internet. In addition, he was a volunteer with the Revolutionary Guard. [Location deleted: s.431(2)] was attacked in August 2011 and many documents were seized. Militias have a free hand and can do what they wish.
54. The applicant was asked about the protest in April 2011. He stated that the protest was against NATO's intervention in Libya and he supported Gaddafi. About 20 people attended the demonstration. However, the protest was interrupted by students opposed to the regime

and the 2 groups clashed. It was the video of this demonstration that was posted on the internet. It was put to the applicant that the Tribunal had viewed the video on YouTube. Neither he nor anybody else was clearly recognisable or identifiable in this video. He stated that this was just one video. There were also photographs of the demonstration. He is scared of anti-Gaddafi students, some of who have returned to Libya and are now leading militias. He is also afraid of some people in Australia, with who he has had verbal and physical fights. The applicant was asked how he knew the video or any photographs taken of the protests have been handed to the authorities in Libya. He replied that there were Libyans who were against him and have now returned to Libya to lead certain militias in Misrata. He fears those people the most.

55. It was put to him that he had previously described the demonstration as an anti-NATO demonstration and nothing else. He stated that in his interview he felt that the delegate was being sarcastic and treated him like a child. The Tribunal noted that having listened to the audio recording of the interview the Tribunal did not get the impression that he was being treated sarcastically. He stated that in his culture being called a child is offensive.
56. The Tribunal noted that in his written evidence to the department he had claimed that when the 'revolution' started, he supported it but he was opposed to the NATO intervention as he wanted Libyan to effect change in Libya. He had consistently given the impression that he was opposed to NATO's intervention and never presented himself as being pro-Gaddafi. He stated that at that time he supported the uprising because he wanted to see changes in Gaddafi's ministerial line-up, as he considered many in the ministry were corrupt. When he claimed that he was against NATO's intervention, he meant that he was pro-Gaddafi and had sent a letter to a Libyan satellite channel and a Libyan newspaper in support of the regime.
57. The applicant was asked why he had not made any mention of this letter to the department. He stated that he was unaware of what he needed to mention in relation to his application for a protection visa. He has never been outside of his country before and did not have the assistance of a lawyer. What he submitted to the department was a collection of papers. The Tribunal noted that the copy of the letter he had submitted was undated and could have been written at any time. The applicant offered to log on to his email account to demonstrate when the letter had been sent. The Tribunal accepted and facilitated the applicant's access to his email account through a desktop computer in the hearing room. The applicant retrieved an email from his 'sent' electronic mailbox, which showed that he had sent an email to an address [in] February 2011. Attached to the email was the letter, a copy of which he had submitted to the Tribunal. The letter was signed in the applicant's name. He explained that the email address he had sent the letter to belonged to a television channel by satellite ([channel deleted: s.431(2)]), which reportedly belonged to Saif al-Islam al-Gaddafi¹
58. The Tribunal referred to the contents of his statement [in] November 2011 and put to him that it appeared that his evidence relating to his claimed support for the former regime of Colonel Gaddafi had changed overtime. He responded that when he said at the interview that there was nothing wrong with Gaddafi, he meant that he is a Gaddafi supporter. He further stated that he had not participated in any anti-Gaddafi demonstrations in Australia and had relied on the presumption that claiming that he was anti-NATO was sufficient to demonstrate that he is pro-Gaddafi.

¹ [source deleted: s.431(2)]

