

**0801697 [2008] RRTA 325 (19 August 2008)**

**DECISION RECORD**

**RRT CASE NUMBER:** 0801697

**DIAC REFERENCE(S):** CLF2008/21182 CLF2008/4065

**COUNTRY OF REFERENCE:** Sudan

**TRIBUNAL MEMBER:** Suzanne Leal

**DATE DECISION SIGNED:** 19 August 2008

**PLACE OF DECISION:** Sydney

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

## **STATEMENT OF DECISION AND REASONS**

### **APPLICATION FOR REVIEW**

1. This is an application for review of a decision made by a delegate of the Minister for Immigration and Citizenship to refuse to grant the applicant a Protection (Class XA) visa under s.65 of the *Migration Act 1958* (the Act).
2. The applicant, who claims to be a citizen of Sudan, arrived in Australia and applied to the Department of Immigration and Citizenship for a Protection (Class XA) visa. The delegate decided to refuse to grant the visa and notified the applicant of the decision and his review rights by letter.
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 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 is set out in Part 866 of Schedule 2 to the Migration Regulations 1994.

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

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

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

10. The High Court has considered this definition in a number of cases, notably *Chan Yee Kin v MIEA* (1989) 169 CLR 379, *Applicant A v MIEA* (1997) 190 CLR 225, *MIEA v Guo* (1997) 191 CLR 559, *Chen Shi Hai v MIMA* (2000) 201 CLR 293, *MIMA v Haji Ibrahim* (2000) 204 CLR 1, *MIMA v Khawar* (2002) 210 CLR 1, *MIMA v Respondents S152/2003* (2004) 222 CLR 1 and *Applicant S v MIMA* (2004) 217 CLR 387.
11. Sections 91R and 91S of the Act qualify some aspects of Article 1A(2) for the purposes of the application of the Act and the regulations to a particular person.
12. There are four key elements to the Convention definition. First, an applicant must be outside his or her country.
13. Second, an applicant must fear persecution. Under s.91R(1) of the Act, persecution must involve “serious harm” to the applicant (s.91R(1)(b)), and systematic and discriminatory conduct (s.91R(1)(c)). The expression “serious harm” includes, for example, a threat to life or liberty, significant physical harassment or ill-treatment, or significant economic hardship or denial of access to basic services or denial of capacity to earn a livelihood, where such hardship or denial threatens the applicant’s capacity to subsist: s.91R(2) of the Act. The High Court has explained that persecution may be directed against a person as an individual or as a member of a group. The persecution must have an official quality, in the sense that it is official, or officially tolerated or uncontrollable by the authorities of the country of nationality. However, the threat of harm need not be the product of government policy; it may be enough that the government has failed or is unable to protect the applicant from persecution.
14. Further, persecution implies an element of motivation on the part of those who persecute for the infliction of harm. People are persecuted for something perceived about them or attributed to them by their persecutors. However the motivation need not be one of enmity, malignity or other antipathy towards the victim on the part of the persecutor.
15. Third, the persecution which the applicant fears must be for one or more of the reasons enumerated in the Convention definition - race, religion, nationality, membership of a particular social group or political opinion. The phrase “for reasons of” serves to identify the motivation for the infliction of the persecution. The persecution feared need not be *solely* attributable to a Convention reason. However, persecution for multiple motivations will not satisfy the relevant test unless a Convention reason or reasons constitute at least the essential and significant motivation for the persecution feared: s.91R(1)(a) of the Act.
16. In Australian law, enforcement of laws providing for compulsory military service, and for punishment for desertion or avoidance of such service, will not ordinarily provide a basis for a claim of persecution within the meaning of the Refugees Convention: see eg *Mijoljevic v Minister for Immigration and Multicultural Affairs* [1999] FCA 834 (Branson J, 25 June 1999) at [23]. This is primarily because without evidence of selectivity in its enforcement, conscription will generally amount to no more than a non-discriminatory law of general application: see, for example *Mpelo v Minister for Immigration and Multicultural Affairs* [2000] FCA 608 (Lindgren J, 8 May 2000) at [33]. Whether this is the proper conclusion, however, will depend on the evidence in the particular case.

17. As was stated in *Mohamed v Minister for Immigration and Multicultural Affairs* (1998) 83 FCR 234, at 247:

Persecution for failure to be conscripted is not necessarily persecution for a Convention reason. ... Imprisonment for resistance may be motivated by punishment for failing to comply with a lawful obligation to join not for a political view or arising from membership of a group. But it does not follow from this ... that in all circumstances persecution for failure to accept conscription might not amount to persecution for a Convention reason. All the facts must be considered.

