

**1207970 [2012] RRTA 757 (3 September 2012)**

**DECISION RECORD**

<b>RRT CASE NUMBER:</b>	1207970
<b>DIAC REFERENCE(S):</b>	CLF2012/69617
<b>COUNTRY OF REFERENCE:</b>	Sudan
<b>TRIBUNAL MEMBER:</b>	Christine Cody
<b>DATE:</b>	3 September 2012
<b>PLACE OF DECISION:</b>	Sydney
<b>DECISION:</b>	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 Sudan, 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] April 2012.
3. The delegate refused to grant the visa [in] May 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 application form*

20. According to the information provided in the applicant's protection visa application, he was born in [year deleted: s.431(2)] in Khartoum, Sudan. He was a Sudanese citizen at birth and does not hold any other citizenship, nor does he have the right to enter or reside in any other country. His religion is Sunni Muslim. He provides details of his parents, [six siblings]. He had [educational details deleted: s.431(2)].
21. He travelled to numerous countries throughout his life, as explained in his statutory declaration (reproduced below) and attachments to the protection visa application form. More specific information about where he has resided, in addition to that provided in the statutory declaration form, is as follows:
  - [in] December 1997 moves from [Town 1] to Syria, where he stays for six months in [a number of locations].
  - June 1998: he stayed three days in [Country 2] with a friend, then returned to Syria where he stayed for about 48 days in rural regions.

- August 1998: he stayed 13 days in [Country 2] again with friend, then returned to Syria where he stayed in a [a number of locations including a refugee camp].
  - April 1999: he spent three months in [northern Eurasia].
  - July 1999 until July 2001: stayed in [Syria].
  - July 2001 until August 2001: [Country 3] for about one month.
  - November 2001 until March 2002: mostly stayed with a relative in Mecca and then two other locations.
  - February 2002<sup>1</sup> until May 2002: 50 days in [Town 1].
  - May 2002 until April 2004: various addresses in [Country 4].
  - April 2004 until December 2008: detained when he entered Israel until December 2006, when released stayed in Jerusalem.
  - December 2008 until 28 April 2008<sup>2</sup>: various addresses in [Country 4].
  - 28 April 2009 until 31 January 2010: [Town 1], Khartoum.
  - 31 January 2010 until October 2010: [a country in South-East Asia] then crossing the border into [Country 5] illegally, hidden in a minibus.
  - October 2010 to 12 March 2011: [Country 5], after entering illegally he travelled to various locations. He left [Country 5] [in] March 2011 using his own passport.
  - March 2011 until January 2012: [Town 1], Khartoum.
  - January 2012 until March 2012: [a number of countries in South-East Asia].
  - [In] March 2012: travel from [a country in South-East Asia] via Singapore (transit) to Australia.
22. After he [finished school] he was unemployed in Sudan until December 1997 when he left. In the various countries he has lived in and travelled through, he has either been unemployed or has worked in casual farming work or other casual work. When he returned to Khartoum in 2002 and 2009/2010 he was unemployed. On the third occasion, between March 2011 and January 2012, he earned some money by sometimes buying a box of food and selling the items of food individually to people on the street.
23. His reason for travelling to various countries was generally related to either seeking protection or because he had to leave a place. Concerning his reason for travelling back to Sudan, he stated that it was his country of birth.
24. He has had a number of passports, both legally issued, and two passports illegally issued:

---

<sup>1</sup> it appears from the chronology that this should be March 2002.

<sup>2</sup> It appears that this should be 28 April 2009.

- In 2009 he was issued with [a European] passport in an Arabic name and he attempted to travel from [Country 4] to the UK but was caught because he could not speak [the language of the passport he held]: he was not allowed to board the plane. He was taken to a detention place in [a Country 4] airport and was interviewed.
  - In 2012 he bought [a Country 5] passport (in the [first two names of his name used in the review application] (with his same date of birth)).
25. He was also issued in 2009 with a travel document from the Embassy of Sudan in [Country 4].
  26. He left Khartoum in January 2012 illegally using the above referred to [Country 5] passport which he threw in the toilet in Singapore whilst in transit on his way to Australia. His entry to Australia was "unauthorised" [in] March 2012, using a different passport, obtained from the Sudanese consulate in [Country 4] in 2009. Upon arrival he stayed at the airport until it was empty, he told a woman who approached him that he had no passport and he was interviewed by immigration, telling them that he needed protection.
  27. He has no relatives in Australia. He is in contact with (unspecified) relatives by phone.
  28. He has never been convicted, and is not charged with any current offence.
  29. He is in detention in Villawood.

*The applicant's statutory declaration*

30. In a written statutory declaration attached to his application for a protection visa, the applicant provided the following details:
  1. In my application a number of the dates are approximate only.
  2. Where I am unsure of an exact date, I have used "31st December".
  3. Some of the years used in the application are also approximations.
  4. I was born in Sudan.

**The reasons I left Sudan**

5. I left Sudan to seek protection in another country because it is not safe for me to live in Sudan because of my sexual orientation.
6. I am a homosexual and this places my safety and life at risk in Sudan.
7. I did not have a happy childhood. There was violence in my family. My father used to hit my mother. My parents did not look after us or care about us.
8. Since I was very little I always spent time outside my house because of the problems at home. I spent time outside in the street or went to visit my neighbours' homes.
9. When I was very small, maybe less than five years old whenever I visited one of my neighbours he used to do bad things to me. He sexually abused me. I did not tell anybody.
10. As I grew older other people started to do bad things to me, to sexually abuse me. I did not tell anybody. I started to just let people abuse me in this way.

11. I started to enjoy having sexual relationships/encounters with men, by the time I was about 17 years old I was attracted and having sexual encounters with other men.
12. In 1997 I was with a close friend in my house. My brothers and sisters were not at home, my mother was not at home. We had not planned to do anything, but the opportunity was there and the moment was there.
13. My brother came and saw us. He was very angry. He told me not to do it again and that he will tell my family if I did this again. He hit me and told me that what I was doing was wrong, that I was a bad person.
14. I could not openly show my sexual preference, because homosexuality is not accepted in Sudan.
15. I was afraid that I will be reported to the Police or to the Court. I was also afraid that people will attack me, discriminate me.
16. I decided to leave Sudan and go to a country where people will accept my sexuality.
17. I decided to go to Chad. I wanted to get an illegal passport in Chad to travel to France.
18. I crossed the border from Sudan to Chad. I walked across the border but when I entered Chad I was caught by the authorities and sent back to Sudan, The authorities in Chad just told me to go back to Sudan. I just walked across the border back to Sudan.
19. In 1984, my parents divorced. My father moved away to another house. I stayed with my mother and my siblings in our grandmother's house.
20. I continued to have relationships with men and lived in fear that if people knew what I was doing I risked being punished by people or by the Police.
21. I decided to go to Syria because it was the only country that did not require a visa for people with a Sudanese passport.
22. In Syria the situation was not different. Homosexuality is hidden I was fearful that I will go to jail for a long time if caught by the Police or Security.
23. I decided to go to another country. I wanted to be a free person.
24. I went to [Country 2]. I stayed with the sister of a friend. She is Sudanese and lives with her husband in [Country 2]. My visa was valid for only three days. She suggested that I return to Syria and get a Visitor's Visa.
25. I went to Syria and obtained a Visitor's visa and returned to [Country 2].
26. I stayed in [Country 2] for 13 days, and decided to go back to Syria because it is hard to get work and to get a permanent visa.
27. I returned to Syria.
28. In April 1999 I travelled to [a country in northern Eurasia]. I used my passport to go [there] but I bought the visa from a people smuggler it was a Business Visa valid for three months.
29. In [northern Eurasia I stayed] with some Sudanese students. I told them I wanted to cross the border to [country] because I heard that there is freedom [there]. They told me it was not easy and if

the border Army caught me, I will have big problems and might be taken to a prison in Siberia. I also did not have money, so could not pay a smuggler to help me.