59. The Tribunal noted that the Warfalla tribe is a very large tribe with members concentrated across Libya. It was put to him that the Tribunal has found no information to suggest that the mere membership of Warfalla attracts persecution by militias or other tribes. He stated that Warfalla was divided during the uprising. Warfalla in [Town 1] supported Gaddafi. Those who demonstrated against Gaddafi in [Town 1] were killed and others were warned. [Tribe 3] separated from Warfalla after the recent events and Warfalla did not stand with [Tribe 3] in the most recent battle.
60. The Tribunal put to the applicant that it has found no information to suggest that former members of the Revolutionary Guard are being specifically targeted for the reason of being members of the Guard. He stated that 2 days ago a female member of the Revolutionary Guard was killed in Egypt. There are many reports from human rights organisations suggesting that former members of the regime and the army have been targeted.
61. It was put to the applicant the Tribunal accepted that militia groups remain active and there has been some infighting between armed groups. It was put to him that fears of general violence do not necessarily invoke Australia's protection obligations under the Refugee Convention or complementary protection provisions. He stated that he is not fearful of general violence. He stated that he is fearful of his own safety. He is known to have participated in pro-Gaddafi demonstrations in Australia and some students who were opposed to Gaddafi were aware of this and have now returned to Libya. There is a new law in Libya which permits the arrest and ill-treatment of anyone associated with the former regime. There is also a new law which allowed the militias to use deadly force, including poisonous gases against the population of [Town 1].
62. The applicant was asked why he would be unable to internally relocate. He stated that he is known to many students from across Libya who were studying in Australia. These people know him and hate him. If he were to move from city to another he would be a stranger and would not be safe.
63. The Tribunal put to him that it had concerns in relation to his evidence regarding the Gaddafi regime. The Tribunal asked the applicant to provide to the Tribunal a copy and certified translation of his Revolutionary Guard ID card and any additional information in relation to the alleged killings of students who had returned to [Town 1]. He undertook to do so [in] November 2012.

Post-Hearing Evidence

[In] November 2012, the applicant submitted the following additional evidence:

- Copy and certified translation of the applicant's Revolutionary Guard Corps ID card;
- Copy and 'Google translation' of an email, dated [in] September 2010, sent from the applicant to a group of Libyan students in Australia, inviting them to attend 'Algaddafi day' celebrations; and
- Further country information.

Evidence from other Sources

64. In February 2011, the arrest of a human rights campaigner sparked violent protests in the eastern city of Benghazi that rapidly spread to other cities. Authorities used aircraft to attack protestors and many Libyan diplomats resigned in protest. In the same month, anti-Libyan government militias took control of Misrata after evicting forces loyal to Gaddafi.
65. In March 2011 the Libyan National Council met in Benghazi and declared itself the sole representative for Libya. France, followed by a number of other countries, recognised the National Council.
66. The UN Security Council authorised a no-fly zone over Libya and air strikes to protect civilians, over which NATO assumed command. Backed by extensive NATO air raids, Libyan rebels initially capture territory but were then forced back by better-armed pro-Gaddafi forces. Many senior figures in Gaddafi's regime began defecting.
67. In June 2011 the International Criminal Court issued arrest warrants for Gaddafi, his son Saif al-Islam and intelligence chief Abdullah al-Senussi on charges of crimes against humanity. In July 2011 the international Contact Group on Libya formally recognised the main opposition group, the National Transitional Council (NTC), as the legitimate government of Libya.
68. In August 2011 rebels swarmed into Col Gaddafi's fortress compound in Tripoli, six months after the uprising began. With only a few remaining strongholds under his control, Col Gaddafi went into hiding. Subsequently, several foreign embassies re-opened in Tripoli.
69. On 20 October 2011, Col Gaddafi was killed. Three days later, the NTC declared Libya to be officially "liberated" and announced plans to hold elections within eight months. A month later Saif al-Islam, the fugitive son of former Libyan leader Muammar Gaddafi, was captured.
70. In late October 2011, Abdel-Rahim el-Keib was elected as the new head of a transitional government. Subsequently, the NTC named a new government with a line-up favouring appointees who would have soothed rivalries between regional factions.² The US State Department reported:

At year's end, a 38-day-old interim government began to exercise authority in Libya, formerly the Great Socialist People's Libyan Arab Jamahiriya. After eight months of civil war, ending with the ouster of the Qadhafi regime, construction of a republican form of government began. The opposition leadership in the [NTC], which was formed on February 27, exercised executive authority prior to naming an interim government on November 23 and thereafter acted in a de facto legislative capacity as an arm of the government engaged in transition planning.³
71. The NTC was responsible for guiding the country towards the General National Congress elections.⁴ On 7 July 2012 Libya held its first free elections in almost five decades under the

