

**1107888 [2012] RRTA 78 (1 February 2012)**

**DECISION RECORD**

**RRT CASE NUMBER:** 1107888

**DIAC REFERENCE(S):** CLF2011/56421

**COUNTRY OF REFERENCE:** Libya

**TRIBUNAL MEMBER:** Shahyar Roushan

**DATE:** 1 February 2012

**PLACE OF DECISION:** Sydney

**DECISION:** The Tribunal affirms the decision not to grant the applicant a Protection (Class XA) visa.

## **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 Libya, arrived in Australia on [date deleted under s.431(2) of the *Migration Act 1958* as this information may identify the applicant] May 2010 and applied to the Department of Immigration and Citizenship for the visa [in] April 2011. The delegate decided to refuse to grant the visa [in] July 2011 and notified the applicant of the decision.
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] August 2011 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, *Applicant S v MIMA* (2004) 217 CLR 387 and *Appellant S395/2002 v MIMA* (2003) 216 CLR 473.
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.
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. 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.

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.

### **Application for a Protection Visa**

#### *The Form*

20. According to the information provided in the applicant’s protection visa application, he was born in Tripoli, Libya in [date deleted: s.431(2)]. He is Muslim and of Berber or Amazigh ethnicity (the two terms have been used interchangeably in this decision record). He has completed 22 years of education and holds a [bachelor degree]. Before coming to Australia he worked as a ‘shop owner’ from February 2004 to May 2010. The applicant travelled to Russia on three separate occasions between June 2005 and July 2007 and visited Tunisia on three occasions in 2004 for business purposes. He resided at a single address in [address deleted: s.431(2)] from January 2000 to May 2010.
21. The applicant arrived in Australia [in] May 2010 on a Student visa.

#### *Written Statement*

22. In response to questions in relation to his reasons for claiming protection visa in Australia, the applicant made the claims summarised below.
23. The applicant is of Berber ethnicity. He graduated from [university]. He never ‘felt as being a Libyan citizen’ because of his ‘non-Arabic origin’ and was discriminated against because he is a Berber.
24. Berbers have their own language, culture and customs and Arabs regard them as ‘backward, uncivilized, stupid, illiterate and lately as traitors’ They are often accused of ‘treason and collaborating with foreign, western and Israeli Governments to divide the North Africa Arab countries into smaller, weaker states and loyal to the west or Israel’
25. Under the rule of Colonel Gaddafi, Berbers in Libya suffered more than Berbers living in the neighbouring Arab countries. Politically active Berbers were arrested, detained, imprisoned and killed. The Libyan authorities ‘want to eliminate, erase and finish anything which is related to the Berbers existence’. They ‘instigate anti-Berbers hatred and racism’ In 2007, a law banned Berbers from giving newborns Berber names and

forced children with Berber names to adopt traditional Arabic names in order to register for school. The Libyan government has also pursued a 'forced urbanization' program 'to annihilate Berber cultural identity and language'. The discriminatory attitude towards Berbers is not just held by the Gaddafi regime but by all Libyan Arabs 'who consider themselves superior and better'. He had to work harder than the rest of his classmates in order to be 'acceptable and approved' by his teachers and Arab friends.

26. In his last year of studies at the university he was detained by the Libyan intelligence services (Revolutionary Committees) for ten days because he had an argument with a student at the university in response to insulting remarks the latter had made about the Berbers. After the applicant 'walked away' four men approached him and identified themselves as 'members of the Revolutionary Committees'. The applicant was taken away, verbally abused, spat on, kicked and beaten with belts and batons. He was tied to a chair and interrogated for hours. He was asked about his political contacts in Libya and overseas. He was accused of being a CIA agent and being in contact with Israel. Eventually, his father was able to secure his release after 10 days. Before being released he was told that he will be under watch. This incident affected his career as a medical practitioner. He graduated two years before coming to Australia, but he was unable to find employment in his field because of the detention and the accusations levelled against him. He believes the Revolutionary Committees 'blocked any work opportunity' for him
27. In May 2010, he came to Australia on a Student visa to continue his education in order to improve his chances of finding employment in Libya
28. [In] February 2011, he participated in a demonstration against the [Libyan regime]. On the following day [a newspaper] published a photograph of the demonstration, depicting [him].
29. [In] March 2011, when he called his family, he was told by his mother that [in] February 2011, the applicant's father and brother were taken away by the Revolutionary Committees because of the applicant's activities in Australia. His elderly father and brother were detained for three days and seriously mistreated. When he spoke to his father, he was told not to return to Libya as those who had detained his father had threatened to kill the applicant for insulting their great leader
30. The applicant stated that if Gaddafi remains in power he will be killed for insulting and working against him. If Gaddafi were to lose power, he 'will never be treated as a full Libyan citizen who enjoy his rights and privileges' (sic). As a Berber he is not allowed to have his own Berber name, culture, and customs or be employed in a 'respectable position'. As a Berber, he will always be treated 'badly' because of the perception that Arabs are superior to Berbers

#### *Evidence in Support of the Application*

31. In support of his application for a protection visa, the applicant submitted copies and translations of his educational qualifications and birth certificate. He also submitted a copy of a report published in [a newspaper in] February 2011 relating the Australian Government's then plans to evacuate Australian citizens from Libya. The report features a photograph of protesters destroying a poster of [Colonel Gaddafi]. The

applicant can be seen in the [photograph]. In addition, the applicant submitted the following newspaper articles:

- ‘Berber Jews’, *Wikipedia*, 27 February 2011
- Simona Fuma Weinglass, ‘What the Indigenous Peoples of the Mideast Really Think About Israel’, *The Cutting Edge*, 23 March 2011
- ‘Berber culture’, *Wikipedia*, undated - accessed 28 March 2011
- ‘Libya: Peoples’, *Looklex Encyclopedia*, undated - accessed 28 March 2011
- Aisha al-Rumi, ‘Libyan Berbers struggle to assert their identity online’, *Arab Media & Society*, Spring 2009
- ‘The Berbers’, *www.al-bab.com*, undated, accessed 28 March 2011
- ‘Berber people’, *Wikipedia*, undated, accessed 28 March 2011
- Khaled Nasir, ‘Who is Fighting Libya's Civil War?’, *American thinker*, 27 April 2011
- Camille Tawil, ‘Mapping Qaddafi's Tribal Allegiances in Libya: An Overview’, *Terrorism Monitor* via *www.markswatson.com*, 28 April 2011
- Steven Sotloff, ‘Anxious in Benghazi: Watching Out for Gaddafi's Saboteurs’, *Time*, 7 June 2011
- ‘Libya: Benghazi blast rocks hotel used by rebels’, *BBC News Africa*, 1 June 2011
- Praveen Swami, ‘Libyan rebel commander admits his fighters have al-Qaeda links’, *The Telegraph*, 25 March 2011
- Amnesty International, ‘Libya: Four arrested amid fears of Amazigh culture crackdown’, *kabylia.wordpress.com*, 27 January 2011
- ‘WA student murdered by Gaddafi marksman’, *The West Australian*, 26 June 2011

