

**DECISION RECORD**

**RRT CASE NUMBER:** 0902607

**DIAC REFERENCE(S):** CLF2009/5865

**COUNTRY OF REFERENCE:** Sudan

**TRIBUNAL MEMBER:** George Haddad

**DATE:** 29 July 2009

**PLACE OF DECISION:** Melbourne

**DECISION:** The Tribunal remits the matter for reconsideration with the direction that the applicant satisfies s.36(2)(a) of the Migration Act, being a person to whom Australia has protection obligations under the Refugees Convention.

## **STATEMENT OF DECISION AND REASONS**

### **APPLICATION FOR REVIEW**

1. This is an application for review of a decision made by a delegate of the Minister for Immigration and Citizenship to refuse to grant the applicant a Protection (Class XA) visa under s.65 of the *Migration Act 1958* (the Act).
2. The applicant, who claims to be a citizen of Sudan, arrived in Australia on [REDACTED] and applied to the Department of Immigration and Citizenship for a Protection (Class XA) visa [in] January 2009. The delegate decided to refuse to grant the visa [in] April 2009 and notified the applicant of the decision and his review rights by letter dated [in] April 2009.
3. The delegate refused the visa application on the basis that the applicant is not a person to whom Australia has protection obligations under the Refugees Convention.
4. The applicant applied to the Tribunal [in] April 2009 for review of the delegate's decision.
5. The Tribunal finds that the delegate's decision is an RRT-reviewable decision under s.411(1)(c) of the Act. The Tribunal finds that the applicant has made a valid application for review under s.412 of the Act.

### **RELEVANT LAW**

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

### **Definition of 'refugee'**

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

owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence, is unable or, owing to such fear, is unwilling to return to it.

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

stateless, unable, or unwilling because of his or her fear, to return to his or her country of former habitual residence.

18. Whether an applicant is a person to whom Australia has protection obligations is to be assessed upon the facts as they exist when the decision is made and requires a consideration of the matter in relation to the reasonably foreseeable future.

## **CLAIMS AND EVIDENCE**

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

### *The protection visa application*

20. The applicant provides in the visa application forms that he is a Sudanese citizen, he was born in Nyala, Sudan on [date of birth deleted in accordance with s.431(2) of the Migration Act as it may identify the applicant] and is aged 39 years. He states that she speaks, reads and writes English and Arabic. He has completed 17 years of education and graduated with a Science degree (chemical engineering technology) in 1998. His employment history indicates that he began as a self employed home tutor and went on to various positions with companies in oilfields. His final position is described as chemical engineer/senior processing officer.
21. The applicant states that he last left Sudan to undertake training in Malaysia. He fled to Australia from the Islamic political group that are leading Sudan; and he fears harm and persecution by the authorities if he were to return to Sudan. He indicates that he will set out his claims in a separate statement.
22. The applicant states that he married [in] April 2008. His wife lives in Sudan. His mother and a number of siblings live in Sudan, one sibling in India and one in Canada.
23. The applicant provided certified copies of his passport, birth certificate, marriage certificate, his academic qualifications and number of other training awards and course attendance or participation.

### *The applicant's first statutory declaration*

24. The applicant provided a statutory declaration dated [in] February 2009 setting out his claims which may be summarised as follows (the full statement is at D1, folios 76-86):

He states his place and date of birth and states that he arrived in Australia on a visitor visa [in] December 2008. He states that he grew up in Darfur. He provides his academic history and qualifications; and his employment history.

He states that in the last six years that has been conflict in Sudan. Oilfields are routinely attacked by rebels from Darfur. Government security forces suspect employees who are from Darfur and employees who are not members of the Islamic Party of being complicit with the rebels and interrogate and torture them. Despite having no involvement with the rebels or any political involvement he had this experience on three occasions.

The team then asked him similar questions as the previous team had. They brought into the room his belongings including his laptop. He had downloaded information about the company and the oilfield as part of his work with the company. He also had BBC reports about the war in Darfur which he had downloaded to read at a later date.

After he denied any links with the rebels, they asked him about the documents on his laptop. He explained that these were for his personal use and he had no intention of providing them to anyone. They threatened to kill him and his family. They told him that they have the power to do whatever they wanted. Hours later they took him outside and beat him in a similar way as he had been beaten by the other team. Torture followed for many hours and was held in another room made of mud and bound in chains.

The following morning the team from Khartoum returned and he was taken to the office and interrogated. Again he was beaten and tortured after the interrogation and late in the evening he was taken and held in the mud room and chained. But this time the room was full of water.

The following morning he was taken and again interrogated and beaten and at around 2pm he went into a coma. He woke up in the company clinic in the evening. The company security personnel came and told the applicant that the government security men had told the company that the applicant was involved in a car accident but he has informed the applicant's department that he was attacked by locals. He advised the applicant not to report the incident or to inform anybody of it. The company security knew what had actually happened but they take orders from the government security. After around one week he left the clinic and returned to his duties in Khartoum. He did not tell anyone of the incident as he feared losing his job and that his family may be harmed. He had no money to leave Sudan and he could not leave his family alone in Sudan.

The second occasion he was assaulted by government security was immediately following an attack on the [Location A] oil field. Rebels attacked the oil field [in] October 2007. He was arrested. He found out through the media reports that the leader of the rebel group that attacked the oil field was his friend, [Person 1]. They had previously worked together as employees at the [company name deleted: s.431(2)]. He knew [Person 1] to be political and well-educated. He was unafraid to speak even though it was risky. They would sit together during breaks and discuss the political situation in Darfur. He did not know that [Person 1] was a rebel. He knew him to be a quiet and peaceful man who had not spoke of any intentions to join the rebels. He did not maintain contact with [Person 1].

He thinks that the security forces would have had a file on [Person 1] and had knowledge of who his friends and associates were. The security forces also suspected that the applicant had given [Person 1] information about the [Location A] oil field. They told him this during the interrogation over five days in a security camp near the oil field. During the period of five days he was abused, beaten and tortured. He thinks he was released because the security forces realised that he didn't know anything and had not provided information to [Person 1]. His company bosses also asked for his release because they needed him as he was the only senior processing engineer in the department.

The third occasion he was detained was [in] December 2007 after an attack on the [Location B] oil field. They asked him questions; they threatened him and then released him. He was detained for one day. The reason for his quick release was because he was needed to attend to a problem at the oil field.

In February 2008 his company selected him to go to Malaysia for six months to undertake further training. He had already obtained a passport in 2005, before the security forces began to harass him. Others in the company had the opportunity to go for further training after around two years of service with the company; this was his first opportunity which came after around eight years of employment. He thinks he was discriminated against in this and in other aspects such as promotions, pay and benefits because he was not a member of the Islamic Party and he was from Darfur.

Before he left for Malaysia, in mid-April he married. There was a ceremony and relatives from Darfur came to where he lived in Omdurman. Immediately following this he and his wife left Sudan and travelled to Malaysia. His family who came from Darfur continued to stay at his house in Omdurman according to Sudanese tradition.

In May 2008, whilst he was in Malaysia, there was an attack on Omdurman. The security forces suspected his family of involvement with the attack because they were related to him and they are from Darfur.

[In] May 2008 six government security men went to his house and asked questions of his father, eldest brother and uncle about the applicant and the rebels. They searched the house. His father tried to stop the security men from entering the women's part of the house. They hit his father and he fell. His father was recovering from surgery and began to bleed. They did not allow his father to go to hospital. By the time they left, it was too late and his father bled to death. His uncle had a pre-existing heart condition; he suffered a heart attack from the shock and went into a coma. He died the next day. Two weeks later his brother told by telephone what had happened. The rest of the family moved to stay with friends and relatives. His brothers disappeared.