30. They told me that they will help me with the ticket to go back to Syria.

31. I returned to Syria in July 1999. I stayed in Syria until July 2001.

32. In Syria I decided I heard that in [country] it might be possible to work and stay permanently so I decided to go to [country].

33. In July 2001 I travelled to [Country 3] and stayed in [Country 3] for one month. I was not able to travel to [country] because I was told at the airport that I needed to have a return ticket to my country.

34. My ticket was to travel from Syria to [Country 3] to [country] then back to [Country 4 and] to Syria.

35. I had no money to buy another ticket so I was not able to travel to [country].

36. I returned to Syria [in] August 2001.

37. I remained in Syria and [in] November 2001 I travelled to Saudi Arabia.

38. I obtained the visa to Saudi Arabia by paying money to a person. This person obtained a Tourist Visa valid for one month.

39. I travelled to Saudi Arabia. I remained in Saudi Arabia for four months. I decided to leave Saudi Arabia because my visa was no longer valid and because in Saudi Arabia the situation for people with my sexual orientation is not safe.

40. I left Saudi Arabia in March 2002. My ticket was from Saudi Arabia to Sudan via Syria. I arrived in Syria on Wednesday, the flight to Sudan was on Friday.

41. On arrival in Syria I was not allowed to enter Syria. I was taken to a small room in the Security area of the airport. This room is for people who are going back to their own countries and waiting for their flights. I was given food and remained there until my flight on Friday.

42. I stayed in Sudan until May 2002 and then travelled to [Country 4].

43. In [Country 4] I registered with UNHCR in 2002. UNHCR gave me a document with my photo and my name and the details of how I entered [Country 4]. I was interviewed but was not given any assistance with food, money or accommodation.

44. I remained in [Country 4] until April 2004. I did not receive any assistance from UNHCR and there was no progress with my case. It was hard for me to survive in [Country 4]. I was also fearful because of my sexuality, fearful that I will be caught and penalised.

45. I left [Country 4] and travelled to Israel in April 2004. On arrival in Israel I was detained.

46. I had a visit from UNHCR when I was detained. UNHCR obtained my details but did not assist me.

47. I remained in Detention until December 2006 when a Human Rights lawyer assisted me to be released. He advised me to go to the [UNHCR Office] to seek their assistance.



48. I went to the UNHCR office. I was given a paper that stated that I was registered with UNHCR for 6 months and was told to return in 6 months.
49. I went back to the UNHCR office 6 months later. A stamp was put in the paper that had been issued the previous time which meant I was registered with UNHCR for another 6 months.
50. I returned every 6 months to the UNHCR office and the paper was renewed but in 2008 UNHCR informed me that they could not renew this paper anymore. They told me to go to Israeli Immigration and to talk with them.
51. I went to Israeli Immigration and I was given a visa allowing me to stay in Israel for 3 months but with no work rights.
52. After 3 months I went back to Israeli Immigration and this visa was extended for another 3 months.
53. I had previously explained my case to authorities in Israel and that I needed Protection but I was told that I could not be given a permanent visa and that there was no process available to apply to be a refugee.
54. I did not return for a further extension of the 3 months visa because I wanted a permanent solution to my problem, permanent protection.
55. I left Israel and returned to [Country 4] to meet with UNHCR.
56. I met with UNHCR in [Country 4]-I did not tell UNHCR. I was advised by UNHCR that I will not be accepted as a refugee and to return to Sudan.
57. I signed all the relevant papers and my file with UNHCR in [Country 4] was closed.
58. I returned to Sudan [in] April 2009. I continued to travel to other countries trying to find a way of going to a country where I could apply for Protection.
59. I heard that Australia accepted refugees and decided to travel to Australia to seek protection.
60. I arrived in Australia [in] March 2012.

**What I fear may happen to me if I return:**

61. I fear for my safety and my life will be at risk in I return to Sudan.
62. I cannot return to Sudan because of my sexual orientation. I cannot openly and freely be myself.
63. Homosexuality is not accepted by people or by the government.
64. I am at risk of being harmed by people and by the Police and of being detained and punished.
65. In Sudan homosexuality is illegal and the punishment for homosexuality in Sudan includes the death penalty.
66. I am also fearful of returning to my country because I have travelled to many countries including Israel and now Australia.

67. The government of Sudan imposes a very strict interpretation of Islam and imposes severe punishment to people who do not share that view of Islam. I do not have the same view of Islam as that imposed by the government.

68. Authorities in Sudan will not protect me because they do not offer protection to homosexuals, they persecute homosexuals.

69. I will face the same problems everywhere in Sudan.

#### *Other evidence*

31. The Departmental file contains a photocopy of a passport issued in the names [name deleted: s.431(2)] (born [date deleted: s.431(2)]) [in] June 2009 by the Republic of Sudan.

#### **Airport entry interview**

32. The Departmental file contains an Airport Entry Interview for the applicant [in] March 2012. The applicant provides details of his relatives and travel. He started thinking about leaving his country of nationality in February 2010 and he left [in] January 2012. He has no friends or relatives in Australia or in any other country other than his country of nationality. He left his country of nationality because it is not safe for him, he was sexually abused as a child, no one cared about him, there was no school. In 1985 his parents divorced, he is from a broken family. He is lost psychologically and does not feel like it is his country.

33. As to why he came to Australia, he heard people say that the community is good, people will look out for him, and there are no problems of war. Concerning the issue of returning to Sudan, he does not know if anyone will hurt him, but he does not think it is good for him.

34. His additional comments were that he does not want to lie, he does not need to pretend something will happen to him and lies are bad.

#### **The Departmental Interview**

35. The applicant was interviewed by a delegate of the Minister [in] May 2012 at Villawood. The Tribunal has listened to the audio recording of the interview and what follows is a summary of the applicant's oral evidence to the delegate.

36. He has had four passports, two from Sudan, one was from [Country 5] and one was from [a European country]. He has only ever been a citizen of Sudan. Both his current Sudanese passport, and the [Country 5] passport he used to travel to Australia, were destroyed by him in transit. Later, when the applicant suggested that he was being honest when he came to Australia, the delegate suggested it was not very honest of him to destroy documentation. He said that he had destroyed his genuine Sudanese passport in Singapore because he didn't need to use it anymore, and he destroyed the [Country 5] passport because he did not want to be deported back to [Country 5].