#### *Departmental Interview*

32. The applicant was interviewed by a delegate of the Minister [in] June 2011. 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.
33. The applicant stated that his family originates from the [name deleted; s.431(2)] area, but he was born in Tripoli and resided at a single address in that city throughout the time he lived in Libya. He was raised by his parents to follow Berber traditions. His family follows the Ibadī sect and shares 70% of the customs and habits of Arabs. At home his family spoke mainly Arabic and occasionally in the Amazigh language. The applicant spoke the language as a child, but has now forgotten the language. His education in Libya, other than his university education, was conducted in Arabic.
34. He stated that after graduating from university in August 2008, he was unable to find a job as a medical practitioner, so he decided to open a [store]. The business was a very profitable business. The [store] is currently being run by one of his friends, but the applicant’s father is supervising the running of the business. The [store] is still profitable, but the profits have dropped because of the recent events.
35. He stated that before graduating he worked with his cousin in a food store and later he started trading [in Libyan markets]. In 2003 he started working as an assistant in one of his friends’ [stores]. He was asked why in his application for a protection visa he had stated that he worked as a shop owner from 2004 to 2010. He stated that since the beginning of 2004 he no longer received money from his father.

36. The applicant stated that his father was an accountant at [a government organisation]. However, when he realised that he was passed over for promotions, he retired in 2004, after 28 years of service, and began working as a [occupation deleted: s.431(2)].
37. The applicant stated that he found it difficult to get a scholarship from the government. He was financially in a position to support his studies abroad in order to find employment in his professional field.
38. The applicant stated that he was arrested and detained for 10 days by the Revolutionary Committees towards the final years of his studies. He was interrogated, mistreated and accused of being a spy. This incident happened after the applicant engaged in an argument at the university library with another student who was insulting Berbers. He stated this was the first time he had heard people insulting Berbers in this manner. He was asked if he was ever involved in Berber activism. He said no. He was asked if he was detained ever again. He said no. He was asked if he had experienced any difficulties when departing Libya to come to Australia. He said other than being asked at the passport control desk if he was Berber, he did not experience any other difficulties.
39. The applicant stated that the demonstration he attended [in] February 2011 was the first demonstration he had ever attended. He supports the rebels in Libya 'one hundred percent'.
40. He was asked if his father and brother's detention was his family's first experience of mistreatment in Libya. He said his family had been subjected to verbal abuse, but not this type of mistreatment.
41. The applicant was asked why he would not be able to relocate internally. He stated that it would be difficult for him to leave the place he was born in and where his family lives. Secondly, he will be asked to fight with the rebels if returned to the eastern parts of Libya and if he were to refuse he will be thought of as a spy. He is a Berber and does not wish to take up arms to fight anyone.
42. The applicant was asked if Gaddafi's regime lost control in Libya was there any reason he would be unable to return. He said he hopes Gaddafi loses power as soon as possible. However, there are many powerful tribes still loyal to Gaddafi and they will not surrender easily. They will continue to destabilise the situation.
43. It was put to the applicant that despite his claims of discrimination against Berbers, it appeared that his family was prosperous. He said this was due to the work and determination of his father who had built his life despite being an orphan. The situation is not different from the Jewish people who have prospered despite the persecution they suffer. The delegate noted that when he applied for a protection visa he had provided evidence showing that his father had hundreds of thousands of dollars in his bank account. In addition, even though the applicant had been unable to work in his preferred field, he was able to study in his chosen field and his father had worked for a government organisation for many years. It was put to the applicant that this indicated that his family had been less affected by discrimination in Libya. He stated that the government needed his father when it employed him, but he was passed over when it came to promotion. When one is clever and hardworking one can achieve anything. He had his own [business] and worked hard.

## Application for Review

### Pre-Hearing Submissions

44. In support of his application for review, the applicant provided a submission dated [July] 2011. In the submission the applicant expressed his disagreement with the delegate's conclusions based on the country information considered, particularly information in relation to Berbers. The applicant essentially reasserted the claims he had put forward to the department and stressed that he will be at risk of harm from the regime and its loyalists if he were to return to Libya.
45. The applicant submitted that the brutality and discrimination against Berbers in Libya had continued and was on the increase, especially after the rebellion against the regime. He submitted that discrimination was not related to poverty and the financial situation of his family did not mean that his claims of discrimination should be rejected. He submitted that the discrimination faced by Berbers had a detrimental effect on him and his family. The applicant referred to his arrest and detention after defending the rights of Berbers at the university, his inability to find employment as a medical doctor and the arrest and detention of his father and brother following his participation in a [demonstration]. He submitted that he had faced discrimination on a daily basis. He did not feel accepted by Arabs and did not have friends.
46. The applicant submitted that he was being watched by the security services. He stated that his experiences in Libya 'shut [him] up forever'. He stated that the fact that his passport was renewed and he was able to depart the country did not mean that he would be able to safely return.
47. The applicant submitted that as a Berber he will face persecution under any Arab regime in Libya. The opposition has made no pronouncements about the rights of Berbers and there have been no 'outrageous cries' in response to the crimes committed by Gaddafi forces against the Berbers. If he were to return to Libya he will be forcefully recruited by the opposition forces to fight against Gaddafi. He does not believe in violence and if he were to refuse he will be accused of being a spy. There is no safe place for him in Libya as there are many Gaddafi supporters working secretly in areas under the opposition's control.
48. He also provided the following news items in support of his application for review:
  - Associated Press, 'Libya stages back-to-back rallies in face of world condemnation', *The Washington Post*, 17 July 2011
  - 'UK housewife smuggles supplies to Libyan rebels in Tripoli', *Herald Sun*, 4 July 2011
  - 'Gaddafi loyalist in Italy accused of plotting to assassinate Libyan TNC leader', *The Guardian*, 10 June 2011
  - John Ropley, 'Civil war in Libya', *Jamaica Gleaner*, 7 March 2011
  - Omar Ashour, 'Libya after Gadhafi', *Project Syndicate*, 16 July 2011
  - Associated Press, 'Libyan rebels accused of burning homes and looting', *The Guardian*, 13 July 2011
  - Aman Tamazight, 'Berbers of Libya: persecuted Natives', Facebook Comment, 1 February 2011