While in Malaysia, his wife became pregnant. It was a difficult pregnancy and they were running short of money. His wife decided to return home to Omdurman. She returned in October 2008 and gave birth to a healthy baby girl [in] June 2009.

Because of the death of his father and his uncle; and because of his own experiences of harassment in Sudan, he decided not to return to Sudan but to seek asylum in Australia. He applied for a visitor visa to Australia. In order to be granted the visa to Australia, he made up a receipt from Western Union to demonstrate that he had sufficient funds and would depart Australia. He also made up an email purporting to be from his company granting leave to take a holiday in Australia. He did not seek protection in Malaysia because of the strong relationship between Sudan and Malaysia. He feared the Malaysian authorities would return him to Sudan.

The company has not paid him his salary since November 2008. He assumes he has been dismissed and if he were to return to Sudan, he would be unemployed. He would have a very low chance of gaining a job because the jobs are occupied by members of the government's Islamic Party; he is not a member, and because he is from Darfur. The only reason he was able to gain his job previously and obtain the position which he did and which requires government approval and security checks, was because of a connection and some fortunate circumstances.

While in Malaysia, he has heard from a friend in Sudan in a telephone conversation in October 2008 that he is on a government security blacklist. They were friends at university; his friend's uncle is in the Sudanese government security forces and holds a high rank. It is a

secret forces blacklist of people the government suspects are possible threats to it. It is a list of people who are not supposed to work in sensitive government areas, especially oil. Only high-level persons know of this list.

His wife was detained and questioned for more than four hours at the airport upon her return to Sudan from Malaysia. She has received calls asking the applicant's activities and when he would be returning to Sudan. She called the applicant a day after she returned asking him to arrange for her return to Malaysia. His family in Sudan has also had visits from strangers asking about the applicant. People also went to his wife's mother's house, where his wife is staying, asking if the applicant was there.

He fears returning to Sudan as he believes he would be arrested on arrival. He would at least be tortured or killed. He fears for his family especially his wife and daughter and about his mother.

#### *The review application*

25. In support of the review, the applicant submitted a statutory declaration dated [in] May 2009 and attachments (see T1, folios 37-43) which may be summarised as follows:

The applicant's second statutory declaration

The applicant confirms his earlier statement of [date deleted: s.431(2)] February 2009 and states that he wishes to clarify matters and respond to the delegate's decision record.

He refers to the delegate not accepting his claim of being arrested and detained after the attack on the [Location A] oil field [in] October 2007 (the delegate note that the applicant's passport indicated that he was out of Sudan at the time of the claimed attack and returned on [date deleted: s.431(2)] October 2007). The applicant confirms that he was out of Sudan between [date deleted: s.431(2)] and [date deleted: s.431(2)] October 2007 as it is shown in his passport. But he did not explain the travel in his first statutory declaration as he did not see it as important. He adds that his use of the word "immediately" when referring to his second arrest was incorrect. He was arrested on [date deleted: s.431(2)] October 2007.

[In] October 2007 he travelled to Egypt on a business trip with his boss. They returned with spare parts needed for the company. He did not mention this trip in his original statutory declaration because he did not see it as an important feature of his arrest. He returned to Khartoum on [date deleted: s.431(2)] October 2007 and [the following day in] October he returned to the [Location A] oil field with the spare parts procured in Egypt. At around 4pm on [that day] he was arrested by security forces. The two workers to whom he refers in his first statutory declaration were arrested during the attack on the oil field [earlier in] October. He had described the other two workers as Chinese but he believes that one was an Iraqi and the other an Egyptian. He did not notice this error in his earlier statutory declaration when he read through it.

In response to the delegate's observations that despite the claimed arrests, the applicant was able to renew his passport and travel in 2007 and 2008 and continue in his employment, the applicant states that he able to do so because the company organised his flights. The Khartoum authorities do not undertake thorough checks of oil company employees who travel for business purposes because the government needs the income generated by crude oil. The authorities assume that such employees have already undergone full security checks

before being employed. He was required to travel because of his very important position with the company.

In respect of his continued employment with [Company A] which is part-owned by the Sudanese government, he believes he continued to be employed because of his exceptional professional skills. He does not believe that anyone in the higher ranks of the company knew what had happened to him or that the security forces had informed the company that he was a suspected rebel or had information about rebels. His supervisors assumed that the security forces had simply made a mistake.

The applicant adds that branches of government do not necessarily share information as the systems which would enable information sharing do not exist in Sudan. So, even though the security forces were investigating him, it does not mean that another branch involved in the resources industry would be aware of the investigations.

The applicant reiterates that he remained in his job despite the fears he had because jobs such as the one he had are difficult to find. He was lucky in the way he was able to be in that job and if he were to look for a similar job, he would have to undertake strict security checks and he may not be as lucky as he was the first time.

He also comments on why he agreed that his wife return to Sudan despite the risk he perceived. He was unable to give her the care she required, she was sick and wanted to return to be with her mother. He was also unsure whether he would have been issued a visitor visa to Australia. He was concerned that if he had made his wife stay with him in Malaysia and he was unsuccessful in obtaining a visa to Australia, her situation would become much worse. He sent his wife back also knowing that her uncle is a member of the Islamist Party and would be able to protect her.

The applicant also provided further comments regarding the claimed attack on his family home [in] May 2008. He has relatives from the Zaghawa tribe. According to his culture, in Sudan when relatives attend major events such as weddings they stay for long periods of time – up to months. When he had his wedding [in] April 2008, both Fur and Zaghawa family members attended. His father came to help with the preparations for the wedding and became ill. He had surgery after the wedding. Some family members stayed to look after his father even after he left Sudan. The security forces attacked his home because they suspected his family members of being involved because they are related to the applicant and they are from Darfur, the security forces had also seen Zaghawas from Darfur visit his home.

The attachments to the statutory declaration are email exchanges between the applicant and persons at GNPOC regarding the reimbursement of medical expenses.

26. The applicant appeared before the Tribunal [in] May 2009 to give evidence and present arguments. The Tribunal hearing was conducted with the assistance of an interpreter in the Arabic (Sudanese) and English languages.
27. The applicant was represented in relation to the review by his registered migration agent. The representative attended the Tribunal hearing.

*The Tribunal hearing*

28. The applicant confirmed his personal details, family composition and his education and employment history as stated in previous documents he has submitted.
29. The applicant stated that he contacts his wife when he can afford to do so and the most recent contact was the morning of the Tribunal hearing. His wife contact his other family members when she is able to see them, they live around one hour away from where she lives in Omdurman.
30. I indicated to the applicant that after reading his statements, I have formed the impression that the authorities in Sudan have developed a significant interest in him.
31. The applicant responded that the authorities have treated him very badly because he is from Darfur At work, even though he was a senior engineer, his managers used to humiliate him by asking him to make the tea or coffee and gave him photocopying tasks. He felt that he did not have the same rights as others and was unable to speak freely. Security files are kept on employees of oil fields. Given he is from Darfur, he was always monitored. He is suspected of supporting political dissidents.
32. I referred the applicant to his statements regarding his claimed arrest in October 2007. I referred him to his statement where he had said that he was arrested “immediately” after the attack on the [Location A] oil field, however his passport indicates that he was not in Sudan at the time of the claimed attack on or around [that date], and that he had returned to Sudan [after the attack] The applicant said that is a mistake in the translation. He referred to another instance in his statement where he also used the word ‘immediately’ to demonstrate that the way he used it should not be taken as it may usually be used or understood in English. He had stated in the same declaration that “immediately” after his wedding he and his wife left Sudan, he added that he and his wife had married [in early] April 2008 and had in fact left Sudan for Malaysia at the end of April 2008.
33. I also indicated to the applicant that I have considered his clarification of this point, where he stated in his second statutory declaration that he returned to Khartoum on [date deleted: s.431(2)] October 2007 and the next day he travelled to [Location A] oil field and at 4pm of that day the security forces arrested him. I indicated that it also appeared unusual that the authorities had suspected him, but did not question him on arrival at the airport but would allow him to move freely into Khartoum, travel to [Location A] oil field and wait until nearly the end of the following day to arrest him in connection with the significant attack.
34. The applicant replied that he had travelled to Egypt on a business trip with his manager. Officials at Khartoum Airport are not concerned with those who work at petrol companies because workers of petrol companies are trusted and have been security cleared.
35. The applicant said that he believes communication between security departments is not efficient. They use traditional methods of communication. Information given to one lazy officer may not be acted upon. I indicated to him that what he is now saying is inconsistent with earlier evidence he has given and statements he provided. It is also inconsistent with information he has provided regarding his wife being detained and questioned at the airport for more than four hours when she returned to Sudan.
36. The applicant said when he arrived at Khartoum airport [in] October 2007, the next day he took a plane to the oil field which is a 2-3 hour trip; he arrived at around 1.00pm. He had