37. His family (parents and siblings) remain in Sudan.

38. His brother found out that he was gay in about February 1997 and assaulted him on one occasion. His brother did not tell his parents directly, but he thinks his parents knew because they started avoiding him. One of the locals saw him with another boy, kissing someone, and then eventually

everyone in the neighbourhood knew he was gay and people would look at him and treat him in a despising way and they did not respect him anymore and started persecuting him. The delegate asked what he meant by persecution and he said that whenever he tried to talk to someone in the neighbourhood he was told to go away, he is gay, he should get away from them. People started to avoid him especially in holidays and special celebrations He felt very isolated. When the delegate asked why, if the neighbourhood knew about him being gay, they didn't report him to the police, he said it was because his parents were a respected family.

39. When asked whether he ever had problems with the authorities in Sudan for being gay, and whether anyone ever reported him, he said he didn't have particular problems with the authorities except once when he went to a friend's house and suddenly the police arrived but he managed to escape, but if the police catch someone, it can lead to an execution.
40. The delegate noted that in his written claims he had not mentioned anything about his neighbours finding out, his parents being suspicious, or almost being caught by the police. His statement only said that his brother had found out. The applicant said that his language is not that good, he answered briefly the questions, it was his first time to talk about, he did not go through details that were boring or unnecessary to mention and he mentioned his brother in the application form because he was the only one who confronted him and treated him badly. He felt his parents knew but they never talked about it, but the way they treated him was bad. The applicant said when the interview commenced the delegate said this was his opportunity to give more details, and so this is what he is doing now.
41. The delegate suggested that on the one hand he was saying the neighbours would treat him very badly, insulting, ignore him because he is gay, but on the other hand they respected his family too much to say anything to the police. He said this is the Sudanese mentality and culture which is different to all other parts of the world.
42. He had multiple relationships in Sudan, he had to conduct relationships in secret, they were in fear of the authorities. He said he had a transcript of Sudanese law to show the delegate but the delegate said she was willing to accept that Sudanese law can be quite severe.
43. He first tried to go to Chad because he was fed up with his life in Sudan and his goal was to get a Chad passport and go to France where he understood there was more respect for human rights and freedom. Then he went to Syria, where he thought his life would be better but it was very hard for him mentally there although he had thought life would be better there and that people would help him. It was also hard to have relationships there. He then went to [Country 2]. In every country he has been going to, he's been searching for security.
44. The first time he approached UNHCR was in 2002 in [Country 4]. He had been told to give UNHCR any old story, which he did. He did not tell them the truth about his homosexuality because he didn't know at the time there were laws to protect homosexuals. He registered with UNHCR before going to Israel.
45. The delegate noted that he had lived in other countries such as Saudi Arabia and [Country 4], where he had said that homosexuals are not accepted, which the delegate suggested indicated he had another reason for going to these places over the years, not that he was searching for a safe place as a homosexual. The applicant said that being gay was not the only reason; he also felt that he was not cared for as a child and did not have any opportunities in his home. In every country he has moved to there is a separate case or story, most of the countries he didn't stay very long in,

such as Saudi Arabia or Syria, they were short stays, and he was a transit traveller, he didn't stay in these countries.

46. The delegate asked what happened after he returned from Israel, and he said that in [Country 4] he was informed that he would not be accepted as a refugee. He did not tell anyone in [Country 4] that he had spent all this time in Israel because he was scared he would be perceived as a spy. Once back in [Country 4] he tried to go to the UK with a false passport but he was caught and the officials arrested him and took him to UNHCR and he was asked by UNHCR what he was doing so he told them the same story again.
47. He only realised in about 2010, when he was in [South-East Asia], that someone could claim protection from persecution in Sudan on the basis of his homosexuality.
48. Concerning why he did not refer to his homosexuality in the entry interview when he arrived in Australia, he said there was not an interpreter, he is shy and an introverted type of person, he was tired from the journey, he did not sleep much. When the delegate suggested that he did mention that he had been sexually abused, and abused by his father, so the delegate did not understand why he did not mention his homosexuality, when asked specifically why he did not want to return to Sudan, he said that he can only repeat what he has said, he was tired, fatigued, shy and found it difficult to discuss these things.
49. If he returns to Sudan he will be taken by the police department and then referred to the state security, intelligence, and they will do everything to get information from him, this could mean severe beating and probably he will be killed because he was in Israel for a long time and also because he applied for refugee status in Australia. They will also discover he is gay and he will be executed or physically harmed.

#### **The Delegate's decision and the application for review**

50. The delegate considered that homosexuals in Sudan are a cognisable and distinguishable group within society, sharing a common and unifying characteristic, on the basis of the independent country information relevant to their social, cultural and legal situation in Sudan. She was concerned about the omissions from the applicant's statement concerning discrimination received in Sudan from other members of his family apart from his brother, that his neighbours ignored or avoided him and that he had narrowly escaped being caught by the police. She was also concerned about inconsistencies between his family commanding respect and yet his neighbours treating him with discrimination. The delegate was not satisfied that the applicant had provided consistent and coherent claims concerning key issues namely, who in his community in Sudan knew about his sexual orientation, and the resulting treatment he experienced. She was also concerned that the applicant had failed to mention his reason for leaving Sudan in the airport interview, and that the applicant had returned to Sudan three times, and remained in countries despite saying the situation there was unsafe for homosexuals. The delegate considered that the applicant's use of fraudulent documentation and illegal means to travel to a variety of countries together with his admission he had been willing to fabricate claims when he first approached UNHCR suggested that his protection claims may not be based on fact.
51. The applicant lodged an application for review against the delegate's decision. He was represented in relation to the review by his registered migration agent.

### **The Tribunal hearing**

52. The applicant appeared before the Tribunal [in] August 2012 to give evidence and present arguments. The Tribunal hearing was conducted with the assistance of an interpreter in the Arabic and English languages.
53. The following is a summary of the evidence and discussions at hearing. It is not a transcript, and the information was not necessary provided in this order.

### **Preparation of his protection visa application**

54. The applicant was asked about the preparation of his application for a protection visa. He stated that he was assisted by his agent in preparing his protection visa application, its attachments, and the accompanying statutory declaration. He confirmed the accuracy of the information contained in both documents and stated that he did not wish to change or make additions to any of the information therein.

### **Background in Sudan before he left in 1997**

55. The applicant confirmed that he first left Sudan in 1997, and he provided the following information about his background in Sudan until that time.
56. Concerning his education he had studied [up to intermediate school]. He was an average student. (He also stated that he has not done any other study outside of Sudan).
57. From [year deleted: s.431(2)] when he finished school, until he left in 1997, he was unemployed; he was not working, not studying. He then explained that he did work, mostly [as a labourer], in Khartoum, every now and then, perhaps on average one week per month, depending on the working opportunities, sometimes he may or may not find work. His parents did not really care much about whether he worked or did not work. He survived just by eating the food he could locate, generally he was living a very poor life, barely sufficient, he did not live life.
58. He lived with his mother, [and siblings] in his grandfather's home in [Khartoum]. His father lived in [Town 1], with his new wife. His father was a [vocation deleted: s.431(2)] and now he is retired. His mother never worked.
59. The family still live in the same place.

### **Background in Sudan when he returned in 2002, 2010 and 2011**

60. The applicant had returned to Sudan after he left in 1997, as follows:
  - In March 2002 for three months until May 2002: he lived with his mother and all his siblings in [Khartoum]. He didn't need to work because when he was in Saudi Arabia he saved money.
  - From April 2009 until January 2010. He lived with his mother and all his brothers and sisters; he worked on and off as a labourer.
  - From March 2011 until January 2012 (calculated to be 10 months) he lived with his mother and siblings. He worked as a labourer and selling food products as a moving salesman.