² Timeline: Libya's uprising against Muammar Gaddafi, *Reuters*, 22 August 2011; Libya Profile, *BBC News*, 16 January 2012 and Libya's NTC unveils new government, *Reuters*, 22 November 2011

³ US Department of State 2011, Country Reports on Human Rights Practices for 2011, Libya, 24 May, <http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm?dliid=186437#wrapper>

⁴ Freedom House 2012, *Libya Freedom on the Net 2012*, <<http://www.freedomhouse.org/report/freedom-net/2012/libya>> Accessed 15 October 2012

guidance of the NTC.⁵ Following the elections, NTC officially handed power to the newly elected General National Congress on 8 August 2012.⁶ There were several incidents reported in August and October involving members of the General National Congress. They include the sacking of Prime Minister, Mustafa Abushagur in October, and the subsequent appointment of the New Prime Minister, Ali Zidan.⁷ Three members of Libya's Congress were also suspended in August after it was alleged they had links with Gaddafi's regime.⁸

72. Libya's General National Congress is responsible for selecting a committee to draft Libya's new constitution, which will need to be confirmed in a national referendum.⁹ Sources indicate that the constitutional committee will be elected and that the committee will be given 120 days to complete a drafted constitution.¹⁰ According to *Foreign policy*:
73. A 60-person committee will draft the constitution and reckon with key social issues facing Free Libya, including national identity and human rights, state and religion, and the distribution of political and economic power.¹¹

Clashing Militias

74. In January 2012 reports indicated that since the fall of Col Gaddafi's regime, the militias that led the nine-month uprising, to end Gaddafi's 42-year rule, had refused to cede control of their fighters and hand in their arms. Clashes between rival militia groups had occurred in Tripoli, Janzour and Ghayran. Reports described Tripoli as a patchwork of fiefdoms held by rival militias that arrived in the capital months ago to chase out Gaddafi and have since refused to leave. Fighting between militias in Tripoli usually breaks out when members of one militia try to cross through territory of another while refusing to disarm¹²
75. A report relating to clashes between rival militias in Ghayran, south of Tripoli in January 2012 stated that many of the clashes are over land and minor disputes, and often each side

⁵ 'UN chief congratulates Libyan people on first free elections in almost five decades' 2012, *UN News Centre*, 9 July <<http://www.un.org/apps/news/story.asp?NewsID=42422&Cr=Libya&Cr1>> Accessed 19 October 2012; Libya's NTC sets date for power transfer' 2012, *Al Jazeera*, 6 August

<<http://www.aljazeera.com/news/africa/2012/08/2012860265783636.html>> Accessed 12 October 2012

⁶ 'New Libya parliament elects Mohammed Magarief as head' 2012, *BBC*, 9 August <<http://www.bbc.co.uk/news/world-africa-19204111>> Accessed 12 October 2012

⁷ 'Ali Zidan elected Libya's new prime minister' 2012, *BBC*, <<http://www.bbc.co.uk/news/world-africa-19943593#>> Accessed 15 October 2012

⁸ 3 Libya assembly members suspended for Gaddafi links' 2012, *Press TV*, 30 August, <<http://www.presstv.ir/detail/2012/08/30/258922/3-libya-assembly-members-suspended/>> Accessed 15 October 2012

⁹ Pack, J 2012, 'Libya's election: Uncertainty before and after', *Al Jazeera*, 6 July <<http://www.aljazeera.com/indepth/opinion/2012/07/20127613111533522.html>> Accessed 15 October 2012; Pickard D, 2012, Libya's constitution controversy, *Foreign Policy*, 5 September

<http://mideast.foreignpolicy.com/posts/2012/09/05/libyas_constitution_controversy> Accessed 15 October 2012

¹⁰ Mezran, K 2012, 'Libya's NTC Turns over Power: Where Does the Transition Go From Here?' *New Atlanticist*, 7 August, <http://www.acus.org/new_atlanticist/libyas-ntc-turns-over-power-where-does-transition-go-here> Accessed 17 October 2012; 'Explainer: How the Libyan election works' 2012, *Al Jazeera*, 3 July <<http://www.aljazeera.com/news/africa/2012/06/2012626182419350919.html>> Accessed 17 October 2012

¹¹ Pickard, D 2012, *ibid*.