important spare parts and he was the only senior processing engineer who was able to perform the task.

37. I asked the applicant how the company was able to function without his presence while he was sent to Malaysia for several months. He replied that he has just remembered that before he was sent to Malaysia two Sudanese workers from [another oil field] came to where he works on training exchange, they had experience and were able to replace him.
38. I asked the applicant about the government blacklist that he referred to in his written statement, and the friend who told him he was on that list. He said his friend, named [deleted: s.431(2)], works in the warehouse of a ceramics company. He graduated as a textile engineer. He contacted him while he was in Malaysia to get news of his own family. The applicant said his friend's uncle, [Person 2] works in the security forces. The applicant has known [Person 2] for a long time and they were close. Both men had attended the applicant's wedding. He had told his friend that the applicant's name is on the list.
39. I indicated that I may find it implausible that an officer of the security forces, the government agency that was pursuing him and purportedly attacked his family in May causing the death and his father and his uncle, would warn him that his name is on a government blacklist which the applicant describes as only available to high level officers.
40. I also indicated that I may find it unusual that while in Malaysia and knowing that the government is looking for him, he would continue to communicate with the [Company A] where the government has a presence.
41. I referred the applicant to his statutory declaration where he stated that he had "made up" Western Union receipts and an email from his company to support his visitor visa application to Australia. He has submitted emails to the Tribunal purporting to be communication between him and personnel at his previous work place in relation to medical expenses, so why would these emails not be suspected of being "made up". He said he has taken an oath and has no reason to lie as he is now in Australia. I also indicated that the evidence he gave regarding sending his wife to Sudan while aware of the claimed risk appears implausible. He said that she was crying day and night, she said her uncle is part of the Islamist government, she told him that if he does not allow her to go back, she would divorce him.
42. The applicant said he is trying to obtain the medical evidence from his wife in support of why he contacted the company to redeem medical expenses. I indicated that I accept the claim that his wife received medical attention in Malaysia. But I also found implausible that knowing the claimed level of interest in him by the authorities and the serious attack on his house, that he would send his wife back to Sudan. The applicant said that his wife insisted and that her uncle is part of the Islamist government in Sudan so she would be safe staying with her mother.
43. I asked the applicant about his travel out of Sudan. He said the first time he travelled to Italy through Holland in 2005. Then he travelled to Egypt in 2007 and to Malaysia in 2008.
44. I put country information to the applicant from a number of sources regarding Sudanese nationals requiring exit visas to depart Sudan. Also the reports indicate that a person who is of interest for reasons of association with political dissidents would be highly unlikely to obtain an exit visa. However, the applicant was able to exit Sudan twice after his claimed first arrest and interrogation and torture by the security forces on suspicion of being associated

with political dissidents in November 2006. I indicated to the applicant that if I were to rely on the information from the international reports, it would appear inconsistent that having the profile he claims, he would have been able to obtain an exit visa and depart Sudan to Egypt, re-enter Sudan and exit again to Malaysia. I indicated this may mean that I may not accept his claims of arrest and detention or that the government of Sudan has any interest in him or that the security forces attacked his home in 2008 causing the death of his father and uncle, that I may reject all of his claims. The applicant confirmed that he understood the information and its relevance to the review. I invited him to consider if he wished to adjourn the review before considering making comments and/or responding to the information.

45. A short adjournment was declared. When the hearing resumed, the applicant's migration agent commented that she and the applicant do not have the benefit of the reports to which I referred. I responded that I expect the migration agent and the applicant would wish to make further submissions and I will provide reference to the reports I have and allow time to respond. The migration agent made comments about lack of specificity of reference to 'authorities' responsible for passports in Sudan in the international reports and whether those authorities have links with the security forces that the applicant fears.
46. The applicant made a short statement that he first travelled out of Sudan to Italy in 2005 which was before his first arrest. He said that he is not sure whether those who arrested and detained him belonged to the Janjaweed militia or the formal government security forces. The militia members present themselves as government agents but sometimes operate of their own accord and without government direction. He said he does not know if the security forces from the oil fields reported to the Khartoum government security forces, to which level and to which department, and that his travel was arranged by the a department within the company. The applicant indicated that he does not know if the central government security in Khartoum may not have known of the incident or security interest in him because it may have been the Janjaweed operating of their own accord. Therefore it may explain why he was able to obtain exit visas. The applicant added that sometimes people who arrive by helicopter may not be from the government, he simply does not know how the army operates. He repeated that he does not know if those who arrested him in November 2006 were pure Janjaweed acting alone or as part of the government forces.
47. I referred the applicant to his first statutory declaration where he stated that government security forces from Khartoum arrived by helicopter on the occasion of his first claimed arrest and detention in November 2006 and took over the investigation, interrogated and brutalised him. This would indicate that the central government security forces had an interest in him and were aware of him. And that his travel out of Sudan in October 2007 and April 2008 follows the incident which Khartoum security forces were aware of and in which they had an interest.
48. The migration agent assisted the applicant and stated that she wished to avoid the applicant leaving the Tribunal with the impression that the security forces are a unitary homogeneous group. She added that it has relevance to the issue discussed earlier of the applicant's claim that his name is on a government blacklist; and that there is only one security force. She argued that there may be an umbrella of security under which there are discreet and disparate groups. I indicated that further submissions may present such arguments and I would consider them.
49. I indicated to the applicant that I may have concerns about the credibility of much of the evidence he has given. I indicated that I have identified inconsistencies in his statements and

country information. In addition he may have added inconsistencies in his oral evidence. For example he stated that as a Darfur man he was treated badly, however, in 2005 shortly after moving to the Khartoum office in 2005 he is chosen to travel to Europe, is promoted and in 2007 he is selected to undergo further training for six months in Malaysia. This indicates that his efforts and skills were recognised favourably and rewarded which is inconsistent with his oral evidence. Noting also that the company where he was employed has government presence. I indicated that there appears to be internal inconsistencies and implausibility in his evidence. I added that the credibility concern may be part of the reason which may lead me not to accept his claims and lead to me affirming the decision. I invited the applicant to comment at the hearing or he may choose to comment later. He indicated that he would comment during the hearing.