61. These are the only times he has returned to Sudan.

### **The applicant's travel**

62. The applicant had travelled to numerous countries, including Syria, [Country 2], Saudi Arabia, [Country 3], [Country 4], Israel, [Country 5], [and four other countries]. He also tried or made attempts to go to [Chad, France and the UK].

63. The Tribunal asked if there was a general reason as to why he did all this travel and he said there was a specific reason for every country and it will take a long time him to explain this. The Tribunal asked if there was perhaps one general reason as to why he did all this travel and he said he can give three examples. He went to Chad because he wanted to go to a western country to seek refuge because he is gay and he was unable to live that in Sudan, and based on what he heard on the news a western country could protect him. He knew before he left Sudan that he could be better off in a western country, as they generally provide help for people regardless whether gay or not.

64. The Tribunal asked why he left certain countries and he gave the following evidence:

65. Concerning Israel, he said because in summary he did not find the help he was hoping for. The Tribunal noted that the Israeli immigration authorities kept on extending his visa and he said the UN in Israel gave him six months, temporary residencies. The Tribunal said it was referring to the Israeli immigration authorities who he said in his statement had kept giving him 3 month visas. He said they only renewed it once. The Tribunal asked why they kept on giving him three month visas and he referred again to the UN saying they could not give him 6 months anymore and that he could only get 3 months just on a piece of paper, not on his passport. The Tribunal said it still doesn't understand why Israel let him stay, noting that he had been detained for 2.5 years and UNHCR had told him that they could not give him protection, yet the Israeli authorities gave him a visa and once that expired they let him stay longer. He said of course this happened a long time ago so he can't remember. It happened in 2008, he was only given this once and he was asked to move out from [Israel] there weren't any privileges associated with this visa.

66. The Tribunal repeated its question and he said he can explain in detail. The Tribunal said it just wants to know why the Israeli authorities let him stay after he had already been detained and UNHCR could not offer him any protection there. He said at the beginning he was arrested and he spent 11 months in detention then they took him to another place and forced him to stay there for more than 17 months. Then the UN interfered and they gave him 6 month passes that he would renew. He said he is nervous now. He said from 2006 to end 2008 UNHCR renewed it and then they asked him to go to the Israeli immigration authorities.

67. Concerning [Country 3]: He wanted to go to [Asia] so that is why he travelled to [Country 3]. He left [Country 3] to go to Syria because things were not easy for him financially. The Tribunal asked him why things were better from him financially in Syria rather than [Country 3]. He said in [Country 3] he was there for transit he was there for a full month but he didn't have enough money, the authorities in [Country 3] said if he was going to [Asia] he needs a return ticket to Sudan and he couldn't afford to buy the ticket which cost about \$400-700 as he only had about \$900-1000. So he went back to Syria.

68. The Tribunal asked about his travel in other countries and he explained as follows:

69. Concerning Syria: He didn't need a visa to enter or stay in Syria on any occasion as they consider Sudan to be an Arabic country. The Tribunal asked why then was he not allowed to re-enter Syria on his way back from Saudi Arabia and he said this needs a lot of explanation. The Tribunal said it just would like to know why. He said when he arrived at Syria and he was asked how much money he had and he told them \$700-800 and they took him to wait to go catch his flight back to Sudan and did not give him a reason.
70. Concerning Saudi Arabia: The Tribunal asked why he overstayed in Saudi Arabia and he said he was trying to stay in Saudi Arabia but he decided it was not a safe country for him. The Tribunal noted that was not an answer to the question and repeated the question as to why he allowed himself to become unlawful in Saudi Arabia. He said his understanding is not too good and he does not understand what the Tribunal is saying and that happened a long time ago. He wanted to stay in Saudi Arabia and settle there but he does have another reason and if there is enough time he can explain that to you. The Tribunal said he could explain it but he had not answered the question. The Tribunal asked if he was able to answer the question as to why he allowed himself to become unlawful in Saudi Arabia. He said he was unlawful because it was difficult for him to renew his visa and if he wanted to renew it he would have had to go back to his country which he did not want to do and it would have taken a lot of money and a lot of time and that was the reason that made him want to stay even though he was unlawful rather than go back. He wanted to stay longer but it is not safe for him and Saudi Arabia is a Muslim country and won't allow gay people to practice in complete freedom and is a bit oppressive over there that was a reason why he left and he did not stay there longer than that period of 4 to 5 months.

#### **The applicant's reasons for not wanting to return to Sudan**

71. The applicant was asked why he did not want to return to Sudan. He stated that if he was to return to Sudan and he is coming from a different country and he is gay that would be dangerous for his life this is the reason he doesn't want go back. It is dangerous because they will know what he has done and they will torture him, they will see he has come from Australia, they will ask him where his passport is and he doesn't have one. They will use their methods to get information out of him.
72. The second reason is that in Sudan he was not practicing his liberty as he is gay and even in his home town he got no respect and it is an Islamic community and they see this as a sin as it is an Islamic country that follows the sharia.
73. The Tribunal asked if there was any other reason and he said there was no other reason.

#### **The applicant's evidence about his homosexuality**

74. The applicant was asked when he came to realise he was gay. He said that since he was 6 years old the neighbour used me. The Tribunal explained that it was asking him to talk about when he realised he liked men. He said he was about 17 years old. He used to like men more and he never used to approach women so he became aware of these issues since he was 6 years old, his attraction was to do with men, not anything to do with women.
75. The Tribunal asked what he thought about his sexual orientation or desires before he was 17 years old, and he said they were using him and he tried this and he found it was good and it just continued.

76. The Tribunal asked what occurred at the age of 17 years to make him think he was homosexual. He said it was a turning point, he was being used and then he started to be the "doer" around that period, as far as he can remember.
77. The Tribunal said how he felt about this and he said it was a good feeling, he was comfortable with that, that he was gay. The Tribunal asked whether it was the case that he didn't think before he was 17 years of age that he was gay. He said in society when a man is doing this with another man he is gay. He is not very educated but that is what he understands.
78. The Tribunal asked whether he was saying that he had voluntarily sexual encounters at the age of 17 years. He said yes. The Tribunal asked him to discuss this, for example could he say whether he was in a relationship, or whether he just had encounters. He said he would pick a man he found handsome and he would try to make him understand that he was gay and he did not have a specific person. The Tribunal asked how would he make someone understand he was gay and he said in a simple way for example he would talk and start touching the person and he would make him know that he was attracted to him and then would tell him that he wants him and loves him and then the relationship starts. The Tribunal asked whether this occurred over a single encounter. He said this was at gatherings or in secret but the relationship would be secret.
79. The Tribunal asked whether he attended gay parties and he said that would sometimes happen. The Tribunal asked how he would find out about gay parties he said they used to happen in secret and a friend may tell him that there is a party.
80. The Tribunal asked how many gay friends did he have before he left Sudan and he said during the last period before come to Australia, he was close to about five people.
81. The Tribunal said it was talking about the time prior to when he first left Sudan in 1997 and he said not so many, in 1997 he had a few, maybe 7 or 8. He said one he met at a party and they were attracted for 2 to 3 times. The Tribunal asked him to explain more about the encounters he had before left Sudan for first time. He said at one time a group of people were together and he managed to run away. At parties there were 25-30 people and they would listen to music or hold each other or dance with one of the beautiful men. He would go to these parties 2-3 times per month from the time he discovered he was gay until he left Sudan in 1997.
82. He first knew about the parties from friends in the same or other neighbourhoods, they would say there is a party on this day but he won't go into details. The Tribunal asked him to go into details and to explain how he knew about the party the first time. He said in early 1997 about January or March he was told there was a party today. The Tribunal said that it thought he first started to go to the parties when he discovered he was homosexual in [year deleted: s.431(2)]. He said it is not like that when he was around 19 he became aware and he started to understand these things. The Tribunal said it thought he had said that he had expressed himself as homosexual at the age of 17 years when he went to parties. He said he was a homosexual when he became the doer. The Tribunal said it understood that he met people through the parties. He said yes. The Tribunal said he didn't start going to parties until he was 19 years old.
83. He said he can't exactly understand and the Tribunal noted he first had feelings towards men at 17 years and he expressed his sexuality at that time, including by going to parties where he met men. He said that's correct but this is a long time ago and this is why his memory is not 100%. The Tribunal said it would expect that the realisation of being homosexual was quite significant for him at age of 17 years and it is now not clear about how he expressed his sexuality at age of 17. He said he would express his sexuality when he would find someone he likes, he would talk