¹² Charles Recknagle, Is Libya Sliding Toward Civil War?, Radio Free Europe/Radio Liberty, 5 January 2012, http://www.rferl.org/content/is_libya_sliding_toward_civil_war/24443215.html; and Mahmoud Habboush and Ali Shuaib, Militias may drag Libya into civil war, transitional government chief says, Washington Post, 5 Jan 2012, http://www.washingtonpost.com/world/update-1-militias-may-drag-libya-into-civil-war-ntc-chief/2012/01/04/gIQA08kebP_story.html

accuses the other of supporting the dead dictator.¹³ Other incidents in the ensuing period included clashes between Arab Zawi and African Tebu groups in Al-Kufra in the remote south-east in February 2012.

76. In June, government struggled to control local militias, especially in Zintan in the West. The Al-Awfeia Brigade briefly took over Tripoli International Airport, and a pro-autonomy mob ransacked the election commission building in Benghazi.¹⁴
77. Since the uprising, the relationship between state agents and militias has blurred. The Libyan Government has relied on militias' powers to protect the state's authority¹⁵ and militias have been integrated into national security forces.¹⁶

Legislation outlawing the 'glorification' of Gaddafi and limiting legal recourse for people harmed in the uprising

78. In May 2012 the Libyan Government introduced legislation, *Law 37* and *Law 38*, prohibiting propaganda that 'glorifies' Gaddafi and his regime and that protects people from prosecution who committed crimes in the course of promoting the revolution.¹⁷ On 5 May 2012 Human Rights Watch stated:

Under Law 37, passed on May 2, 2012, spreading "false or vicious news" or "propaganda" that harms "military efforts to defend the country, terrorizes people, or weakens the morale of citizens" is a criminal offense, punishable with imprisonment for an unspecified amount of time. Included in "propaganda" is glorification of Gaddafi, his regime, and his sons. If the offensive statements damage the country, the law says, the offender can be sentenced to life in prison.¹⁸

79. In a separate report from May 2012 Human Rights Watch provided an overview of *Law 38* and stated that it will foster a culture of impunity by 'giving a pass to people responsible for serious crimes' committed during the uprising:

Law 38, On Some Procedures for the Transitional Period, passed on May 2, 2012, and to go into effect on May 12 [2012], says there shall be no penalty for "military, security, or civil actions dictated by the February 17 Revolution that were performed by revolutionaries with the goal of promoting or protecting the revolution."

The new law [Law 38, On Some Procedures for the Transitional Period] does take some measures to address the serious problem of bringing the thousands of detainees held by militias under the central government's control and

¹³ Rival militia clash for third day near Libyan town, Reuters, 15 January 2012

¹⁴ Libya Profile, *BBC News*, 21 October 2012, <http://www.bbc.co.uk/news/world-africa-13755445>.

¹⁵ Wehrey F 2012, 'Libya's Militia Menace', *Foreign Affairs*, 12 June

<<http://www.foreignaffairs.com/articles/137776/frederic-wehrey/libyas-militia-menace?page=show>>

Accessed 15 October 2012

¹⁶ Gumuchian, M 2012, 'Libyan Army Gives Rouge Militias Ultimatum after two Disband', *The Daily Star*, 23 September <<http://www.dailystar.com.lb/News/Middle-East/2012/Sep-23/188916-libyan-authorities-to-dissolve-unlawful-militias.ashx#axzz29WyAqp3X>> Accessed 17 October 2012

¹⁷ Human Rights Watch 2012, *Libya: Amend New Special Procedures Law*, 11 May

<<http://www.hrw.org/news/2012/05/11/libya-amend-new-special-procedures-law>> Accessed 17 October

2012; Human Rights Watch 2012, *Libya: Revoke Draconian New Law*, 5 May

<<http://www.hrw.org/news/2012/05/05/libya-revoke-draconian-new-law>> Accessed 17 October 2012

¹⁸ Ibid.