- 'Libya: Benghazi blast rocks hotel used by rebels', *BBC News Africa* [also in DIAC file], 1 June 2011
- Steven Sotloff, 'Anxious in Benghazi: Watching Out for Gaddafi's Saboteurs', *Time* [also in DIAC file], 7 June 2011
- Mark Colvin, 'Libyan man says Gaddafi crushing Berbers', *PM*, 18 April 2011
- Craig Woodhouse, 'Colonel Gaddafi has threatened to blow up Tripoli if the capital falls into rebel hands, Libya's prime minister said.', *London Evening Standard*, 15 July 2011
- Dennis Godwin, '540 College Students Kidnapped in Libya', *WNCNews*, 2 March 2011
- Richard Spencer, 'Libya: secret police arrest hundreds in sweep of Tripoli', *The Telegraph*, 3 March 2011
- Eleanor Hall, 'Gaddafi releases kidnapped Libyan teenager but not father and brothers', *The World Today*, 9 March 2011
- Jamie-Leigh Carter, 'Pro-Gadhafi Libyan Students Rebut Protest', *Toowoomba News*, 25 February 2011
- Evan Hill, 'Under Gaddafi's eyes', *Al Jazeera English*, 17 April 2011
- Hamish Macdonald, 'Libyan rebels reveal dark secrets', *The Australian*, 1 April 2011
- 'Libya: Gaddafi Rails Against 'No Fly' Attacks and Berbers', *allAfrica.com*, 20 March 2011
- Video, 'Dec. 2008 Gaddafi's militias attacking Amazigh Minority in Nefusa Mountains', *www.francetudiant.com*, no date - accessed 24 July 2011
- Wikileaks, 'Regime-orchestrated attacks against Berbers in Yefren', *The Telegraph*, 31 January 2011
- 'Morocco grants Berbers greater rights, as Libyan Berbers join revolution', *WW4 Report*, 3 September 2011
- Ghaith Abdul-Ahmed, 'Libya's Berbers join the revolution in fight to reclaim ancient identity', *The Guardian*, 28 February 2011
- V. Wheeler, 'Dumped in the desert: Gaddafi's arsenal', *The Sun*, no date - accessed 8 January 2012
- 'Libya: Gaddafi promises 'war of bees' in new audio message', *The Telegraph*, 2 September 2011
- David D. Kirkpatrick, 'Qaddafi 'Gave Us Dignity,' a Captured Loyalist Says', *The New York Times*, 29 August 2011
- Richard Seymour, 'Libya's spectacular revolution has been disgraced by racism:', *The Guardian*, 30 August 2011
- 'Amnesty and racist rebel atrocities in Libya', *Human Rights Investigations*, 31 August 2011
- 'Libya: Militias Terrorizing Residents of 'Loyalist' Town', *Human Rights Watch*, 30 October 2011
- 'Libya: Transitional Council Failing to Secure Weapos', *Human Rights Watch*, 25 October 2011
- David D. Kirkpatrick, 'In Libya, Fighting May Outlast Revolution', *The New York Times*, 1 November 2011
- 'U.N. Chief Says Ex-Rebels Still Hold 7,000 People in Libya', *FOX News*, No date, 2011 - accessed 8 January 2012
- Vanessa Gera, 'Libya leaders acknowledge abuse of prisoners', *The Guardian*, 29 November 2011

- Clifford Kraus, 'Celebrating Peace and Unity in Libya, but Feeling Tension Beneath the Surface', *The New York Times*, 15 November 2011
- Alice Fordham, 'Armed Clashes intensify in divided Tripoli', *The Washington Post*, 13 November 2011
- Hamuda Hassan & Christian Lowe, 'Fighting flares in tribal dispute south of Tripoli', *Reuters*, 12 December 2011
- Dave Graham, 'Britain's Ian Martin named head of U.N. Libya mission', *Reuters*, 19 September 2011
- David Batty, 'US defence secretary warns Libya of struggle ahead', *The Guardian*, 17 December 2011
- 'Libya's Attorney General Says Gunmen Attacked Him', *FOX News*, No date, 2011 - accessed 8 January 2012
- Christian Lowe & Taha Zargoun, 'Rival Militias wage turf war near Libyan capital', *Reuters*, 3 December 2011
- Reuters, 'Several killed' in Libya fighting', *Al Jazeera*, 12 December 2011
- Hisham El-Dani & Christian Lowe, 'Refugees of Libya revenge attacks plan to go home', *Reuters*, 14 December 2011
- Chris Stephen, 'Libyan scramble for £100bn in assets fractures the peace at Tripoli airport', *The Guardian*, 17 December 2011
- Associated Press, 'Tunisia says 4 guards kidnapped at Libya border, 3 quickly escape', *The Washington Post*, 2 January 2012
- Reuters, 'Libyan soldiers demand salaries, complain about militias', *The Washington Post*, 6 January 2012
- Associated Press, 'Tunisian and international rights groups oppose extradition of former Libyan prime minister', *The Washington Post*, 7 January 2012
- Associated Press, 'Libyan fighters clash with ex-regime loyalists in former Gadhafi stronghold, 2 killed', *The Washington Post*, 26 December 2011
- Ali Shuaib, 'Armed groups clash in turf war near Tripoli airport', *Reuters*, 11 December 2011
- Mahmoud Abbash & Ali Shuaib, 'Militias may drag Libya into civil war, transitional government chief says', *The Washington Post*, 5 January 2012
- Steven Sotloff, 'In the Former Rebel Capital: Benghazi Protests Libya's New Regime', *Time*, 16 December 2011
- David D. Kirkpatrick & Rod Nordland, 'Waves of Disinformation and Confusion Swamp the Truth in Libya', *The New York Times*, 23 August 2011
- Edwin Lane, 'After Gaddafi, Libya's Amazigh demand recognition', *BBC News Africa*, 23 December 2011
- 'Berbers press for inclusion', *The Times of Malta*, 28 November 2011
- Francois Murphy, 'Libyan Berbers protest outside PM's office', *Reuters*, 27 November 2011
- 'Gaddafi supporters 'try to blow up Tripoli power grid'', *The Telegraph*, 1 January 2012
- Rami Al-Shaheibi, 'Former Libya rebel groups clash in Tripoli, 5 dead', *The Washington Times*, 3 January 2012
- Associated Press, 'Rival Libyan militias clash south of Tripoli, leaving 2 fighters dead', *The Washington Post*, 14 January 2012
- AFP, 'Libyan Berbers cherish shared history with Jews', *France 24*, 22 July 2011

- Karlos Zurutuza, 'Libya's Berbers feel rejected by transitional government', *Deutsche Welle*, 8 November 2011
  - Oliver Holmes, 'Excluded from cabinet, Libya's Berbers fear isolation', *Reuters*, 25 November 2011
49. On 20 January 2012, the Tribunal received the following additional news items:
- David Gerbi, 'Libyan Jew blocked from Tripoli synagogue', *The Guardian*, 4 October 2011;
  - 'Libyan Jewish exile forced to leave country', *Intermountain Jewish News*, 14 October 2011;
  - 'Gaddafi loyalists thirst for revenge', *News24*, 1 November 2011;
  - World Directory of Minorities: Libya Overview, *Minority Rights Group International*, August 2011.