50. The applicant made a short statement that he gained the position in the company through luck. He received his security clearance with the company through luck. He became technically proficient with assistance from the Canadians in the company. He started as a laboratory assistant and had the support of the Chinese partners in the company. He needed to support his family so he tolerated poor treatment from the Sudanese. The government men in the company did not care whether he stayed or not.
51. He said at times he is unable to explain his experiences or to speak. He is unable to sleep.
52. The applicant's migration agent indicated that expert medical evidence relating to scars and injuries and their causation would be submitted to the Tribunal.
53. The migration agent requested three weeks to consider the country information, prepare further submissions and provide the medical evidence.
54. Reference to the country information was sent to the applicant's migration agent by fax [in] May 2009 and the applicant was granted until [date deleted: s.431(2)] June 2009 to respond and/or comment on the information and present any further submissions in support of the review.

*Post hearing submissions*

55. [In] June 2009, the Tribunal received a submission from the applicant's migration agent dated [date deleted: s.431(2)] June 2009, a medical report from Dr [name deleted: s.431(2)] dated [in] June 2009 and a statutory declaration from the applicant date [in] June 2009 (see T1 folios 52-72). The submission and attachments may be summarised as follows:

The applicant's third statutory declaration

The applicant states that he continues to rely on the earlier two statutory declarations as true and correct save for clarifications he makes in this declaration.

He states that all the evidence he has given regarding his experiences in Sudan and that relating to his family are true.

He was able to obtain exit visas from Sudan with the help of the travel department of [Company A].

He states that his name does appear on a blacklist. He believes it may have occurred after he travelled to Malaysia and not before. He believes that is the reason his wife was questioned at

the airport on her return to Sudan He believes he was placed on the blacklist after the attack on his home [in] May 2008. He does not know if his two brothers are also placed on the blacklist. He has not spoken to his brothers since the call in which his brother told him of the attack on his home.

The applicant adds that while in Malaysia he came into contact with a number of other Sudanese on short stays and returned to Sudan. He spoke to them of his anger about what had happened to his family and said that if the government behaved in this way with the innocent members of his family, it justifies the rebels fighting back. He states that one of those Sudanese persons may have informed the government of what he had said and that may have led to his name being placed on the blacklist and the reason his wife was detained and questioned on her return.

The applicant states that he seeks to withdraw paragraph 34 of his statutory declaration dated [date deleted: s.431(2)] May 2009 and the email correspondence attached to it “*only insofar as these e-mails are not in their original form as I received them. I say that I have re-arranged these e-mails and deleted information from them. I have tried to retrieve the original e-mails but I cannot.*”

The applicant states that it is true that he had communicated with the company and with the two individuals in the emails who were his friends. He also contacted his section head at the company who was his close friend and he continues to contact him. He had re-arranged the emails because in their original form they contained details about work and gossip about female secretaries at work. He does not know why he rearranged the emails but he did not intend to deceive anyone.

#### The medical report

The medical report is addressed to the applicant’s migration agent and states that the writer, Dr [name deleted: s.431(2)], examined the applicant and found two healed abrasion scars on his right and left legs. The report also states that the applicant had what appeared to be two healed laceration scars on the right upper arm. The writer concludes that he was unable to detect any other evidence of injury on the applicant’s body and provided photographs of the scars described.

#### The migration agent’s submission

The migration agent submits that the country information provided by the Tribunal and discussed during the hearing supports the applicant’s account of how he was able to obtain exit visas and depart Sudan despite having been persecuted and being known to the authorities.

The submission argues that the reports support the following constructions:

- Co-operation between government agencies is not reliable or consistent in Sudan;
- There is no single agency responsible for security making co-operation and communication between security agencies unreliable and difficult;

- Although the Sudanese government required citizens to obtain exit visas to depart the country, the issuance of exit visas was *pro forma* and generally not used to restrict citizens' travel;
- Exit visas can be obtained through bribes given the local level of corruption of security officials;
- Accounts of departing Sudan can amount to the "surreal" although they are true.

The submission further argues that the applicant's particular circumstances make it plausible that he was able to obtain an exit visa and depart the country. He had obtained strict security clearances in the past in relation to his employment. His exit visa was arranged by the relevant section of a petroleum company – [Company A] which carried the necessary influence and authority in Sudan and as indicated by the country information, went through a "*Pro forma*" process. Given the above, it is conceivable that the applicant was able to obtain an exit visa and depart Sudan.

The submission goes on to discuss the points by reference to the reports and refers to reports regarding the security apparatus of Sudan operating to monitor Sudanese citizens abroad.

The submission adds that the applicant may also be a member of a particular social group – failed asylum seekers and refers to one of the reports mentioned earlier in the submission.

The submission also refers to reports about Sudanese citizens being questioned upon their return regarding any previous criminal activity or for taxation purposes.

The submission concludes with a discussion of the applicant's credibility and well founded fear of persecution and refers to a number of sources on credibility and case law.

#### *The second Tribunal hearing*

56. As the submission which followed the first hearing raised a new issue relating to returning as a 'failed asylum seeker'. The Tribunal invited the applicant to attend a further hearing [in] July 2009 to present arguments and give oral evidence in relation to this and any other new issues that might have developed.
57. The applicant gave oral evidence that he would fear returning as a failed asylum seeker for a number of reasons. He fears that he would be questioned or interrogated because he failed to return to Sudan after his assignment in Malaysia ended. He also fears returning because since arriving in Australia he has met a number of Sudanese nationals with whom he discussed many political issues and aired his views of the current government of Sudan. He has learnt that some of those he has met are sympathetic to the Sudanese government. Some have warned him to be careful as to what he says in their presence as they are thought to be members of the government Islamic Party and convey information to the government of Sudan.
58. The applicant confirmed that he does not have any unresolved taxation matters of previous crimes in Sudan. His fear is related to his claim of being suspected to have helped the rebel forces who mounted attacks on the oil fields. He stated that he was in a good economic situation in Sudan. He held a high position and earned a good income. But he lived in fear of persecution as a Darfuri and since the attack on his home in May 2008 which resulted in the

death of his father, and his uncle and the displacement of his brothers his fears are real and heightened. Since that incident, he has become personally politicised and cannot tolerate remaining passive. He would fight against the authorities for the actions they have taken against his people. He is confident that when he spoke of his anger about the attack on his home with other Sudanese nationals, some of those present would have conveyed his views and anger to the authorities.

59. I indicated to the applicant that I may find that his involvement or discussion with other Sudanese nationals in Australia may be taken as conduct he engaged in for the purpose of strengthening his claim to be a refugee. He was invited to comment.
60. The applicant replied that he did not engage in this conduct for the purpose of strengthening his claim to be a refugee. He said if that was his motive, he may have engaged in more public political activities but he did not. He said he was simply having ordinary conversations with other men in a restaurant but he fears that his views may have been relayed to the authorities which would put him at risk of being interrogated upon his return.
61. The applicant's representative made an oral submission on his behalf. He argued that while it may be accepted that returning as a 'failed asylum seeker' of itself may not succeed as a claim on the basis of the country information discussed, the particular circumstances of the applicant present a different case for consideration. He argued that the applicant was consistent in his claims and the credibility concerns raised were resolved through adequate explanation. He argued that the applicant has not sought to embellish his claims or to engage in public activities in Australia to strengthen his claim to be a refugee. The representative argued that because the applicant held a high position in a sensitive occupation where he had access to information regarded as sensitive by the government. The applicant's long absence and failure to return to Sudan after his assignment in Malaysia places the applicant in a different category of persons from other failed asylum seeker returnees. He argued that given the country information about the regime in Sudan and that the applicant is from Darfur, the possible perception of the applicant's involvement in suspicious activities by government authorities upon his return is possible. This may then place the applicant in danger of serious harm as he would be referred to the security forces.