to someone in a sweet way and they would get closer regardless whether that was at a party or not. The Tribunal asked him to talk about his first encounter when he realised he liked men. He said when this happened it happened somewhere and he was 17 and that was the last year of his studying and they were in classroom and he met him and spoke to him and expressed feeling and that was the first time and that was an on and off relationship whenever they would have opportunity to do so they would.

84. Essentially, he said that before he left Sudan in 1997, he was young, not doing much, he would continuously have encounters with many people, he loved young men. Concerning the sexual aspect of his life he was happy, except that the encounters had to be done in secret because it is a Muslim country and dangerous. It was very risky, he was always risking himself but he is now speaking about it openly.
85. The Tribunal asked whether his sexual life has always been like that, and he said it is different from one country to another. He said that in Sudan he was fearful and he can explain what happened in every other place he went to. The Tribunal asked him to explain about Saudi Arabia. He said he was extremely fearful there, homosexuality is something very extreme, they apply god's laws and it was extremely dangerous and he was trying not to take risks and he was doing it at a minimal level. Even if someone befriends another person that can be fearful. He did this twice with someone, probably 2 months after he arrived. He did not have sexual experiences as soon as he arrived because he was extremely fearful and cautious, it was not his country and fear was in control of the situation. The Tribunal said it doesn't understand, if this was the case, why he went to Saudi Arabia in the first place. He said when he came back from [Country 3] his intention was to go to [Asia] but this was the only open country for him. The Tribunal said he didn't have to leave Syria to go to a place that was so dangerous such as Saudi Arabia. He said unfortunately this is what happened. The Tribunal said it doesn't understand why he would go to Saudi Arabia in the first place and then overstay and become unlawful. He said according to his way of thinking at the time what happened was that the visa to Saudi Arabia was easy at the time and he thought he may be able to find a good work opportunity but this is how he was thinking at the time.
86. The Tribunal asked the applicant about his practice of homosexuality on the occasions that he return to Sudan. He said his tendencies were towards men so when he would feel this instinctive urge he would try to look for men to practice. When he went back in 2002 he had three encounters. Similarly, when he returned in 2009/2010 he would try to find someone at a party or a friend's gathering and he would talk to him about feelings and he would practice. In 2011/2012 it was the same. As he was working as a [salesperson] he would find someone he founded attractive and then would try to make an appointment with him. The Tribunal asked whether he ever got it wrong. He said no he is always very cautious to a high degree, and depending on the situation, that will influence how he behaves. The Tribunal asked whether he had ever had any relationships with women and he said absolutely not.
87. Concerning Syria, this was also a Muslim country so they would always be very cautious because he was a stranger there, the regime would punish people for the big and the small, it was very strict at the time. The Tribunal asked the applicant why, if it was so difficult and bad in Syria, did he spend such a long time there. After some time he said he didn't have options and his financial situation was not good, he tried to go to [other countries], and he was unable to do anything else.
88. The Tribunal said it sounds from his descriptions that these places are worse than Sudan. He said he agrees but he was young at the time and he did not have the understanding. He thought he

would stay in Syria, work there for one year and then go to a western country but it did not work out like this.

### **Details of past persecution**

89. The Tribunal said whether anything bad happened to him in Sudan and he said that the neighbourhood did not respect him, they knew he was homosexual, he is not sure who told them maybe someone told them. On any occasion he could see them talking about him and people would move away from him and he was very lonely. His family did not care about him.
90. The Tribunal asked if anything else occurred. He said he was fearful the authorities might catch him in Sudan when he was doing this. The Tribunal asked why they didn't catch him before and he said probably because his encounters occurred in complete secrecy. The Tribunal said he went to parties and had multiple encounters with many people, yet he did not come to the attention of the authorities. He said that is true but what used to happen was that it was top secret to a degree that he cannot explain. The Tribunal asked him to try to explain and he said they would work like the intelligence, they would try to calculate everything so the error margin was zero percent, and he cannot express it more.
91. The applicant confirmed that in addition to having to have encounters in secret and the neighbourhood not respecting him, no one ever saw him except his brother who hit him and he cannot forget the day it happened: [in] February 1997. His brother was extremely cruel, he denigrated him and beat the applicant as if he were a donkey.
92. The Tribunal asked if there were any other instances of past harm and he said nothing else.
93. The Tribunal said since that he has come back and lived with his brother on three different occasions. The applicant said he didn't have other options, his financial situation was impossible and he loves his mother so much. The Tribunal noted his evidence was that he was returning to Sudan, having multiple secret encounters and living in family home. He said he had to go back.
94. The Tribunal noted that in contrast with his evidence that his financial situation was impossible, he had told the Tribunal that the first time he returned to Sudan he had money. He said it's not like he had lots of money, he had \$700 in his pocket which is a lot of money. The Tribunal said that if he had a lot of money he didn't have to stay with his family. He said this is not what he meant to say, \$700 might allow him to travel to [Country 4] on a ship but it is not enough to support him and help him settle in the country.
95. The Tribunal said did anything else bad ever happen to him in Sudan. He said this is what happened.

### **Issues, s.424AA and the agent's submissions**

96. The Tribunal explained that there were certain matters that were still causing it to have concerns, including that he could not provide more detail than were in his statement concerning certain aspects of his claims such as why Israel let him stay and why he overstayed in a country like Saudi Arabia where he was fearful. He said maybe he has forgotten or is tired because he has been in detention.
97. The Tribunal said it was also concerned that he returned and lived with his brother after his brother beat him up in 1997, and according to his evidence he was actively involved in homosexual encounters each time he returned to Sudan, yet he discloses no further problems with

his family. The applicant said he did not have options. He did not have an opportunity to go elsewhere because his situation did not allow him to. The Tribunal said he has been so resourceful, he has got the money together and he has travelled so much. He said if he was to explain this it will take a lot of time but he can summarise it: when he has money, he doesn't spend it on silly things, instead he would put pressure on himself financially to enable him to travel.