### *The Hearing*

50. The applicant appeared before the Tribunal on [in] January 2012 to give evidence and present arguments. The Tribunal hearing was conducted with the assistance of an interpreter in the Arabic and English languages.
51. The applicant was asked about the preparation of his application for a protection visa. He stated that he had received no assistance in preparing his protection visa application. He confirmed the accuracy of the information contained in his application form, the accompanying statement and the statement provided in support of his application for review. He stated that he did not wish to change any of the information provided in these documents.
52. He was asked about his travels. He stated that he has travelled to Tunisia on numerous occasions, Turkey (on two occasions) and Russia (on three occasions in 2006, 2006 and 2007). He stated that he had travelled to Tunisia for business and tourism and to Russia in order to accompany his mother [in Russia]. He arrived in Australia [in] May 2010.
53. He was asked about his movements and residential addresses in Libya. He stated that he was born in [date deleted: s.431(2)] in [Tripoli]. He resided at a single address from the age of 4 until he came to Australia.
54. He stated that his father is a [occupation deleted: s.431(2)] and works from an office in Tripoli. He is renting the office and the license, which is in someone else's name. His mother is a house wife. Both parents live in the family home in Tripoli. He stated that he has [a number of siblings]. [Some of his siblings] are married and reside in Tripoli. The remainder of his siblings are single and reside with his parents in Tripoli. [One of his siblings] assist in his father's office and occasionally [works] on a contractual basis. [Two other siblings] are both [technicians] employed with an [oil company]. His [brother-in-law] is employed with [a foreign cultural office] in Libya.
55. The applicant stated that he completed his secondary schooling in Tripoli in 1993. In 1995 he was admitted to [University], a public university and obtained a Bachelor [degree] in 2008. He spent more than 10 years at university because he was not feeling well psychologically and worked on a part-time basis. He worked [in variety of roles in transport and retail]. After completing his [degree], he was unable to find work [in his

field]. He then decided to obtain a [license] and opened a [specialised store]. The [store] is currently being run by one of his friends under the supervision of his father. After he came to Australia, he first studied English and he is currently enrolled in a Graduate [course] at the University of [university deleted: s.431(2)].

56. He was asked whether he was ever a member of or associated with any political party, movement or organisation. He said 'no'. He was asked if any member of his family was ever involved or associated with any party, movement or organisation. He said 'no'. He was asked if he ever participated in any form of political activity in Libya. He said 'no'. However, he assisted in organising and participated in 4 demonstrations in Australia against the former Libyan regime between February and August 2011.
57. The applicant was asked why he did not want to return to Libya. He stated there are two reasons: first, persecution of and discrimination against Berbers and secondly he fears being killed by Gaddafi loyalists or armed militias in control of Libya. He was asked on what basis he feared being killed by armed militias in Libya. He stated that these militias are in control of the land and if they have a dispute with any person they could kill that person, particularly if that person belongs to an ethnic minority.
58. The Tribunal noted that he had claimed to have been detained and questioned by the Libyan authorities in 2006. He was asked about the circumstances of his detention. He stated that he was studying at the library when he heard two Arab Libyans belittling Berbers. The applicant became angry and was unable to control himself. He entered into a 'strong discussion' with the person. He was subjected to further insults and accusations and he decided to respond strongly. After about 10 or 15 minutes the person at the other end of the discussion returned with 4 members of the Revolutionary Committee. He was arrested and taken to an unknown place. The applicant was spat on, verbally abused, beaten, tied to a chair and accused of being a CIA and Israeli agent, working against the regime. This interrogation continued for 10 days. He did not admit anything and they could not find any evidence against him. In the meantime, his father paid bribes and contacted others in order to secure the applicant's release. After that the applicant was extremely cautious. He was aware that there was a file against him and he was being monitored.
59. The applicant was asked if anything else happened to him in Libya. He said 'no'.
60. The Tribunal put to the applicant the details of the country information before it in relation to Berbers in Libya (see paragraphs 77-79, below). The applicant was asked if he wished to comment on this information. He stated that during Gaddafi's regime, speaking Amazigh language was forbidden. In 2004-2005 Gaddafi was trying to reconcile with the west and attempted to take minor steps in relation to Berbers. He brought a handful of people together and put on a theatrical performance on TV. In reality, there was no radical change in the Berber situation. People were allowed to speak Amazigh inside their houses in certain parts of Libya, but in larger cities the Amazigh were unable to speak their language even within their homes. In terms of any academic studies, the sources are probably referring to studies taking place in western countries, consisting of 'shallow procedures'. Libyans are not equal as stated in the report by the fact-finding mission. Majority of Libyans are Sunnis while Amazigh are Ibadi Muslims – somewhere between Sunni and Shi'a Islam.

61. The applicant stated that the TV program in relation to Berber history, which was referred to in the 2010 report, was all lies. While he did not see the program, he was told by his relatives and this program amounted to nothing but lies. Similarly, it is a lie that signs reflected Amazigh language. In relation to the situation of Berbers after the fall of Gaddafi's regime, the activities mentioned in the Minorities in Focus report had taken place in Amazigh regions only and not in the larger cities. Libyan Arabs refuse to give any rights to Amazigh even after the fall of Gaddafi. They are now busy fighting for power. As Libya is being scrutinised by the international community they want to appear to be good people, but he has heard from his relatives that nothing has changed. The news reports he has looked at show that despite the Berber contribution to the downfall of the former regime, this contribution has been ignored by the media and demands that the name of an Amazigh mountain be changed have not been heeded. In addition, the current Minister for Sports and Youth, a key figure in the rebellion against Gaddafi, refused to acknowledge the Amazigh language and culture on TV. The NTC is a power sharing body and members of the NTC have not been appointed on the basis of merit or capability. No Berbers have been appointed as ministers or assistant ministers. In addition, the draft constitution is devoid of any mention of Berbers. The promises made are the same as the promises made following the independence of Libya in 1951.
62. It was put to the applicant that not being able to work in his chosen profession may not necessarily amount to persecution. Similarly, isolation, rejection and lack of acceptance do not necessarily amount to serious harm. He commented that the discrimination against Amazigh in Libya was perpetrated by all Libyans and not just by the former Libyan regime. Discriminatory attitudes persist in the Libyan society. He added that the NTC continued to grant scholarships to students outside of Libya. However, when he applied for a scholarship in September 2011, he has not received a reply. He was asked why he thought this was because of his race. He said this is the only explanation as all other Arabs have received approval.
63. It was put to the applicant that it seemed that his arrest and detention in 2006, the arrest and detention of his father and brother in last year were due to the perception that he was engaged in activities against Gaddafi's regime. The Tribunal noted that the Gaddafi regime has been overthrown. Colonel Gaddafi is dead and the country is being managed by those who fought against Gaddafi's regime. The Tribunal put to him that the Tribunal has found no information that Gaddafi loyalists and remnants of the regime are harming the hundreds of thousands of people who opposed the regime in a variety of ways or played a role in toppling the regime. The Tribunal put to him that it was difficult to believe that he would be targeted for harm because of his participation in activities in Australia. He stated that the Revolutionary Committees are preparing themselves for a comeback. They have weapons, money and manpower. He believes that they are in the position of organising themselves for revenge. They have his name since the days of the civil war. They have started killing opponents but the international community is not aware. He has heard this news from people who have lived there. In their eyes, he has committed the greatest sin by breaking the photograph of their great leader. He is a Berber from a weak minority and an easy target. Libya's fate will be similar to Iraq, Afghanistan and Somalia.
64. It was put to the applicant that the Tribunal accepted that militia groups remain active and there has been some infighting between armed groups, particularly in Tripoli. It was put to him that the infighting appears to be over territory and minor disputes.