## **FINDINGS AND REASONS**

62. In order to be a refugee under the Convention, it is necessary for the applicant to be outside his country of nationality and for him to hold a well-founded fear of persecution for reasons of at least one of the five grounds enumerated in the Convention.
63. The applicant has claimed that he is in need of protection for reasons of his actual or imputed political opinion. He claims to belong to the Fur tribe. He was born and was raised in Darfur and he is suspected by government forces of being associated with rebels or anti government activities.
64. The Tribunal accepts that the harm that the applicant claims he fears involves serious harm and systematic and discriminatory conduct, and that the essential and significant reasons for the harm claimed to be feared are actual and/or imputed political opinion. In a post hearing submission the applicant also claims to be a member of a particular social group, namely returning as a failed asylum seeker, any of which is a Convention reason.

65. In both his protection visa application and his review application the applicant described himself as a national of Sudan. The applicant arrived on a valid Sudanese passport with a valid visa to enter Australia which the Tribunal has sighted. On this basis the Tribunal accepts that he is a citizen of Sudan and having made no claims against another country and as he is outside his country of nationality, for the purpose of the Convention the Tribunal will assess his claims against Sudan.
66. The Tribunal's task in the present case is to consider whether the applicant fears persecution for the reasons described above, and if so, whether that fear is well-founded. This task requires examining the claims that he has raised and the evidence that he has submitted, in addition to relevant independent country information.
67. The mere fact that a person claims fear of persecution for a particular reason does not establish either the genuineness of the asserted fear or that it is "well-founded" or that it is for the reason claimed. It remains for the applicant to satisfy the Tribunal that all of the statutory elements are made out: *MIEA v Guo & Anor* (1997) 191 CLR 559 at 596. Although the concept of onus of proof is not appropriate to administrative inquiries and decision-making (*Yao-Jing Li v MIMA* (1997) 74 FCR 275 at 288), the relevant facts of the individual case will have to be supplied by the applicant himself or herself, in as much detail as is necessary to enable the examiner to establish the relevant facts. A decision-maker is not required to make the applicant's case for him or her: *Prasad v MIEA* (1985) 6 FCR 155 at 169-70; *Luu & Anor v Renevier* (1989) 91 ALR 39 at 45. Nor is the Tribunal required to accept uncritically any and all the allegations made by an applicant: *Randhawa v MILGEA* (1994) 52 FCR 437 at 451.

#### Assessing the applicant's claims

68. The applicant's claims maybe summarised as:

#### **Political opinion, actual and/or imputed; and/or political involvement**

69. He was born and raised in Nyala, Southern Darfur, Sudan. He attended school in Nyala until around mid secondary school. He moved to Khartoum around 1987-1988. He completed the last two years of secondary school in Khartoum and attended university in Khartoum. He graduated with a Bachelor of Science with Honours in Chemical Engineering Technology.
70. In 2002 he began work as a laboratory assistant with [Company A] (in which the Sudanese government is a partner). Three years later he became a maintenance planner and remained in this position for around 18 months. He was then promoted to the position of process engineer.
71. The applicant claims that because he is from Darfur, he was treated badly and humiliated by fellow Sudanese workers and because he did not belong to the government Islamist Party as others did. As a Darfur man, he was also always monitored. He claims that the government security forces suspect employees who are from Darfur and those who are not members of the Islamist Party of being complicit with the rebels; and they interrogate and torture them.
72. I will address the claim of discrimination or bad treatment at work for reasons of being from Darfur further below. I have considered the claim of discrimination, bad treatment, regular monitoring and suspicion of complicity with the rebels for reasons of not belonging to the Islamist Party as imputing a political opinion to the applicant because he is from Darfur. I have had regard to the evidence that the applicant continued to be promoted in the company

which is partly owned by the government and was selected to travel abroad on company business and to undertake further training. That his contribution were therefore acknowledged and rewarded and he reached the position of senior engineer. On this basis I am satisfied that he did not suffer persecution for these reasons in the past and UI am further satisfied that, if he were to return, he would not face persecution in his workplace in the reasonably foreseeable future for reasons of imputed political opinion.

73. The applicant claims that he was first arrested, detained and tortured [in] November 2006; then in October 2007 and a further occasion [in] December 2007. Each arrest followed an attack on an oil field where rebels were suspected of responsibility for the attacks.
74. The applicant also claims that while he was in Malaysia on training for a period of six months, he received a call from a friend who told him that his name appears on a government blacklist. The applicant claims that his friend's uncle is a high-ranking officer in the government security forces and he had told his friend to warn the applicant.
75. I have considered the applicant's evidence contained in the three statutory declarations, in written submissions and in the oral evidence he gave during the Tribunal hearings.
76. During the first hearing, I indicated to the applicant that I had concerns regarding inconsistencies and aspects of his claims of being implausible and lacking in credibility.

#### The October 2007 arrest

77. The first concern I expressed to the applicant was that in his first statutory declaration he states that he was arrested immediately following an attack on an oil field [in] October 2007. The concern arose because in his passport it is shown that he was out of Sudan between [date deleted: s.431(2)] October and [date deleted: s.431(2)] October 2007. The delegate had also made the observation of this apparent inconsistency.
78. I have taken into account the applicant's statement in his second statutory declaration in which he seeks to explain this point. He states that the use of the word "immediately" in his first statutory declaration was incorrect and states that he was arrested on [a later date in] October 2007. He goes on to describe that he was on a business trip to Egypt and returned to Khartoum on [date deleted: s.431(2)] October 2007. On [date deleted: s.431(2)] October he traveled to his work place at Defra oil field and was arrested at around 4.00pm on the same day. He gave oral evidence consistent with this explanation during the hearing and provided that he traveled from Khartoum to [Location A] oil field by plane which is a two to three hour journey. He also submitted during the hearing that the use of the word "immediately" has a different meaning in his language from that which it may have in English. He gave the example of using it elsewhere in his statement where he refers to leaving Sudan "immediately" after his wedding celebrations but that in fact he had left around two weeks after the day he married.
79. I have considered all of the applicant's statements in respect of this concern. I have taken into account the explanation he seeks to submit in his second statutory declaration that the use of the word "immediately" was incorrect and he asserts that he was arrested on [date deleted:s.431(2)] October 2007. He also states that he did not see it as important to refer to the fact that he was in Egypt when the attack on an oil field took place in October 2007. During the hearing he sought to attribute the potential inconsistency in terms of a difference in translation. I do not accept the analogy with the use of the word when referring to the

wedding ceremonies. The applicant described the event of the wedding to involve preparation and celebrations where relatives attend and stay for many days or months. In this context to say “immediately” after such lengthy celebrations of an event such as marriage and where the actual period is two weeks is conceivable. However, I do not accept that it is similarly loosely used in reference to an event such as an arrest immediately after an attack. I also found it inconsistent that the applicant refers to the claimed events of arrest, interrogation and torture in considerable detail but he did not see the fact that he was out of Sudan at the time of the attack as an important aspect of the events.

80. I also found it implausible that, even if he was supposedly arrested after he returned to Sudan, that the government security would not arrest him at the airport upon his arrival on [date deleted: s.431(2)] October. Rather they would allow him free movement into Sudan and then to fly the next day to his work place and arrest him hours later. I found his evidence in an effort to explain this supposed delay – that he was on an important mission to attend to a task at work - also similarly implausible.
81. I am of the view that the applicant has constructed the “explanation” after it was identified in the delegate’s decision record that he was not in Sudan at the time of the attack and his claimed arrest. I also consider this aspect of the claims and the concern I have which has not been resolved, to be critical to the applicant’s claims generally. It casts significant doubt about the credibility of all of his claims. However, there are other concerns which I will address in respect of other aspects and evidence relating to his claims.