98. Concerning his return to Sudan on three occasions and his evidence that he continued to organise homosexual encounters despite his fear of the authorities he said the only thing he can say is that he has never returned of his own free will, he was deported from the countries and he can give an example. The Tribunal noted that according to his statement he went from Saudi Arabia to Sudan via Syria; he didn't say that he was deported. He said he was talking in general. He then said that the reason why he had a ticket to Sudan was because that was a condition of the airline.
99. The Tribunal asked why he didn't go somewhere else after [Country 4] – noting that he left [Country 4] to travel to Sudan. He said this requires a lot of explanation. The Tribunal asked him to explain. He said he did not have a choice it was deportation and he had [a European] passport and he was going to [Europe] and once they caught him they said for that reason he should go back to his country.
100. The Tribunal said it was also concerned that he had travelled to and stayed in countries that had an extremely negative view towards homosexuals. He said if he had the option he would have travelled to a free European country, all the countries he went to were like transits to go to the good countries and this was his understanding when he was young.
101. The Tribunal noted he claimed that he cannot return to Sudan after having been in Australia and Israel, but he has already returned to Sudan after having been in Israel. The Tribunal said it was not aware of information that just because he is returning from Australia he will be harmed, and he has returned to Sudan before without being harmed. He had been away for years, he just told the Sudanese embassy he had lost his passport, and he was given another one. He said that for any person who comes from a western country they will ask where they have come from and why. He was deported from [Country 4] with approval of Sudanese Embassy, and when he returned to Sudan he hid the fact he had been in Israel.
102. The Tribunal noted he had said that he was deported from [Country 4] with the knowledge of Sudan, yet nothing happened to him. He said this was because he hid the truth and things are worse because they now want to apply sharia law and because of the separation between Sudan and South Sudan.
103. The Tribunal put to the applicant pursuant to s.424AA information from the airport interview. He said it was a very long [trip] and he didn't sleep for 24 hours and he was shy to say anything and he was trying to manage with his not so good English but he was exhausted and yes he wanted protection when he [arrived].
104. Later, the Tribunal asked the applicant why in the airport interview he mentioned sexual abuse, but he had not mentioned his homosexuality. He said he was tired, he was unable to express it, maybe he didn't know what they meant, he was confused and he had been under pressure in other countries and he was not comfortable. The agent contributed that when she saw the applicant for the first time he did not want to discuss his claims with an interpreter present, and he asked to speak with her in private.

105. The Tribunal asked if he had anything further to say and he repeated his concerns about the application of sharia law, and his fear of harm from the authorities because they consider Israel is helping southern Sudan.
106. The agent provided submissions about the particular social group of homosexuals, that they should not be required to be discreet, that the laws in Sudan concerning the death penalty for homosexuality are disproportionate to the actual behaviour, and that even if the applicant was not charged with an offence if the authorities were to be aware of his sexuality he would be at risk. He travelled to various countries because they are Arab countries and he could obtain a visa and this is the only choice he had. The authorities will be more suspicious because he is coming from a non-Islamic country. She will try to obtain some independent country information in relation to failed asylum seekers, however in any event there is a lack of accountability from the Sudanese regime in terms of human rights abuses. She submitted he provided a detailed and feasible account of becoming aware of his own sexuality and what happened in other countries. He did not exaggerate his experiences, and did not present like the Western stereotype of a homosexual.
107. The Tribunal noted it had to weigh up all of the evidence in relation to all aspects, including whether he is a homosexual.

### **Independent country information concerning Sudan**

108. In its 2012, *Country Reports on Human Rights Practices 2011: Sudan* report, the US Department of State noted that ‘societal discrimination against [homosexuals] was widespread’ and that ‘official discrimination based on sexual orientation and gender identity occurred.’<sup>3</sup> On 18 July 2012 the UK Foreign and Commonwealth Office similarly noted that ‘Sudanese society is not tolerant of homosexual relationships’<sup>4</sup> On 30 March 2012, *Pink News*<sup>5</sup> reported that ‘being out’ in Sudan can have ‘serious social and economic consequences.’<sup>6</sup> According to the report, these consequences typically include ‘a loss of job prospects, ostracism from family and community or even murder (so-called “honour killings”).’<sup>7</sup> The abovementioned 2012 US Department of State report noted that during 2011 vigilantes targeted suspected gay men and lesbians for violent abuse, and there were public demonstrations against homosexuality.<sup>8</sup>
109. It has been suggested that while homosexuality is starting to be viewed as less of a forbidden subject in Sudan, many people continue to regard homosexuality as a taboo subject and homosexual men as ‘deviants’. An undated post by Gareeb (a member of the Sudanese LGBT

---

<sup>3</sup> US Department of State 2012, *2011 Country Reports on Human Rights Practices: Sudan*, 24 May, p. 41 <[www.state.gov/j/drl/rls/hrrpt/2011/index.htm](http://www.state.gov/j/drl/rls/hrrpt/2011/index.htm)> Accessed 25 May 2012

<sup>4</sup> UK Foreign and Commonwealth Office 2012, *Travel and Living Abroad: Sudan*, 18 July <<http://www.fco.gov.uk/en/travel-and-living-abroad/travel-advice-by-country/sub-saharan-africa/sudan1?ta=lawsCustoms&pg=3>> Accessed 27 July 2012

<sup>5</sup> *Pink News* is a UK-based online newspaper for the LGBT community. Established in 2005 *Pink News* provides reports and information about LGBT issued in the UK and around the world.

<sup>6</sup> Littauer D 2012, ‘New Magazine and Hope for LGBT People in Sudan’, *Pink News*, 30 March <<http://www.pinknews.co.uk/2012/03/30/new-magazine-and-hope-for-lgbt-people-in-sudan/>> Accessed 27 July 2012

<sup>7</sup> Littauer D 2012, ‘New Magazine and Hope for LGBT People in Sudan’, *Pink News*, 30 March <<http://www.pinknews.co.uk/2012/03/30/new-magazine-and-hope-for-lgbt-people-in-sudan/>> Accessed 27 July 2012

<sup>8</sup> US Department of State 2012, *2011 Country Reports on Human Rights Practices: Sudan*, 24 May, p. 41 <[www.state.gov/j/drl/rls/hrrpt/2011/index.htm](http://www.state.gov/j/drl/rls/hrrpt/2011/index.htm)> Accessed 25 May 2012

group Freedom Sudan)<sup>9</sup> published on the International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA) website states:

...attempts to talk freely about homosexuality were met by such an enormous denial and aggressive attack. Even until now after it has started to become less and less [of a] forbidden subject, many people still think this issue shouldn't be discussed openly and should be dealt with secretly by security measures only, after all (according to these voices) these "deviants" represent only a very small and closed group in Sudan and no one support[s] them.<sup>10</sup>