However, this does not necessarily suggest that he will suffer serious harm for a Convention reason in Libya as a result of clashes between armed groups. It was put to the applicant that the Tribunal has not encountered any information to suggest that militias are forcing anyone to join their ranks or that they have targeted Berbers. He stated that these militias are fighting amongst themselves for power. They are not paying any attention to Berbers because they know their time will arrive that they will be in complete control over Berbers, mirroring the past. All Arabs are under the protection of one militia or another and in the absence of such protection one cannot defend oneself or one's family. The western world wish for Libya's success and foreign correspondents are not interested in certain information. The information from his family suggests that the situation is bad and they are unable to leave home after sunset.

65. It was put to the applicant that if he feared Ghaddafi loyalists or armed militias in Tripoli, it would be open to him to internally relocate to the Amazigh areas or Benghazi. He stated that there are severe tensions in the eastern parts of the country and fight could break out and recently an NTC official was assaulted in Benghazi. As soon as they find out he is Amazigh he will be discriminated against. As he did not participate in the fight to overthrow the regime he will be treated as a coward not deserving to live amongst them. Amazigh areas are isolated and lack infrastructure. The former regime and the government of King Idris surrounded these villages with Arab villages, which were then neglected.
66. He was asked if he wished to make additional comments. He said Libya is a rich and strategically located country. If he was not fearful for his life for the reasons he has provided, he would have preferred to live in his own country amongst his relatives. Western countries have great interest in Libya and want to invest in Libya. Therefore, he believes that not much importance will be placed on protecting the rights of minorities, including Berbers. The discrimination against Berbers was not just perpetrated by the former regime, but by the entire Arab population of Libya. Libyans are 'racists' and show this racism towards Tuareg as well as Berbers in the south. Similarly, Libyan Jews have not been allowed back.

#### *Evidence from other Sources*

67. In February 2011, the arrest of a human rights campaigner sparked violent protests in eastern city of Benghazi that rapidly spread to other cities. Authorities used aircraft to attack protestors and many Libyan diplomats resigned in protest. In the same month, anti-Libyan government militias took control of Misrata after evicting forces loyal to Gaddafi.
68. In March 2011 the Libyan National Council met in Benghazi and declared itself the sole representative for Libya. France, followed by a number of other countries, recognised the National Council.
69. The UN Security Council authorised a no-fly zone over Libya and air strikes to protect civilians, over which NATO assumed command. Backed by extensive NATO air raids, Libyan rebels initially capture territory but were then forced back by better-armed pro-Gaddafi forces. Many senior figures in Gaddafi's regime began defecting.
70. In June 2011 the International Criminal Court issued arrest warrants for Gaddafi, his son Saif al-Islam and intelligence chief Abdullah al-Senussi on charges of crimes

against humanity. In July 2011 the international Contact Group on Libya formally recognised the main opposition group, the National Transitional Council (NTC), as the legitimate government of Libya.

71. In August 2011 rebels swarmed into Col Gaddafi's fortress compound in Tripoli, six months after the uprising began. With only a few remaining strongholds under his control, Col Gaddafi went into hiding. Subsequently, several foreign embassies re-opened in Tripoli.
72. On 20 October 2011, Col Gaddafi was killed. Three days later, the NTC declared Libya to be officially "liberated" and announced plans to hold elections within eight months. A month later Saif al-Islam, the fugitive son of former Libyan leader Muammar Gaddafi, was captured.
73. In late October 2011, Abdel-Rahim el-Keab was elected as the new head of a transitional government. Subsequently, the NTC named a new government with a line-up favouring appointees who would have soothed rivalries between regional factions.<sup>1</sup>
74. According to the NTC website,

[T]he council derives its legitimacy from the decisions of local councils set up by the revolutionary people of Libya on the 17th of February. These local councils facilitated a mechanism to manage daily life in the liberated cities and villages. The council consists of thirty one members representing the various cities of Libya from the east to the west and from the north to the south. The aim of the Transitional National Council is to steer Libya during the interim period that will come after its complete liberation and the destruction of Gaddafi's oppressive regime. It will guide the country to free elections and the establishment of a constitution for Libya.

The Council members representing Al Buntan, Al Gubbah and Benghazi have been named while the names of those representing Ajdabiya, Zintan, Misratah, Nalut and Ghat have not been disclosed due to security reasons. The council is awaiting the nomination of representatives from the central and southern regions as well as Tripoli.<sup>2</sup>
75. Since the fall of Col Gaddafi's regime, the militias that led the nine-month uprising, to end Gaddafi's 42-year rule, have refused to cede control of their fighters and hand in their arms. Clashes between rival militia groups have occurred in Tripoli, Janzour and Ghayran. Reports suggest that Tripoli today is a patchwork of fiefdoms held by rival militias that arrived in the capital months ago to chase out Qaddafi and have since refused to leave. Fighting between militias in Tripoli usually breaks out when members of one militia try to cross through territory of another while refusing to disarm<sup>3</sup>

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<sup>1</sup> Timeline: Libya's uprising against Muammar Gaddafi, *Reuters*, 22 August 2011; Libya Profile, *BBC News*, 16 January 2012 and Libya's NTC unveils new government, *Reuters*, 22 November 2011

<sup>2</sup> The Libyan Interim National Council, Introducing the Council, <http://www.ntclibya.org/english/about/>