#### Departing Sudan and exit visas

82. I indicated to the applicant and provided him with country information which states that Sudanese nationals require exit visas to depart Sudan
83. A December 2005 *10th European Country of Origin Information Seminar* contains comment on the issuance of exit visas to persons the government may suspect of political dissent. The views recorded in this instance are those of Hans Friedrich Schodder, who was then Senior Protection officer of the UNHCR representation in Khartoum:

Sudanese citizens need an exit visa to leave the country, and these are denied to persons the government doesn’t want to travel abroad, for example to attend critical meetings or conferences. While considering an application for an exit visa, the authorities keep the passport of the applicant. It’s not a fact that political opponents don’t get exit visa at all; it just might take a couple of months or even years, and through all those years the passport stays with the authorities (ACCORD 2005, 10th European Country of Origin Information Seminar, United Nations High Commissioner for Refugees website, 1-2 December, United Nations High Commissioner for Refugees website, p.22, 3.10.1 <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/opendocpdf.pdf?docid=4451d6a04>

84. The US State Department’s *Country Reports on Human Rights Practices* on Sudan for 2006 provides that:

The government detained persons, particularly opposition political figures, at the airport and prevented them from traveling due to “security concerns.” For example, on August 20, the government prevented the director of a local NGO working in Darfur from departing the country to attend a conference overseas and confiscated his passport.

The government required citizens to obtain an exit visa to depart the country; however, the issuance of exit visas was pro forma and generally not used to restrict citizens' travel.

85. In a February/March 2000 fact-finding mission on Sudan, the Danish Immigration Service provides the opinions of several experts on the issuance of exit visas to opposition party members or professionals the government suspected of possessing harmful information:

Fadol [President Umma Party (UP), Egypt Office] explained that anyone wanting to leave Sudan must have an exit visa, obtainable from the Sudanese Ministry of the Interior, in his passport. There are three checkpoints at Khartoum airport.

According to Nhial [Vice-President Sudan Human Rights Organisation and Representative of the Union of Sudan African Parties (USAP) in the National Democratic Alliance (NDA), NDA Executive Office Cairo], the Sudanese Government has recently made it easier for even members of opposition parties to obtain an exit visa in Sudan and thus be able to leave the country legally...

Border control officers at points of departure from Sudan can easily be bribed. Checks there were described as not very effective, despite each passenger at Khartoum airport, for instance, being checked three times on departure. Reasons for such susceptibility to corruption include family ties and low pay for airport staff. The same also applies to all points of departure from Sudan, i.e. Halfa in the north and Port Sudan in the east as well. **He nevertheless made the point that anyone on the list of wanted persons issued by the Ministry of the Interior would never manage to use bribery to obtain an exit stamp or leave Sudan via Khartoum airport. All those leaving Sudan require an exit permit in their passport, in the form of a stamp issued by the Ministry of the Interior** (emphasis added). (Danish Immigration Service 2000, *Report on Fact-finding Mission to Cairo (Egypt) and Geneva (Switzerland) Human Rights Situation in Sudan and Position of Sudanese Nationals in Egypt 29 January to 12 February and 3 to 7 March 2000*, October, Section 2 and 2.1)

86. In response to this information the applicant made comments during the hearing and made further written submissions through his migration agent.
87. In his oral evidence, he indicated that he was aware of the requirement to obtain an exit visa. He stated that all his travel including visas was arranged by a department within the company where he worked. He also sought to argue that he is not sure whether the various organs of the security apparatus in Sudan communicated with each other and suggested that the authority which issues the exit visas may not have been aware of his profile with the security forces. He further argued that the security forces in different locations may not have communicated with each other or that the Janjaweed may have been those who arrested him in November 2006 and they may have acted of their own accord without government security forces involvement. Therefore the security forces in Khartoum may not have been aware of his profile and therefore no reason for the relevant authority not to grant him the exit visas on the two occasions he departed Sudan after his first claimed arrest.
88. In the post hearing written submission of [date deleted: s.431(2)] June 2009, the migration agent also argues that there does not appear to be a single agency that has sole responsibility for security which would make co-operation unreliable between the Ministry for the Interior (the agency that issues exit visas) and security forces. She further argues that by implication it is plausible that there is unreliable and/or inconsistent communication and co-operation between the Ministry for the Interior and the government security agencies. The writer refers

to the report's mention of conflicts between different government security forces resulting in civilian casualties as an example that co-operation between government security agencies cannot be assumed and therefore supports the applicant's claim of being interrogated and tortured by different government security agencies but that his exit visa and departure from Sudan were also possible.

89. The submission also argues that the country information indicates that the issuance procedure of exit visas is reported to be a *Pro forma* process. Given also that the applicant was an employee of a petroleum company and the company had arranged his travel; and given the clout of the [Company A], the lack of co-operation between the security agencies and by deduction, between the Ministry for the Interior and the government security agencies, it is possible that the exit visas were issued through the *pro forma* process. The submission reproduces extracts from the international reports regarding bribery and the scope for corruption in leaving Sudan and then submits that given the applicant's particular circumstances including as an employee of [Company A] and the company obtained his visas, it is plausible that he could depart Sudan despite his history and experiences.

#### The government blacklist

90. The applicant also claimed to have been informed by a friend that his name is included on a government blacklist. He indicated in his first statutory declaration that the blacklist is a secret services list and is known only to high-level people. It is a list of those the government regards as a threat and who are not supposed to work in sensitive government areas especially oil.
91. The applicant claimed that the way his friend came to know about the list and the applicant's name being on it was through his uncle who is a high-ranking member of the government security forces. He said he has known both the friend and the friend's uncle for a long time and they are close which is why he received the warning. He stated that he believes that his name was included on this list while he was in Malaysia – after he last departed Sudan in April 2008. In the post hearing written submission and his third statutory declaration he added that he believes that Sudanese expatriates to whom he spoke and expressed his anger about the attack on his family home in May 2008 may have informed the government and that may be the reason his name was included on the blacklist.
92. I have considered the evidence in respect of the claim regarding the blacklist. I find it highly implausible that a high ranking officer of the government security forces who are claimed to have had a high level of interest in the applicant would send a warning to the applicant. Given also the description of the blacklist being one which the government uses to include persons whom the government regards as a threat and those who are not supposed to work in sensitive government areas especially oil installations, and given the claim that the government security forces arrested and detained the applicant on suspicion of connection with rebel forces, I find it implausible that if there is such a blacklist that the applicant's name would only have been added after he departed Sudan. If the list does exist in the way the applicant describes it and the applicant's name was included, it would make more sense that his name would have been on such a list at a much earlier date. I have also considered the additional post hearing written evidence – that Sudanese expatriates in Malaysia informing the government of conversations may have led to the applicant's name being placed on the blacklist. I also find this highly implausible and speculative.