18. 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.
19. 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.
20. 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**

21. The documentary evidence in this matter is contained in the Departmental and Tribunal files.
22. In his application for a protection visa, the applicant states that he was born in Sudan, that he belongs to the tribe A, is a Muslim and speaks, reads and writes both Arabic and English. He is very well educated having studied both in Sudan and in another country (Country A).
23. He states that he left Sudan illegally 'with help of a friend, [who] works in the police and by paying to airport officer.' He is seeking protection in Australia so that he does not have to go back to Sudan. He explains why he left Sudan and what he fears may happen to him on his return there:

I came to Australia on a [type] Visa to seek protection. As a student in [country A] I lodged an application to [country B]. Upon my return to Sudan after my studies ended, my circumstances changed and I now fear persecution in Sudan based on my actual and imputed political opinion which is opposed to the current government's ideologies. My fears include threat to my life and liberty, significant physical harassment, significant ill-treatment, significant economic hardship and denial of access to basic services.

24. Some of the people he fears in Sudan include the police in Sudan, the army and the Sudanese government. He claims that his fears are based on his past experiences and knowledge of the current situation in Sudan. According to the applicant, 'reports from legitimate sources indicate that the government of Sudan is systematically unwilling and unable to protect people in my position.'
25. In a statutory declaration attached to his application for protection, the applicant provides the following additional information:

My problems first began with government policy that required graduates from high school to enter compulsory military training before they enter university studies. This military training is related to public defense army and is not part of the Sudanese Army. The military training camp is established to prepare recent high school graduates to be soldiers to fight off the civil war in Sudan.

When in this camp, we were taught military training and religious lessons and both had to be attended to. Brainwashing techniques were used to make us conform to what we did not believe in.

At the end of the camps required training period, I was asked to join the [political group] which at that time kept control of the Government. I refused to join this political group. [Description of a negative consequence]

Upon returning home, I was caught by government security agents and after some investigation, they returned me to the camp again to be punished (attached with the application is my Public Defence ID card).

After finishing with the camp training, I was enrolled in [date] at [university] to study [degree].

I was involved in many riots against the government during my university years. I refused invitations to be a member of the Islamic Group called [name] I attended many government opposition group meetings and gave my voice in every election for student union in my university. I also participated in many riots against the military government and was caught and punished many times. I was constantly reported to government security agents.

When I completed my [degree] in [date], there was compulsory military advance training for every Sudanese university graduate to attend because at that time our government was sliding deep into civil war and needed new recruits.

The government needed more soldiers and anyone that could hold a weapon to be presents at check points in major streets inside and outside of [city 1] to keep the city safe from rebel attack.

After university graduation, I was then asked to go back to military training. I refused to take part in any further military training and escaped from [number] military camps.

Due to my race and political opinion, the government of Sudan prevented me from travelling abroad. (I have attached the government travel prevention document with my application).

Seeing that I had not completed my advance military training, the university was instructed to not issue my [degree] which would cause me further hardship in that I would not be able to find a job and no longer be able to support myself. This is a method the government uses to break people down who resist government ideologies. It has proven to be a very effective method of controlling recent graduates.

During this period I was completely depended on my family for support and it was decided that I escape to [country C] where my [sibling] resided.

To get my [degree] conferred after completion of my studies, I had to bribe university officials.

#### *Time spent in [country C]*

I left for [country C] in [date] and stayed with my [sibling].

In [date] when my [sibling] went to Sudan to see my parents, I had to travel to [country D] for about three weeks until my [sibling] returned to the home in [country C]

While in [country C], I had no legal work rights so worked illegally but worked as an [occupation] with [employer] from [date] to [date] and as a [occupation] with [employer] from [month] to [date] and then as a [occupation] til [date].

With the salary that I earned from working and saving it along the way, I decided to further educate my self and enrol in a university in [country A] for post graduate studies.

#### *Time spent in [country A]*

I arrived in [country A] in [date] and [studied].

While in [country A], I applied for migration to [country B] and this application is still under processing (attached documents with application to prove status).

#### *Return to Sudan*

Early [year], the war in southern Sudan had stopped and as my student visa to [country A] was going to expire so I decided to return to Sudan as I had no right of residency in any other country. I also wanted to return to visit my sick father in [city 1]. I had been out of my country for [number] year then.

As this point in time, I did not fear returning to Sudan knowing that after [number] years of absence from the country, government agencies would no longer be in search of me. Therefore I did not apply for protection in [country A].

Knowing that I have a [country B] Immigration application on foot, I felt it was only a matter of time I would migrate legally and through proper channels to an overseas country who would respect me for my educational skills and qualifications as an [occupation].

When I returned to [city 1] from [country A], the airport security at [city 1] international airport searched my belongings

[Friend 1] belongs to Shiai Islam and I met him in [university].

They also found my other university books which I carried with me.