<sup>3</sup> Charles Recknagle, Is Libya Sliding Toward Civil War?, *Radio Free Europe/Radio Liberty*, 5 January 2012, [http://www.rferl.org/content/is\\_libya\\_sliding\\_toward\\_civil\\_war/24443215.html](http://www.rferl.org/content/is_libya_sliding_toward_civil_war/24443215.html); and Mahmoud Habboush and Ali Shuaib, Militias may drag Libya into civil war, transitional government chief says, *Washington Post*, 5 Jan 2012, [http://www.washingtonpost.com/world/update-1-militias-may-drag-libya-into-civil-war-ntc-chief/2012/01/04/gIQA08kebP\\_story.html](http://www.washingtonpost.com/world/update-1-militias-may-drag-libya-into-civil-war-ntc-chief/2012/01/04/gIQA08kebP_story.html)

76. A more recent report relating to clashes between rival militias in Ghayran, south of Tripoli, states that many of the clashes are over land and minor disputes, and often each side accuses the other of supporting the dead dictator<sup>4</sup>

### *Berbers*

77. A fact-finding mission from Norway and Denmark which visited Libya in 2004 reported:

#### 2.8 The Berber minority

The question of the situation for Berbers in Libya was raised with a number of sources. The Libyan professor estimated that there are between 20,000 and 50,000 Berbers in Libya. The situation in Libya cannot be compared with the situation in Algeria, where a large number of Berber organisations exist, many of which are very active politically, and which in recent years have been in open conflict with the Algerian authorities. According to the source, the Berber problem is not an important issue in Libya and except for their language, the Berbers are no different from other Libyans. All Libyans, including Berbers, belong to a clan and that is the important aspect.

Diplomatic sources and a business source stated that they have never heard of Berbers being persecuted in Libya. A diplomatic source expressed surprise at claims of discrimination against Berbers. Business source considered that Berbers are well integrated in Libya.

Diplomatic sources stated that there are no separate Berber organisations in Libya, nor are there large-scale celebrations of Berber cultural festivals.

Two diplomatic sources stated that there are expressions of Berber culture in the country. Diplomatic source stated that every year there is a Berber festival in Ghdames in western Libya on the border with Algeria and Tunisia. In addition, Libyan academics are working to register examples of the Berber cultural heritage, by re-cording Berber poetry among other things. According to another diplomatic source, many of Libya's Berbers are concentrated in Zuwara, where the Berbers speak Berber among themselves. According to this source, expressions of Berber culture do not cause any problems for those involved, as long as there is no question of organised Berber activism. It was emphasised, however, that the problem involved in such a form of organisation would be that it would involve attempting to organise politically outside the framework of the jamahiriyya system; the actual reason for wanting to start an organisation would be secondary.<sup>5</sup>

78. The US Department of State's 2010 report on human rights practices in Libya provided the following information in relation to Berbers:

Arabic-speaking Muslims of mixed Arab-Amazigh (Berber) ancestry constituted 97 percent of citizens. The principal minorities were Amazighs and Tuaregs. Both minority groups are predominantly Sunni Muslims but identify with their respective cultural and linguistic heritage rather than with Arab traditions. Several nomadic groups live in areas along the country's desert borders, including members of Tuareg and Toubou tribes...

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<sup>4</sup> Rival militia clash for third day near Libyan town, Reuters, 15 January 2012

<sup>5</sup> *Report - Fact-finding visit to Libya June 2004 under the auspices of the Norwegian Immigration Appeals Board, the Norwegian Directorate of Immigration and the Danish Immigration Service*, Norwegian Directorate of Immigration, January 2005, downloaded from [http://www.landinfo.no/asset/159/1/159\\_1.pdf](http://www.landinfo.no/asset/159/1/159_1.pdf).



The 1969 Constitutional Declaration defined the country as an Arab nation and acknowledged Arabic as the country's only official language, and the regime officially denies the existence of non-Arab citizens.

According to the Society for Threatened Peoples, Berber (Amazigh) people faced contradictory and at times threatening government policies. During the year the government took steps to alleviate discrimination against the Berber minority. Unlike in previous years, limited exhibitions of Amazigh culture were permitted, including a televised history program. The government allowed the written Amazigh language on more signs but reportedly prohibited it in official contexts. In August 2009 the QDF invited leading representatives of the World Amazigh Conference to Tripoli to discuss Berber culture and status in the country. Local politicians have also visited Berber towns in recent years. In 2007 the government abolished a law prohibiting the use of Amazigh and Tuareg names.

The Berber Web site Tawalt.com reported that revolutionary committee members in 2008 targeted Berber leaders near Yefren. Demonstrators reportedly chanted anti-Berber slogans, vandalized properties, and physically confronted counterprotesters. Opposition Web sites alleged the individuals acted in collusion with local police.<sup>6</sup>

79. In a recent posting on their website, Minorities in Focus stated:

[S]ince the downfall of the Gaddafi regime indigenous Berber have begun to experience a greater amount of freedom in their cultural practice, a cultural revival of sorts – the teaching of Tamazight, the Amazigh language, previously banned, is now embraced in newly available language courses, whilst the airing of radio broadcasts and other cultural initiatives such as the restoration of old Amazigh houses has begun in a bid to preserve their way of life.

The Amazigh, who make up 9% of the Libyan population, have a long history of oppression dating back from the time of the Romans. In Gaddafi's Libya, Amazigh texts, names and symbols were prohibited, suppressing the indigenous community's identity and way of life. Arbitrary arrests, detentions and torture of Amazigh activists were part of Gaddafi's vision of a pan-Arabic, ultra-nationalistic Libya. He even went so far as to state in several occasions that Amazigh identity was nothing more than a colonial invention and that all North Africans were Arab and nothing more.

Fortunately, this extreme form of oppression will not feature in the new Libya. However, what has the Arab Spring really brought to the table for the Amazigh? Can they expect nothing more than the ability to speak and learn their language and open cultural centres without fear of persecution and not much else? Is it a realistic notion to envision a Libya where adequate political representation and indigenous rights are constitutionally protected? The National Amazigh Libyan Conference (NALC) certainly seems to think that constitutionally protected rights is more than just an aspiration, seeing that their publicity campaign centres around this pertinent issue.

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<sup>6</sup> USDOS, 2010 Human Rights Report: Libya, Bureau of Democracy, Human Rights and Labor, 8, April 2011, <http://www.state.gov/g/drl/rls/hrrpt/2010/nea/154467.htm>.