prosecuting them when there is evidence they committed crimes. Law 38 says the Ministries of Interior and Defense must refer all “supporters of the former regime” currently detained by militias, if there is sufficient evidence against them, to the competent judicial authorities. The deadline for transfer of detainees is July 12, taking into account the 10-day period between the issuing of the law and its coming into force.¹⁹

Reports of Non-State Agents Targeting Actual and Imputed Gaddafi Supporters

80. The sources consulted by the Tribunal suggest that 5,000 people have been detained by militias during the uprising for allegedly supporting Gaddafi remain in detention.²⁰

81. On 13 October 2012, the New York Times reported that some militias are eagerly rounding up suspected Qaddafi loyalists. The report stated:

[a] few weeks ago, fighters from Benghazi’s Feb. 17 Brigade detained a dental student, Firas Ali el-Warfalli, whose father had been on one of Colonel Qaddafi’s revolutionary committees. When Mr. Warfalli’s family and fellow students put up billboards calling for his release, an ally of the militia posted to the Internet a recording of a telephone call on which Mr. Warfalli referred to supporters of Colonel Qaddafi’s green flag as “seaweed like us.” A brigade officer confirmed that the recording came from the Intelligence Ministry.

Telephone surveillance in the hands of independent militias suggests a lack of oversight and raises concerns about eavesdropping on political rivals, said Anwar Fekini, a prominent lawyer. “No government that is worthy of being called a government would allow this,” he said. “But we have a government that exists only on paper.”²¹

82. On 17 September 2012, Amnesty International issued a news release in relation to the arrest and harassment of 2 sisters for their alleged support for the former government.²²

83. On 18 May 2012, *France 24* news reported that a video depicting the torture of an alleged supporter of Gaddafi was posted on YouTube on 16 May 2012. According to the article, the video shows men dressed in ‘military garb’ beating the prisoner and explaining the ‘reason’ for the torture is that the victim is allegedly a former Gaddafi supporter ‘who made a mobile phone video of a bloody attack against Misrata rebels.’²³ The title of the video claims that the perpetrators of the torture are ‘militiamen’ in Misrata.²⁴ The article states that ‘this is not the first time’ such a video has emerged on the internet; in many of these videos the ‘victims are

¹⁹ Human Rights Watch 2012, *Libya: Amend New Special Procedures Law*, *ibid*.

²⁰ Human Rights Watch 2012, *Libya: As Deadline Passes, Militias Still Hold Thousands*, 12 July <<http://www.hrw.org/news/2012/07/14/libya-deadline-passes-militias-still-hold-thousands>>Accessed 17 October 2012

²¹ David Kirkpatrick 2012, ‘Libya Struggles to Curb Militias, the Only Police’, *The New York Times*, 13 October, <http://www.nytimes.com/2012/10/14/world/africa/libyan-government-struggles-to-rein-in-powerful-militias.html?pagewanted=all>.

²² Amnesty International 2012, ‘Libyan authorities must protect two sisters from harassment’, 17 September, <http://www.amnesty.org/en/news/libyan-authorities-must-protect-two-sisters-harassment-2012-09-1>.

²³ ‘Seven Months After Gaddafi’s Death, Libyan Rebels Still Out for Revenge’ 2012, *France 24*, 18 May <<http://observers.france24.com/content/20120518-seven-months-after-gaddafi-death-libyan-rebels-still-out-revenge-misrata-video-torture-mercenaries-human-rights>>Accessed 15 October 2012

²⁴ *Ibid*

black African or Berber nomads, who were targeted because they were believed to be Gaddafi mercenaries.’²⁵

84. On 29 December 2011, an unnamed 22 year old man, known only as ‘B5’, and his brother were taken from their family home in the Ghot al-Shaal neighbourhood of Janzur in north-western Libya by ‘members of a militia’ and placed in a detention centre. According to Amnesty International ‘B5’ belonged to a family of perceived Gaddafi supporters. ‘B5’ claims that he was tortured extensively while in detention.²⁶ It is unclear from the report whether ‘B5’ and his brother remain in detention.
85. According to the UNHCR, in October 2011 between 65 and 78 alleged Gaddafi loyalists and soldiers were executed at the Mahari Hotel in Sirte by *thuwar* (or anti-Gaddafi forces).²⁷ The victims had their hands bound behind their backs and were shot.²⁸ According to Amnesty International, an investigation into the killings has not been initiated.²⁹