110. Sources suggest that homosexuality is illegal in Sudan<sup>11</sup>, although there are no explicit anti-homosexual laws. Articles of the *Penal Code 1991* outlaw sodomy (which is classified as including some homosexual acts), along with 'indecent' and 'obscene' acts that could be applied to homosexuals. According to the *Penal Code* (which still appears to be in force) the severity of the punishment for sodomy depends on whether the prosecuted is a repeat 'offender' with punishments ranging from flogging to the death penalty.
111. In 2012, the US Department of State noted that 'there were no reports of antisodomy laws being applied' during 2011.<sup>12</sup> It is of note however that in June 2012 the UK Home Office commented on the general lack of information regarding the use of the death penalty in Sudan, noting that 'there are no official numbers of convictions or executions'.<sup>13</sup> On 4 August 2010, the *BBC* reported that 19 men were convicted of breaking Sudan's public morality codes after they were found wearing women's clothing and make-up and dancing in a 'womanly fashion'.<sup>14</sup> According to local newspapers, the men were attending a party to celebrate the wedding of a homosexual couple.<sup>15</sup> It is unclear from the article where in Sudan the men were arrested.<sup>16</sup> The article notes

---

<sup>9</sup> Freedom Sudan is the only LGBT organisation in Sudan. It was formed in December 2006 and is considered illegal by the Sudanese Government. Please see: International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA) n.d., *Start the Conversation about Homosexuality* <<http://ilga.org/ilga/en/article/n8o46S41ia>> Accessed 27 July 2012; Ammon R 2010, 'Gay Sudan – Brave and Secret', 3 June, Global Gayz website <<http://www.globalgayz.com/africa/sudan/sudan-s-only-gay-organization/>> Accessed 27 July 2012

<sup>10</sup> Ghareeb n.d., 'Homophobia in Sudan', International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA) <<http://ilga.org/ilga/en/article/n7pufFn19E>> Accessed 27 July 2012

<sup>11</sup> US Department of State 2012, *2011 Country Reports on Human Rights Practices: Sudan*, 24 May, p. 41 <[www.state.gov/j/drl/rls/hrrpt/2011/index.htm](http://www.state.gov/j/drl/rls/hrrpt/2011/index.htm)> Accessed 25 May 2012; Itaborahy L P 2012, 'State-Sponsored Homophobia: A World Survey of Laws Criminalising Same-Sex Sexual Acts Between Consenting Adults', International Lesbian, Gay, Bisexual, Trans and Intersex Association (IGLA), p. 36 <[http://old.ilga.org/Statehomophobia/ILGA\\_State\\_Sponsored\\_Homophobia\\_2012.pdf](http://old.ilga.org/Statehomophobia/ILGA_State_Sponsored_Homophobia_2012.pdf)> Accessed 27 July 2012

<sup>12</sup> US Department of State 2012, *2011 Country Reports on Human Rights Practices: Sudan*, 24 May, p. 41 <[www.state.gov/j/drl/rls/hrrpt/2011/index.htm](http://www.state.gov/j/drl/rls/hrrpt/2011/index.htm)> Accessed 25 May 2012

<sup>13</sup> UK Home Office 2012, *Operational Guidance Note: Republic of Sudan*, June, p. 24 <<http://www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/countryspecificasylumpolicyogns/sudan.pdf?view=Binary>> Accessed 19 July 2012

<sup>14</sup> 'Cross-Dressing Men Flogged in Sudan for being 'Womanly' 2010, *BBC*, 4 August <<http://www.bbc.co.uk/news/world-africa-10871494>> Accessed 27 July 2012; XE Currency 2012, *Sudanese Pound to Australian Dollar*, 27 July <<http://www.xe.com/ucc/convert/?Amount=1000&From=SDG&To=AUD>> Accessed 27 July 2012

<sup>15</sup> 'Sudan Sentences 19 Men for Wearing Women's Clothes' 2010, *Reuters*, 4 August <<http://af.reuters.com/article/topNews/idAFJJOE67307U20100804>> Accessed 27 July 2012

<sup>16</sup> News reports discussing the case seem to have been filed from Khartoum, however, note that the sentence was issued by a court in Omdurman. It is noted that while Omdurman is located within Khartoum State, it is a separate city to Khartoum.

that the men were each sentenced to 30 lashes and a fine of 1,000 Sudanese pounds (AUD \$217).<sup>17</sup>

112. According to the US State 2012 report, there are significant issues in Sudan concerning abuses by and impunity of security forces,:

The main human rights abuses during the year included the following: government forces and government-aligned groups committed extrajudicial and other unlawful killings; security forces committed torture, beatings, rape, and other cruel and inhumane treatment or punishment; and prison and detention center conditions were harsh and life threatening.

Other major abuses included arbitrary arrest and arbitrary, incommunicado, and prolonged pretrial detention; executive interference with the judiciary and denial of due process; obstruction of humanitarian assistance; restriction of freedoms of speech, press, assembly, association, religion, and movement; harassment of internally displaced persons; restrictions on privacy; harassment and closure of human rights organizations; violence and discrimination against women, including female genital mutilation; child abuse, including sexual violence and recruitment of child soldiers; trafficking in persons; violence against ethnic minorities; denial of workers' rights; and forced and child labor.

Except in rare cases, the government took no steps to prosecute or punish officials in the security services and elsewhere in the government who committed abuses. Security force impunity remained a serious problem....

The government and government-supported militias reportedly promoted hatred and discrimination, using standard propaganda techniques to incite tribal violence.

## **FINDINGS AND REASONS**

113. The applicant did not provide any original identity documentation, having said he destroyed his genuine passport, and a fake passport on the way to Australia. He claimed he was a national of Sudan and produced a photocopy of part of what he said was his genuine passport. The Tribunal is prepared to accept for the purposes of this decision that the applicant is a national of Sudan.
114. There is no evidence that the applicant has a legally enforceable right to enter and reside in any other country apart from Sudan.
115. The applicant claimed to have left Sudan initially in 1997 because he had suffered harm at the hands of his brother, as well as negative attitudes from the community, and fear of the authorities, for reasons of his homosexuality which he discovered in [year deleted: s.431(2)], aged 17 years. He travelled to numerous countries in his search for protection, and returned to Sudan on three separate occasions, most recently in 2011/2012. He also claimed a fear of returning to Sudan effectively as a failed asylum seeker, without a passport, returning from a Western country, who would be interrogated by the Sudanese authorities and it would be discovered that he had been in Israel and he would be considered a spy and subjected to persecution for that reason.