93. I have considered all of the evidence and arguments regarding the composition of the security forces in Sudan and the likely lack of communication and co-operation between and within agencies, however I find that the arguments are largely speculative. I understand their purpose is to suggest an inefficient government apparatus and in particular the security services or agencies which would make possible the issuance of exit visas even though the applicant was of interest to the authorities through lack of, or poor communication and/or co-operation.
94. By contrast however, later in the same submission where arguments are advanced in support of the applicant's claim of being included on a government blacklist, the submission (and the applicant's third statutory declaration) adds that the applicant expressed his anger about the attack on his home in May 2008 while in Malaysia to other Sudanese who may have subsequently informed the government of his comments. That, it is submitted, may have led the government to place him on the blacklist. In support of this argument, the submission refers to the international reports indicating the prevalence of "security and intelligence monitors" abroad where each event is reported directly to headquarters in Khartoum. Here the impression is of a very efficient and prevalent security apparatus.
95. I do not find the international reports' references to a national security apparatus consisting of more than one agency, where tensions may at times exist between agencies, compels an inference of a lack of communication or rendering the apparatus ineffective. I also do not accept the argument that it would lead to a person of the applicant's claimed profile to be routinely granted an exit visa. Countries, including Australia, have more than one agency tasked with different aspects of security responsibilities. This is neither unusual nor is it perceived to be inefficient.
96. I have also taken into account the credibility of the applicant's evidence. I raised this with him during the hearing. In this regard, the migration agent made extensive submissions and references to various sources on the issue of credibility in the post hearing submission of [date deleted: s.431(2)] June 2009. I have had regard to her submissions. However, on considering all of the evidence I found that the account of events significantly lacked credibility. The applicant claimed to have been mistreated as less than human, humiliated at work by his fellow Sudanese workers, however, in his account of his education and work histories, he provides an account of reasonable success where he has progressed in his chosen career and reached the position of senior process engineer. On more than one occasion he was selected to travel abroad on business. He claims that he obtained the job through luck and connections. He also claimed that he obtained his security clearance through luck. Even if he did obtain his original security clearance through good fortune, if his claims of arrest and detention on suspicion of involvement with rebels forces were to be accepted, and taking into account his evidence that people from Darfur are always monitored, it is not plausible that his security clearance would not have come into question following his claimed first arrest. Therefore it is not consistent that he would have been able to continue to progress upwards in his career and depart Sudan without question as an employee in a sensitive area in a company part-owned by the government. I also found inconsistent that the applicant is of such interest to the authorities, but continues to contact former colleagues at the part government owned oil company and regularly contacts his wife. I found the inconsistencies and implausible accounts the applicant provided were critical to his central claims of persecution and claimed fear.
97. On the basis of the above discussion of all of the evidence including my earlier comments regarding the October 2007 claim of arrest, I do not accept that the authorities had any

interest in the applicant. I do not accept that he was ever arrested, detained or tortured by security forces in Sudan for reasons of actual and/or imputed political opinion or involvement. I do not accept that the security forces attacked his home in May 2008 to look for him, causing the death of his father and his uncle because of his actual and/or imputed political opinion and/or suspected involvement with anti-government political activity (I will also address the claimed attack on his house in May 2008 below). I do not accept that the applicant's name is included on a government blacklist. I do not accept that his wife was detained and questioned upon her return to Sudan. I do not accept that his brothers have disappeared or other family members have fled because of his claimed involvement or of being of interest to the authorities. I do not accept that persons, taken to be government agents, have called his wife or gone to his house asking about him.

98. I have also taken into account the medical report from Dr [name deleted: s.431(2)]. I accept the report has identified the presence of healed scars and lacerations on the applicant's body. Given the discussion of the evidence and findings that the applicant was not arrested detained and tortured, I do not accept that these injuries are the result of the claimed arrest, detention and torture.

Ethnicity/ race – Fur/Zaghawa tribes, Darfur origin

99. The applicant claims that he was treated badly and humiliated by fellow Sudanese workers because he is from Darfur I have considered this claim and I have also considered that he enjoyed promotions and recognition for his value and contribution to the company which is partly owned by the government and reached a senior position as an engineer. I do not accept that if he experienced such bad treatment that it amounts to persecution or serious harm. I am satisfied that the applicant would not face a real chance of persecution by fellow workers in the reasonably foreseeable future for reasons of originating from Darfur.
100. Another claim arises from the personal details the applicant provided about himself, namely that he is from Darfur and belongs to the Fur tribe. He also added in later statements that he has relatives from the Zaghawa tribe. This raises a claim on the ground of ethnicity or race.
101. As noted above, the applicant lived in Khartoum from 1988 until he last departed Sudan in 2008. He completed high school, university studies and then commenced work in Khartoum.
102. The United States Department of State 2008 report dated 25 February 2009 relevantly provides as follows:

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, and prolonged pretrial detention; executive interference with the judiciary and denial of due process; obstruction of the delivery of humanitarian assistance; restrictions on privacy; restrictions on freedom of speech; increased restrictions on the press, including direct censorship; restrictions on freedoms of assembly, association, religion, and movement; harassment of IDPs and of local and international human rights and humanitarian organizations; violence and discrimination against women, including female genital mutilation (FGM); child abuse, including sexual violence and

recruitment of child soldiers, particularly in Darfur; preventing international human rights observers from traveling to/within Sudan; trafficking in persons; discrimination and violence against ethnic minorities; denial of workers' rights; and forced and child labor (emphasis added).

103. I have also had regard to the report on Sudan from the United Kingdom Home Office Country Information Reports, Border Agency Operational Guidance Note dated 14 April 2009 which relevantly provides as follows:

Members of non-Arab ethnic groups from the Darfur States

**3.8.1** A significant proportion of applicants will make an asylum and/or human rights claim on the basis of ill treatment at the hands of government-sponsored militias due to their membership of the Massaleit (aka Massalit), Zaghawa (aka Zaghewa), Fur (aka For or Four) or another of the non-Arab ethnic groups from the Darfur States.

**3.8.2 Treatment.** ... Since early 2003, Sudanese government forces and the Janjaweed have been engaged in an armed conflict with the SLM/A [the Sudan Liberation Army/Movement] and the JEM [Justice and Equality Movement (JEM)] rebels – predominantly from African Fur, Zaghawa, Massaleit tribes]. **As part of its operations against the rebels, government forces have waged a systematic campaign against the civilian population who are members of the same ethnic groups as the rebels. Sudanese government forces and the Janjaweed have burned and destroyed hundreds of villages, caused tens of thousands of civilian deaths, displaced millions of people, and raped and assaulted thousands of women and girls** (emphasis added).

104. While the information above indicates indiscriminate attacks on civilians from the same ethnic groups as the rebels, the information does not apply to those living in or around Khartoum, see further below.

**3.8.3** The Landinfo report prepared by the Norwegian Country of Information Centre in November 2008 reports as follows: As a result of Sudan's regional civil wars, Sudan has the world's highest number of internally displaced persons. It is estimated that between 1.2 and 1.5 million of the 8 million people living in greater Khartoum are internally displaced persons (IDPs). Many of those referred to as IDPs see themselves as economic migrants. It is difficult to differentiate between IDPs, migrants and other urban poor in the city slums, and the areas designated as IDP camps by the Sudanese authorities. Living conditions for IDPs, migrants, and others from Darfur appear to be similar to those of the urban poor. **The authorities do not differentiate between these groups. The settlement pattern is based more on social class than ethnicity and regional background.** The people who go to Khartoum usually already have contacts or family members there. Roughly one third of IDPs from Darfur do not have close family/relatives in the city. Information provided by IOM suggests that 4% are Zaghawa, just over 6% are Massalit and only 3% from Arab tribes (emphasis added).

**3.8.4 Four areas have been formally reserved for IDPs on the outskirts of Khartoum: Mayho, Jabal Awliyya, Ummdurman as-Salam and Wad al-Bashir. Neither Ummdurman as-Salam nor the other areas, which some people refer to as camps, are delimited areas. They appear to be permanent residential areas that hardly differ from ordinary residential areas in the slums around the capital, where poor Arabs from the countryside in the north live in conditions that are no better than those for people from the south, east, or Darfur.** In addition to the formally reserved areas, there are two large slum areas, Soba Aradi

and Hajj Ysif, and other slums, where poor people from different backgrounds live, referred to as ‘low-income high-density areas’.

**3.8.6 The authorities have no great interest in exerting pressure on these sections of the population to return to their places of origin, regardless of whether they come from Darfur or other parts of the country.** These groups constitute an important reserve army of labour- not least in relation to all the construction activity in Khartoum. The general economic and social situation, not only for IDPs in the Khartoum area but also for the rest of the city’s poor, can be characterised as bad. IDPs from Darfur largely live under the same conditions as displaced persons from the rest of the country and poor migrants in general.