With the overthrow of Gaddafi and the establishment of indigenous advocacy groups such as the NALC and other Amazigh cultural groups, the future for the Amazigh seems more optimistic than it has ever been in Libya.<sup>7</sup>

## **FINDINGS AND REASONS**

80. The applicant travelled to Australia on a valid passport issued by the Great Socialist Peoples' Libyan Arab Jamahiriya. On the basis of a copy of his passport placed on the department's file, the Tribunal accepts that the applicant is a national of Libya.
81. The applicant's claims are based on the Convention ground of imputed political opinion, race and religion. Essentially, he claims to be of Berber ethnicity. He claims that as a Berber he was persecuted and discriminated against in the past. He also claims to have participated in anti-Gaddafi demonstrations in Australia and during the course of one he damaged and stomped on a portrait of Gaddafi. He claims that as a Berber he will be subjected to further discrimination and that the remnants of the Gaddafi regime will persecute him if he were to return to Libya. He further claims that the situation in Libya is unstable, the NTC is weak and power is vested with armed militias who are engrossed in infighting.
82. The Tribunal accepts that the applicant is of Berber ethnicity. The sources consulted by the Tribunal suggest that Berbers in Libya were subjected to some discriminatory practices in the past, including no formal recognition of Amazigh or Berber language and culture in Libya. However, a fact-finding mission from Norway and Denmark which visited Libya in June 2004 stated that they had never heard of Berbers being persecuted in Libya and that expressions of Berber culture did not cause any problems as long as there was no question of Berber activism. More recent reports suggest that the former regime had moved to alleviate discrimination against the Berber minority, including abolishing a law prohibiting the use of Amazigh names. At the hearing the applicant disputed the country information discussed with him, stating that reports of the action taken to alleviate discrimination against Berber were false or the steps that had been taken were insignificant or meaningless. The applicant contended that the situation of Berbers is unlikely to change and that they will continue to be subjected to discriminatory practices regardless of who rules Libya.
83. The Tribunal prefers the country information before it, which it considers to be reliable and independent. Indeed, this information suggests that following the fall of the former regime, in recent months indigenous Berber have begun to experience a greater amount of freedom in their cultural practice. The Amazigh language, previously banned, is now embraced in newly available language courses, whilst the airing of radio broadcasts and other cultural initiatives such as the restoration of old Amazigh houses has begun in a bid to preserve their way of life. While some discriminatory attitudes may prevail in Libya, according to Minorities in Focus, 'with the overthrow of Gaddafi and the establishment of indigenous advocacy groups such as the NALC and other Amazigh cultural groups, the future for the Amazigh seems more optimistic than it has ever been

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<sup>7</sup> 'Is this just the beginning of the revolution for Libya's Berbers?', Minorities in Focus, 21 December 2011, <http://minorityrights.wordpress.com/tag/libya/>

in Libya'.<sup>8</sup> The Tribunal has encountered no information in the sources consulted or provided by the applicant to suggest that Berbers in Libya are currently facing harm or mistreatment by anyone, including the Arab majority. While the Tribunal accepts that the NTC's decision not to include any Berbers in the new government's line-up has angered Berber groups and there are figures within the new government who may still show discriminatory attitudes towards Berber culture and language, based on the evidence before it, the Tribunal does not accept that the Berbers are being persecuted or discriminated against by the NTC or the Arab population of Libya at a level that amounts to persecution. The Tribunal finds that the expressions of Berber culture do not cause any problems in Libya. The Tribunal does not accept that 'brutality and discrimination' against Berbers in Libya have continued and/or are on the rise. The Tribunal does not accept that there is an underreporting of the situation of Berbers in Libya because western countries place priority in investing in Libya over protecting the rights of the country's minorities.

84. The Tribunal accepts that in 2006 the applicant was arrested, detained for 10 days, verbally abused, threatened and mistreated after he defended Berbers and their rights in response to offensive remarks made by a fellow university student. The Tribunal accepts that the applicant was watched by the security services. On the basis of the applicant's account of the accusations levelled against him, as well as the country information before it, the Tribunal is of the view that the treatment directed by the applicant in 2006 was essentially and significantly motivated by the perception that he was involved in Berber activism. The applicant claimed at the hearing that this experience 'shut [him] up forever'. However, there was no persuasive or satisfactory evidence to suggest that he had modified his behaviour in fear of *persecution*. The applicant was never involved in any form of activism, including speaking publicly about Berber rights prior to this incident and did not claim to have had any interest in being involved in similar type of activity. The Tribunal finds that the applicant's experiences in 2006, which amount to serious harm for a Convention reason, were confined to their circumstances. The Tribunal finds that, in the light of the recent events in Libya and the country information cited in relation to situation of Berbers in the country, the applicant's chance of facing similar treatment at the hands of the authorities is not real.
85. The Tribunal accepts that the applicant experienced rejection and had to try harder to obtain the acceptance of his Arab teachers and peers as he grew up. The Tribunal also accepts that his family was subjected to verbal abuse and limitation placed on the use of the Amazigh language had made it difficult for him to maintain his grasp of the language. The Tribunal appreciates that regular and petty acts of discrimination of the kind described by the applicant are most unpleasant, undesirable and psychologically uncomfortable. However, whilst persecution involves discrimination that results in harm to an individual, not all discrimination will amount to persecution (see *Haji Ibrahim* (2000) 204 CLR 1 at 18-19, per McHugh J). Without wishing to understate the unsavoury nature of the applicant's experiences and having considered his personal circumstances, including his young age and lack of any evidence to suggest any kind of frailty, the Tribunal is not satisfied that the discrimination and the restriction on the cultural practices the applicant faced, assessed cumulatively, reach the standard of

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<sup>8</sup> 'Is this just the beginning of the revolution for Libya's Berbers?', Minorities in Focus, 21 December 2011, <http://minorityrights.wordpress.com/tag/libya/>

persecution within the meaning of the Convention as outlined on page 3 of this decision.