The Revolutionary Guard and Committees

86. The International Commission of Inquiry (ICI) to investigate all alleged violations of international law in Libya provided the following information on the Revolutionary Guard:

The Revolutionary Guard (also known as the Republican Guard) was a structured political and paramilitary apparatus within the armed forces tasked with ensuring loyalty to the Government and suppressing any opposition. According to information provided to the Commission, the Revolutionary Guard included six brigades (a Special Forces Brigade, an Infantry Brigade, an Artillery Brigade, and three tank brigades all stationed on the outskirts of Tripoli). It was thought to have been approximately 40,000 strong and “the real frontier protection force.” The force had access to battle tanks, armoured personnel carriers, helicopters and possibly anti-aircraft artillery and guided weapons. A unit from the Guard, composed solely of female soldiers and known as the “Green Nuns” or “Revolutionary Nuns” served as Muammar Qadhafi’s bodyguards. Members of the Revolutionary Guard were uniformed.

The Commission was informed that Revolutionary Guards were not employed full time but were volunteers, and were accepted for training on the recommendations of other members of the Revolutionary Guards. They were provided about four months of training, especially in the use of weapons, and had to attend annual refresher courses. Thorough security checks were completed in respect of each member of the Revolutionary Guard to ensure that they were completely loyal to the government. At the time of graduation, each member was required to swear an oath never to betray

²⁵ *Ibid*

²⁶ Amnesty International 2012, *Militias Threaten Hopes for New Libya*, February, p.18 <<https://www.amnesty.org/en/library/asset/MDE19/002/2012/en/dd7c1d69-e368-44de-8ee8-cc9365bd5eb3/mde190022012en.pdf>> Accessed 17 October 2012

²⁷ UNHCR 2012, *Report of the International Commission of Inquiry into Libya*, March, p.2 <<http://www.unhcr.org/refworld/pdfid/4ffd19532.pdf>> Accessed 15 October 2012 Also see: Amnesty International 2012, *Annual Report: Libya*, p.220 <<http://www.amnesty.org/en/region/libya/report-2012>> Accessed 24 May 2012

²⁸ UNHCR 2012, *ibid*.

²⁹ Amnesty International 2012, *Annual Report, ibid*

Qadhafi. Members of the Revolutionary Guard had access to many privileges.³⁰
[footnotes omitted]

87. The ICI also provided the following information in relation to Revolutionary Committees:

The Revolutionary Committees, which were set up in 1977 to “safeguard the Revolution”, were originally composed of students who believed in Qadhafi’s populist theories. After 17 February 2011, the head of the Revolutionary Committees was [084]. The Committees had offices throughout the country and school children were required to attend camps regularly, and by the time they enrolled at university, they were already de facto members of the Committees. Their members wore civilian clothes and were armed with light weapons (handguns and AK-47s). Sources that the Commission spoke with estimated that the Revolutionary Committees had tens of thousands of members, possibly between 60,000 and 100,000 members. According to information collected by the Commission, the Revolutionary Committees were tasked with police functions including the arrest of counter-revolutionaries and the management of numerous detention centres in most cities and towns across the country. Prior to February 2011, the Revolutionary Committees were known as an important security organization close to Qadhafi. During the uprisings in February 2011, the Revolutionary Committees formed an integral part of Qadhafi’s loyalist supporters who faced the demonstrators.³¹ [footnotes omitted]

[Town 1]

88. [Information deleted: s.431(2)].³² [Information deleted: s.431(2)].³³

89. Following the siege, there were reports of public buildings -- including schools, banks and even a small museum being severely damaged. Armed young men openly roamed the streets and barged into houses and apartments that already had their doors and windows broken open, apparently conducting house-to-house searches

FINDINGS AND REASONS

90. The applicant travelled to Australia on a valid passport issued by the Great Socialist Peoples’ Libyan Arab Jamahiriya. On the basis of a copy of his passport placed on the department’s file, the Tribunal accepts that the applicant is a national of Libya.