**3.8.7 People from Darfur have the same access to public services as everyone else in Khartoum. They are not discriminated against in relation to schooling etc but the level of public services is lower in the slums around Khartoum, where people from Darfur largely live. There is no difference in access to public services between IDPs from Darfur or other places and other poor migrants. The police generally view the poor and marginalised groups as being a problem and a security threat. Marginalised persons who come from areas where there are ongoing conflicts, experience more problems than people who come from peaceful areas. Skin colour has a major bearing on social standing in Sudan. Due to large-scale immigration to Khartoum from all regions of the country, it is difficult to identify people as, for example, Darfurians and harass them on the basis of a specific geographical/ethnic background** (emphasis added).

105. In addition to the observation which can be drawn from the above information regarding the treatment of IDPs in Khartoum, it should also be noted that the applicant does not claim to be an IDP. His evidence indicates that he moved to Khartoum around 1988 to complete his education after which he commenced work.

106. The report continues:

**3.8.9 Prior to the JEM attack in May, security in Khartoum was generally regarded as good. Slums do experience security problems because of crime but the centre of Khartoum is very safe. People generally dispense their own justice in the slum areas. The personal safety of people from Darfur living in Khartoum was generally better than it is in Darfur While people who are politically active and leaders are more liable to experience problems with the authorities, it is ordinary crime that can create difficulties for most people.**

**3.8.10 The authorities’ reaction to political opponents from Darfur does not differ significantly from the abuse and reactions meted out to other political opponents. The Sudanese authorities focus on people who are politically active and high-profile opponents of the regime i.e. human rights activists, journalists, students etc. irrespective of their ethnicity or regional background. The security service has a dedicated tribal branch that monitors intellectual and politically active Darfurians and opponents of the regime from other parts of the country. The arrests that are made are highly targeted and torture is commonplace in Sudanese prisons and detention centres.**

**3.8.11 Sources confirmed that Darfurians had been arrested in recent years, for example, on suspicion of collaboration with rebel groups, although there were relatively few reports of arrests and persecution of people from Darfur living in Khartoum until the JEM attack. Almost all the reported arrests and/or other persecution have involved people who are either high-profile human rights**

**activists or opponents of the regime. Arrests and other types of persecution of people from Darfur living in Khartoum do not seem to occur on the grounds of their regional or ethnic background alone. It cannot be ruled out that persecution and arrests take place but are not reported. However, given the international presence in Khartoum and the fact that several national human rights organisations operate relatively freely in the capital, the scope of such abuse is unlikely to be extensive. Nor is there anything to indicate that there is a general under-reporting of cases of persecution of persons from Darfur who are staying in Khartoum** (emphasis added).

107. Taking into account that the applicant was employed as a senior engineer in a company partly owned by the government and has been living in Khartoum since 1988, and as I have not accepted his claims of being of interest to the authorities on the basis of suspicion of involvement with anti-government activities, I do not accept that the authorities attacked his home in May 2008 and caused the death of his father and uncle. Further I am satisfied on the basis of the above information that he does not have a profile as described above which would in the reasonably foreseeable future cause him to face persecution for reasons of his ethnicity or race.

Member of a particular social group

108. The Tribunal has considered whether the applicant is a member of a particular social group.
109. The meaning of the expression “for reasons of ... membership of a particular social group” was considered by the High Court in *Applicant A*’s case and also in *Applicant S*. In *Applicant S* Gleeson CJ, Gummow and Kirby JJ gave the following summary of principles for the determination of whether a group falls within the definition of particular social group at [36]:
- ... First, the group must be identifiable by a characteristic or attribute common to all members of the group. Secondly, the characteristic or attribute common to all members of the group cannot be the shared fear of persecution. Thirdly, the possession of that characteristic or attribute must distinguish the group from society at large. Borrowing the language of Dawson J in *Applicant A*, a group that fulfils the first two propositions, but not the third, is merely a "social group" and not a "particular social group". ...
110. It is not sufficient that a person be a member of a particular social group and also have a well-founded fear of persecution. The persecution must be feared for reasons of the person’s membership of the particular social group.
111. The applicant adds a claim in the written submission of [date deleted: s.431(2)] June 2009 that he is a member of a particular social group, namely ‘failed asylum seekers’ I accept that failed asylum seekers may constitute a particular social group within the meaning of the term as provided in the Convention and described by the Courts. I accept that if the applicant’s asylum claims ultimately fail, he would be a member of the particular social group as described.
112. The submission refers to a report (*10<sup>th</sup> European country of Origin Seminar 1-2 December 2005, Budapest*) which provides that failed asylum seekers won’t face severe problems on return unless they are though a threat to the state.
113. In the same submission, the migration agent refers to another report (*Report on fact-finding mission to Cairo, Khartoum and Nairobi. Human rights situation, military service, and entry and embarkation procedures in Sudan 8-12 August and 20-23 November 2001*). The

migration agent refers specifically to section 3 of the report which deals with conditions for entry and exit and at 3.1 ‘Entry to Sudan’. Emphasis is placed on “*no Sudanese had been arrested or even questioned on their return from abroad unless they had some unresolved business with the Sudanese tax authorities or were suspected of previous criminal activities in Sudan.*” Immediately following this extract, the report states that the airport police at Khartoum had a register of all wanted persons. The migration agent concludes in the submission that the information in the report confirms: a) the existence of a register of all wanted persons; and b) Individuals who are suspected of previous criminal activities in Sudan are questioned and/or arrested on their return.

114. The submission questions the unequivocal statements of the Sudanese official in the report regarding the treatment of returnees and the confidence expressed by the Norwegian or German diplomatic representatives (members of the fact-finding mission) regarding the treatment of deported Sudanese. No basis or further argument is advanced to support this questioning. Further, the applicant confirmed during the Tribunal’s second hearing that he does not have previous unresolved taxation matters or other general crime.
115. I have considered the additional evidence given at the second hearing. I accept the applicant’s submission that he did not engage in the low-level political discussions with other Sudanese nationals in Australia for the purpose of strengthening his claim to be a refugee.
116. I have also considered the argument and submissions made by the applicant and his representative regarding the possible return of the applicant to Sudan after a long absence given the position he held in a partly government owned petroleum facility.
117. I am also prepared to give the applicant the benefit of the doubt regarding the claim of the attack on his home in May 2008. I do not accept the extent to which the claim is made; however, I consider the country information regarding the government’s reaction to the attack by the Justice and Equality Movement (JEM) to indicate a possibility that his home may have been searched and his family questioned by government forces. Country information also provides that the JEM is made up from predominantly African tribes including the applicant’s tribe, Fur and his related tribe the Zaghawa. I also accept that the applicant’s previous position with the petroleum company creates a different set of circumstances for consideration as argued during the second hearing. Taking these factors together, and that the applicant is originally from Darfur, along with the country information regarding the government authorities acting with impunity, lack of transparency or accountability (see generally the USSD 2008 report referred to above), I cannot rule out the possibility of the applicant being held and interrogated upon his return which may cause him serious harm. I accept that the applicant would face a real chance of serious harm amounting to persecution on the basis of an imputed political opinion and association with anti-government activity if he were to return to Sudan as a failed asylum seeker.

## **CONCLUSIONS**

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

## **DECISION**

119. The Tribunal remits the matter for reconsideration with the direction that the applicant satisfies s.36(2)(a) of the Migration Act, being a person to whom Australia has protection obligations under the Refugees Convention.

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 <i>Migration Act 1958</i> .
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