86. The Tribunal accepts that following the incident in 2006 the applicant may have been deprived of the opportunity to practice [in his field] after graduating with qualifications from university. The applicant graduated with a medical degree from a public university and was able to open a profitable [store], which continues to operate in Tripoli. The applicant's father, despite being passed over for promotion, worked as an accountant for a government organisation for more than two decades and currently works as a Justice of Peace from an office in Tripoli. [All] of his brothers, as well as his brother –in law are employed also employed in Libya. The Tribunal does not accept that he will be subjected to serious harm, including discrimination amounting to persecution or denial of the capacity to earn a livelihood or gain access to basic services at a level that threatened his capacity to subsist for the reason of his race and/or religion.
87. The applicant claimed that in September 2011, he applied for a scholarship with the Libyan embassy in Australia but did not receive a reply because he is a Berber. When asked why he thought he had not been replied to because of his ethnicity, he said this was the only explanation. The Tribunal does not agree with this assessment. In the Tribunal's view, leaving aside the extraordinary events that were unfolding in Libya at that time, there could be numerous reasons as to why the applicant had not received a reply to his letter. The Tribunal is not satisfied that the applicant's inability to obtain a scholarship from the Libyan embassy in the past few months, when he had come to Australia as a self-funded student, has been essentially and significantly for the reason of his ethnicity.
88. The applicant claimed at the hearing that Berbers belong to the Ibadi sect of Islam. However, he did not claim that he had ever faced any problems on that account and there was no information before the Tribunal to suggest that Ibadis or Berbers on account of the fact that they are Ibadis are facing persecution in Libya. The Tribunal finds that there is no real chance that the applicant will face persecutory treatment for the reason of his race and/or religion if he were to return to Libya.
89. The Tribunal does not accept that the discriminatory attitudes towards or the present cultural status of Berbers in Libya gives rise to a real chance of persecution in the applicant's case.
90. The Tribunal accepts that in the wake of anti-government protests in Libya in February 2011, the applicant, along with a number other Libyan students had participated in anti Gaddafi demonstrations in various locations in Australia. The Tribunal accepts that [in] February 2011 [a newspaper] published a photograph of a demonstration by Libyan students in [Australia] destroying a poster of Colonel Gaddafi. The applicant was amongst those featured in the [photograph]. The Tribunal accepts that the applicant's participation in the demonstration was a genuine expression of his opposition to a regime he had been opposed to in Libya. The Tribunal accept that the applicant's participation in demonstrations in Australia may have led to the arrest and detention of his father and one of his brothers by agents of the former regime.
91. As it was put to the applicant at the hearing, since the lodgement of his application for a protection visa, following months of demonstration and a civil war, in October 2011,

Col Gaddafi was killed, the NTC declared Libya to be officially 'liberated' and announced plans to hold elections within eight months. In late October 2011, Abdel-Rahim el-Keab was elected as the new head of a transitional government. Despite these significant changes in the country's political landscape, the applicant claims that he remains at risk of harm because he is now known to the remnants of Colonel Gaddafi's regime still active in Libya. While the information before the Tribunal suggests that atrocities against Gaddafi loyalists continues,<sup>9</sup> the Tribunal has found no information in the sources consulted, including the sources provided by or referred to by the applicant, to suggest that Gaddafi loyalists or allies have been targeting those who had opposed the Colonel Gaddafi's regime. The evidence before the Tribunal suggests that the applicant's activities in Australia were similar to or at the same level as tens of thousands of Libyans who participated in demonstrations against Colonel Gaddafi and his regime in a variety of forms over many months inside and outside Libya and are now living in Libya free of persecution. The Tribunal finds that the applicant's activities in Australia do not give rise to a real chance that he will suffer persecution by Gaddafi loyalists.

92. The applicant has suggested that remnants of the former regime are powerful, very loyal to Gaddafi and will not surrender easily. He claimed at the hearing that the Revolutionary Committees are preparing themselves for a comeback. They have weapons, money and manpower and are in the position of organising themselves for revenge. As already indicated, the Tribunal has found no information in any sources to support the view that remnants of the former regime, including the Revolutionary Committees, are targeting those who had opposed to Colonel Gaddafi, regardless of their opponents' ethnicity. Whether Gaddafi loyalists will be able to destabilise the NTC, or persecute the former regime's critics is a matter of pure speculation. The Tribunal finds that the applicant does not face a real chance of persecution at the hands of Gaddafi loyalists or anyone else if he were to return to Libya. Having reached this finding, the Tribunal does not accept the applicant's claim that he has to join an armed group in order to be protected from Gaddafi loyalists.
93. The Tribunal does not accept the applicant's claim that former regime loyalists have started killing opponents but the international community is not aware. The Tribunal is of the view that if political opponents were being assassinated by Gaddafi loyalists, these incidents would have been reported by media outlets or NGO's or foreign government sources. The Tribunal finds that the applicant does not face a real chance of persecution at the hands of Gaddafi loyalists or anyone else if he were to return to Libya. The Tribunal does not accept that the applicant's ethnicity will exacerbate his chance of facing persecution at the hands of Gaddafi loyalists. Having reached this finding, the Tribunal does not accept the applicant's claim that he has to join an armed group in order to be protected from Gaddafi loyalists.
94. The applicant has also claimed that the new government is powerless and has no authority over armed militias. Militias are fighting amongst themselves for power and they will target any person who falls foul of these groups. The sources consulted by the Tribunal suggest that the NTC has begun to form a fully functioning army and police force to take over the task of providing security, but the process has been too slow. The Tribunal accepts that since its formation, the NTC has struggled to exert its authority as some rival militia leaders refuse to cede control of their fighters and hand in their

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<sup>9</sup> 'In Libya, death and disappearance still stalk the land, *Reuters*, 21 December 2011.

arms.<sup>10</sup> Clashes between rival militia groups have occurred in Tripoli, Janzour and Ghayran over land, territorial transgressions and minor disputes, and often each side accuses the other of supporting the dead dictator.<sup>11</sup> The Tribunal has found no information in the sources consulted to suggest that Berbers are being targeted by any militia group. While the Tribunal appreciates that the clashes between militia groups are unsettling for the applicant and he is concerned about the general instability in the country, the Tribunal does not accept that the applicant faces a real chance of harm for a Convention reason as a consequence of clashes between armed militias in parts of Libya. The Tribunal has found no information in the sources before it to suggest, and does not accept, that militias are forcing anyone to join their ranks or that Libyans, regardless of their ethnicity, are forced to join armed militias. The Tribunal does not accept that the applicant will be forced to join a militia or that he will be accused of being a Spy if he refused to do so.

95. The Tribunal appreciates the applicant's concerns relating to the future prospects of his country. At the hearing, he claimed that the country will plunge into civil war and that the situation in Libya will turn to resemble Iraq, Afghanistan and Somalia. However, at this point in time there is no persuasive evidence before the Tribunal to indicate that another civil war is expected or that the country will transform into another Iraq. The likelihood of these hypothetical scenarios becoming reality is a matter of pure speculation and the Tribunal is not satisfied that the applicant's claims in this regard give rise to a real chance of serious harm that is essentially and significantly for a Convention reason or reasons.
96. Overall, for the reasons outlined above, the Tribunal is satisfied that the applicant's fear of persecution for a Convention reason in Libya is not well-founded. He is not a refugee.

## **CONCLUSIONS**

97. The Tribunal is not satisfied that the applicant is a person to whom Australia has protection obligations under the Refugees Convention. Therefore the applicant does not satisfy the criterion set out in s.36(2)(a) for a protection visa.

## **DECISION**

98. The Tribunal affirms the decision not to grant the applicant a Protection (Class XA) visa.

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<sup>10</sup> Militias may drag Libya into civil war, transitional government chief says, *The Washington Post*, 5 January 2012. See also Bradley Hope and John Thorne, Libya for 2012: Reconciliation and reining in militias is vital for democracy, *The National*, 27 December 2012.

<sup>11</sup> Rival militia clash for third day near Libyan town, Reuters, 15 January 2012