91. The applicant’s claims are based on the Convention grounds of political opinion and membership of a particular social group. Essentially, he claims that he supported the former Libyan regime of Colonel Gaddafi. He was a member of a Revolutionary Committee and served as a volunteer with the Revolutionary Guard. As a result, he was rewarded with a scholarship to study in Australia. He claims that following the February 2011 uprising he wrote a letter in support of Gaddafi to a Libyan satellite television station and a Libyan newspaper. He also participated in a pro-Gaddafi, anti-NATO demonstration in Australia which was filmed and posted on the internet. He also claims that as member of [Tribe 3]’s branch of the Warfalla tribe he will be identified as a Gaddafi supporter by armed militias. The applicant fears being subjected to serious harm if he were to return to Libya.

³⁰ Human Rights Council 2012, ‘Report of the International Commission of Inquiry on Libya’, 2 March, A/HRC/19/68.

³¹ *Ibid*

³² [Information deleted: s.431(2)]

³³ [Information deleted: s.431(2)].

92. The Tribunal had some concerns regarding the applicant's evidence. These concerns related to the apparent changes in his evidence regarding the exact nature of his political opinion and views. As it was put to the applicant at the hearing, according to his written evidence to the department he had initially supported the 'revolution' but was opposed to NATO's intervention. He had described the demonstration he had attended at [university] as anti-NATO protest and not a pro-Gaddafi demonstration. At the interview, when asked whether he supported Gaddafi in Libya, he failed to provide a clear answer, stating, in essence, that he had found nothing wrong with Gaddafi. Before the Tribunal, however, he claimed to be a Gaddafi supporter and portrayed the demonstration at the university as a pro-Gaddafi rally. He also claimed for the first time that he was a member of a Revolutionary Committee in Libya.
93. Having carefully considered the applicant's evidence at the hearing and the additional information provided by him or accessed by the Tribunal, the Tribunal is not prepared to conclude that the apparent changes in the applicant's evidence are due to his lack of credibility or the unreliability of his evidence. The Tribunal is of the view that the applicant's deficient English language skills and lack of representation at the primary level may have been responsible for his inability to communicate or adequately explain the true nature of his circumstances and claims to the department. The applicant also did himself a disservice by giving evidence in English at the interview and placing insufficient reliance on the telephone interpreter. Undoubtedly these factors resulted in his claims not being communicated accurately.
94. The applicant's claim that he is a Gaddafi loyalist is supported by the letter he had sent by email to two Libyan media outlets clearly stating his position. The email bearing the letter predates the applicant's application for a protection visa and his claims relating to his support for Gaddafi could not be regarded as late invention. In addition, the applicant's military ID card clearly indicates that he was a member of *Al-Haras Al Thawri* (the Revolutionary Guard) and not, as noted in the delegate's decision, the [brigade deleted: s.431(2)]. As claimed by the applicant, and confirmed by the country information before the Tribunal, the Revolutionary Guards were not employed full time but were volunteers, and were accepted for training on the recommendations of other members of the Revolutionary Guards. Thorough security checks were completed in respect of each member to ensure that they were completely loyal to the government. At the time of graduation, each member was required to swear an oath never to betray Gaddafi and members of the Revolutionary Guard had access to many privileges.
95. The Tribunal, therefore, accepts that the applicant was a member of the Revolutionary Guard and that his membership had been accepted on the basis of a recommendation by his brother, then a captain in the army, and after he was thoroughly vetted. Had the applicant not demonstrated his loyalty to the regime, he would not have been able to serve in the Revolutionary Guard. The Tribunal further accepts that the applicant was a member of a Revolutionary Committee and finds his explanations at the hearing for his failure to put this claim forward to the department persuasive. The Tribunal accepts that the applicant is a member of the [Tribe 3] branch of the Warfalla tribe and that the applicant's brothers were also members of Revolutionary Committees. The Tribunal accepts that two of the applicant's brothers were arrested and detained following the Libyan army's successful campaign to capture [Town 1]. Reports indicate that more than 100 Gaddafi loyalists had been arrested

during the operation.³⁴ The Tribunal further accepts that a third brother, [Mr E], was a high ranking officer in Gaddafi's army and had fought, along with the applicant's brother-in-law, against the militias during their attempt to take control of the town.