---

<sup>17</sup> 'Cross-Dressing Men Flogged in Sudan for being 'Womanly' 2010, *BBC*, 4 August <<http://www.bbc.co.uk/news/world-africa-10871494>> Accessed 27 July 2012; XE Currency 2012, *Sudanese Pound to Australian Dollar*, 27 July <<http://www.xe.com/ucc/convert/?Amount=1000&From=SDG&To=AUD>> Accessed 27 July 2012. Also see: 'Sudanese Youths Flogged for Wearing 'Women's' Clothes' 2010, *AFP*, 5 August

116. The applicant provided generally consistent evidence concerning his homosexuality and past events including travel. The Tribunal found the applicant to be generally an articulate witness (for example explaining that he and other homosexual men would work like "the intelligence" in trying to organise encounters, try to calculate everything so that the error margin was zero%), however it was concerned about a number of aspects of his evidence, particularly when he was unable to provide credible explanations for certain events and actions. For example:

- The Tribunal was concerned as to why the Israeli authorities would provide him with a series of three-month visas allowing him to stay in the country, after detaining him for 2.5 years, and after he had been rejected by UNHCR. The Tribunal considered the applicant's explanations to be vague and unsatisfactory and he was not able to expand upon the contents of his statement in this regard, however this does not impact on his central claim to be a homosexual.
- Other concerns however, did have some bearing on his central claim. The Tribunal was concerned that the applicant, who was aware that Saudi Arabia is a country controlled by a strict conservative regime that does not condone homosexuals, and where it is dangerous to practice homosexuality, would travel to, and once there, remain unlawfully in, such a country. The Tribunal found the applicant unable to explain why he overstayed in Saudi Arabia and that his explanation that he was tired or forgotten because he has been in detention, to be unsatisfactory.
- Similarly to his stay in Saudi Arabia, in the context of his evidence that Syria is a strict country which is dangerous for homosexuals, and which punished people for both "big and small" offences, he travelled to and from Syria, remaining there for two years and seven months in total. When the Tribunal suggested that it appeared that these countries were worse than Sudan in terms of their attitudes towards homosexuality he agreed. In the circumstances, the Tribunal finds it difficult to accept that the applicant chose these countries in search of a new life, however the Tribunal is prepared to give the applicant, and his explanation that he was young at the time, the benefit of the doubt.
- The Tribunal was also concerned that the applicant had returned to Sudan on three separate occasions (2002, 2009/2010 and 2011/2012). He gave inconsistent evidence as to why he returned to live with his mother and siblings on the first occasion, firstly saying that he did not have to work as he brought money back with him from Saudi Arabia, but later saying that he had to reside with his family for financial reasons. The Tribunal was also concerned why he would return to live with his family noting that his brother had discovered him in an incriminating position and had then beaten him. However, noting that the applicant did not claim that his family harmed him or spoke about his homosexuality at all except for that one incident with his brother, the Tribunal considers it not implausible that the applicant would return to live with his family, and continue to conduct his lifestyle in secret.
- Further, the Tribunal was concerned about the applicant's failure to mention, at the airport entry interview, his fears that he would be harmed if he was returned to Sudan, and the reason for this harm, namely that he was a homosexual, particularly in the context of the applicant having claimed that he has been searching for a safe western country for many years of his life, and that he was coming to Australia to claim protection. Whilst this does raise concerns about his claims, the Tribunal has taken into

account the applicant's stated exhaustion from the flight, and that this was his first encounter with Australian authorities, and the Tribunal notes that the purpose of the interview may not have been clear. The Tribunal also notes that the applicant did say at that interview that he felt lost psychologically in Sudan, and that the country was not good for him.

117. The Tribunal has weighed these concerns against the applicant's consistent evidence in relation to his homosexuality, the nature of how he has conducted his relationships in the past, and how he felt in Sudan. The Tribunal has also considered the applicant's evidence in relation to the development and expression of his homosexuality. The Tribunal was somewhat concerned with the applicant's lack of detailed evidence in this regard (especially in light of the rest of his evidence where he provided lots of information) however the Tribunal accepts that every individual has a different way of expressing and discussing their sexuality, and the Tribunal notes that the applicant did provide some details in relation to these matters. Accordingly, when weighing all of the evidence, the Tribunal accords the applicant the benefit of the doubt in relation to its concerns, and is satisfied as to the truth of his core claim: namely that he is a homosexual who is not able to conduct his life as a homosexual in Sudan, his country of origin. The Tribunal also accepts that the applicant was discovered in a homosexual act by his brother, was beaten by his brother, and that his parents and the community suspect he is gay. The Tribunal accepts that although the applicant has not in the past come to the attention of the authorities, he has not spent a significant proportion of time in Sudan since he discovered he was homosexual. The Tribunal accepts that the applicant has travelled to various countries to try to find ways to escape the prejudice, isolation, discrimination, ostracism, and the illegality of his sexual orientation.
118. The independent country evidence suggests that the community regards sexuality as a taboo subject and homosexual men are considered to be deviants. They are ostracised by families and communities, and are not protected by the authorities. Indeed, homosexual acts are illegal in Sudan.
119. In *Applicant S v Minister for Immigration and Multicultural Affairs* (2004) 217 CLR 387 at [36], Gleeson CJ, Gummow and Kirby JJ gave the following summary of principles for the determination of whether a group falls within the definition of a particular social group:

‘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".’
120. The Tribunal accepts that homosexuals in Sudan are a particular social group, not identified by their fear of persecution, but by their sexuality. The Tribunal accepts that homosexuals in Sudan face harm from both the community and the authorities because they are homosexuals in Sudan.
121. The Tribunal considers that the persecution which the applicant fears involves ‘serious harm’ as required by paragraph 91R(1)(b) of the Act in that it involves significant physical harassment or ill-treatment; and that his membership of the particular social group of homosexuals in Sudan is the essential and significant reason for the persecution which he fears, as required by paragraph 91R(1)(a) of the Act. The Tribunal further considers 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 his selective harassment for a Convention reason.

122. It is well-established that the Tribunal cannot impose any expectation on applicants that they will remain discreet and that if applicants were to feel obliged to remain discreet for fear of being persecuted then the threat of serious harm would constitute persecutory conduct in itself: see *Appellant S395/2002 v Minister for Immigration and Multicultural Affairs* (2003) 216 CLR 473. The Tribunal accepts that the applicant in this case has felt obliged to remain discreet. The Tribunal accepts that if he was not discreet, and even if he was, having regard to the above evidence there is a real chance that the applicant's homosexuality will be discovered by the community and/or authorities and that the applicant will be the victim of violence for reasons of his sexual orientation if he returns to Sudan now or in the reasonably foreseeable future.
123. Concerning the issue of state protection, the High Court has said that '[n]o country can guarantee that its citizens will at all times, and in all circumstances, be safe from violence'. It has said that the State is obliged 'to take reasonable measures to protect the lives and safety of its citizens, and those measures would include an appropriate criminal law, and the provision of a reasonably effective and impartial police force and justice system' (per Gleeson CJ, Hayne and Heydon JJ in *Minister for Immigration and Multicultural Affairs v Respondents S152/2003* (2004) 205 ALR 487 at [26]). In the context of the country information referred to above, including the illegality of homosexuality in Sudan, the government promoting hatred and discrimination, and the impunity of security forces who commit abuses, the Tribunal considers that reasonable measures are not taken to protect the lives and safety of homosexuals in Sudan.
124. The independent evidence suggests that this situation applies throughout Sudan so the Tribunal considers there is no part of Sudan to which the applicant could reasonably be expected to relocate where he would be safe from the persecution he fears.
125. The Tribunal finds that the applicant has a well-founded fear of being persecuted for reasons of his membership of a particular social group of homosexuals in Sudan in the reasonably foreseeable future.

#### **Claim concerning the applicant's status as a failed asylum seeker**

126. The Tribunal notes that the applicant had made a further claim in relation to what would happen if he returned to Sudan as a failed asylum seeker in his particular circumstances: without a passport, returning from a Western country, who would be discovered under interrogation to have been in Israel and would be considered a spy and thus subjected to persecution. The Tribunal has found above that the applicant has a well-founded fear of persecution for reasons of his membership of a particular social group of homosexuals in Sudan, and thus does not need to consider the second claim.

#### **CONCLUSIONS**

127. 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**

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