96. The country information before the Tribunal indicates that Libya continues to be haunted by violence. Armed militias are active in Tripoli and other major metropolitan areas of Libya. While the government is attempting to rein in armed militias' power, as recently as August 2012 militias continued to cause harm³⁵ and detain people they imprisoned during the uprising.³⁶ Reports indicate that militias have targeted members of Gaddafi's armed forces and security apparatus since the uprising began in February 2011. It is noted that reports discussing the targeting of Gaddafi's security apparatus do not identify what section of the armed forces they belong to.³⁷ Reports also indicate that non-state agents, primarily militias, are targeting actual and imputed Gaddafi supporters. In particular, it appears that those who are perceived to have been members of or affiliated with Revolutionary Committees have been harassed, arrested and detained. Despite attempts by the Ministry of Interior to regulate the number of bodies authorised to carry out arrests, armed militias continue to seize people without warrant.³⁸ The state security apparatus has so far been unable to confront the well-armed militias across Libya. The authorities have also shown a lack of political will to challenge the armed groups that fought against Muammar Gaddafi.³⁹
97. In view of the applicant's political allegiances, past activities, affiliation of other members of his family with the former regime, whether as low ranking members of its Revolutionary Committees or high ranking officers of its army, and his participation in pro-Gaddafi demonstrations in Australia, the Tribunal cannot rule out the possibility of the applicant voicing his opinion and views in Libya. On the basis of the evidence before it, the Tribunal finds that there is a real chance that the applicant will face a threat to his life or liberty, significant physical harassment and/or ill-treatment if he were to return to Libya now or in the reasonably foreseeable future. The Tribunal finds that the harm the applicant would be subjected to involves 'serious harm' as required by paragraph 91R(1)(b) of the Act. The Tribunal is satisfied that the applicant's actual or imputed political opinion and membership of the particular social group of his family and/or [Tribe 3] sub-tribe of Warfalla tribe are the essential and significant reasons for his fear of persecution as required by paragraph 91R(1)(a) of the Act. The Tribunal finds that the persecution which the applicant fears involves systematic and discriminatory conduct, as required by paragraph 91R(1)(c), in that it is deliberate or intentional and involves selective harassment for a Convention reason. The Tribunal is satisfied that the applicant does not have adequate and effective state protection available to him and that he would not be able to avoid the harm he fears by internally relocating. The Tribunal is satisfied that the applicant's fear of persecution is well-founded.
98. The Tribunal is satisfied that the applicant does not have a legally enforceable right to enter and reside in any country other than his country of nationality, Libya. The Tribunal finds that the applicant is not excluded from Australia's protection by subsection 36(3) of the Act (see *Applicant C v Minister for Immigration and Multicultural Affairs* [2001] FCA 229; upheld on

³⁴ [Information deleted: s.431(2)].

³⁵ Human Rights Watch 2012, *Libya: Stop Attacks on Sufi Sites*, 31 August
<<http://www.hrw.org/news/2012/08/31/libya-stop-attacks-sufi-sites>> Accessed 17 October 2012.

³⁶ Human Rights Watch 2012, *Libya: As Deadline Passes, Militias Still Hold Thousands*, *ibid*.

³⁷ Amnesty International 2012, *Annual Report*, *ibid*; and UNHCR 2012, *ibid*.

³⁸ Amnesty International 2012, *Libya: Rule of Law or Rule of Militias?*, 12 July, MDE 19/012/2012.

³⁹ Human Rights Watch 2012, *Libya: As Deadline Passes, Militias Still Hold Thousands*, *ibid*

appeal, *Minister for Immigration and Multicultural Affairs v Applicant C* (2001) 116 FCR 154).

CONCLUSIONS

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

DECISION

100. The Tribunal remits the matter for reconsideration with the direction that the applicant satisfies s.36(2)(a) of the Migration Act.