The government security officials at the airport confiscated items and took the gifts. They did not take my university books. They also took my laptop computer to be searched. I was also fingerprinted.

The government officials then interrogated me for a week saying that I held wrong ideas in my mind and that the ideologies will corrupt Muslim society, they warned me from distributing or talking about these things with any other person and ordered me to come to their office every 2 weeks and to attend Islamic lessons every Friday in a specific mosque called [name]

Every two weeks when I attended the required reporting attendance, government official inquired where I was during the period of absence and what I was doing in Sudan and why I came back. They also wanted to know if I had any connections with opposition groups related to Darfur ripples outside Sudan After every attendance, they released me only after I signed a paper stating that I will not have any activity against the society or regime in Sudan.

The government officials also prevented me from gaining employment when I applied for several jobs in private and government and did not get them and were told by the human resources department in one of the company that they were given clear orders to reject my application.

In mid [date], Sudanese security agents instructed me that they wanted me to attend military camp in three months time for the public defense army as a soldier. This meant that at any time if they needed me to do advance military training, they could then send me to the war area in Darfur region. If I refused this order, they will send me to the military court.

I was afraid of being recruited and felt the security forces had labelled me now as a trouble maker and wanted to see me do some time in Darfur and expecting me to be killed there. I felt I was now persecuted for my political opinion because of having high regards for the writings of forward thinking Islamic writers.

I am in great favouritism for particular writings and thoughts and the division of religion and state. A government can't function properly when it is directed by religious leaders. A distinction has to always be drawn between a Civil and Religious States, the can not co-exists.

#### *Travel to Australia and visa status*

In fear of my life, I left Sudan and entered Australia on a [visa] on [date] at [city] Int'l Airport. I had obtained this visa from the Australian High Commission in [another country] on [date]. [*Details on the granting of visa deleted*] I decided not to travel and thus this is how I had this valid visa to travel to Australia from Sudan.

My [degree] concentrated in [description]. This is a very relevant topic in northerner Europe and understandably in Australia.

[Visa details].

The Australian [type] visa was obtained legally.

When leaving [city 1], I transited in [another country] before coming to Australia.

It was not easy for me to leave Sudan as I had a Prevention to Travel Order against me and if I showed up at the airport without making any prior arrangements, I would not be able to travel. Taking this into consideration, my friend who was an [government official] and with his help in bribing soldiers at the airport, I managed to get through customs and immigration clearance from Sudan. We did not have to bribe the [official] but paid around [amount] to the soldier to let me through. I was very lucky to have been able to pass through customs and board the plane especially after having been marked by government officials.

### *Summary*

The situation in Sudan is deteriorating day by day to the extent that life is not safe for anyone, anymore. Once a person has been marked for any reason by the Government there is no escape from detention, abduction or murder.

I am a well noted person to the Sudanese Government official because of my strong words and actions against them. I have been present in riots during my university days in [city 1] and my thoughts against military service and embracing the [philosophies] have brought me into direct conflict with the regime in Sudan.

My life is threatened for being a well educated individual and am being targeted for my political opinion and am not able to voice my opinion openly.

Due to my extensive travels overseas, and having lived in several countries, I have been accused by the Sudanese authorities for corrupting Islamic thoughts amongst regular citizen of Sudan. I have no connections with rebel organisations in Sudan and just wanted to live a simple life in Sudan until my [country B] application went through.

I had no intention to travel to Australia, but when the situation got worse for me in [date] the only valid visa I had for a foreign country was Australia and that is the reason why I am here today seeking protection.

I am a qualified [occupation] and if given the chance to make Australia my home, I will not become dependent on her but in fact provide my experience to enhance her global profile. I do not wish to return to Sudan and be drafted into the army to fight and suppress my own people.

### *Documentary evidence*

26. Contained on the Departmental file is a certified copy of the applicant's degree in Sudan.



27. A copy of the applicant's birth certificate is on file stating that he was born in Sudan. A full copy of his passport is also on file, which shows that the applicant entered city 1 on a specified recent date.

*Applicant's legal submissions*

The applicant fears serious harm from members or former members of the Sudanese government, the police, paramilitary organizations, army and intelligence officers. The ongoing confrontation between the various factions in Sudanese politics has led to an escalation of violence against civilians. Citizens who hold out views different to that of the government are singled out and as punishment drafted to the army to fight for the government in war torn areas of the country namely the Darfur region of Sudan.

When [the applicant] entered Sudan in early [year]...he was detained at the airport for [Actions] . The action was in direct conflict with the teaching and running of the Government.

The government of Sudan and its state agencies, such as the police, army and intelligence agencies have a demonstrated inability and/or unwillingness to offer meaningful protection to [applicant]. In [applicant]'s case, an identifiable perpetrator is the government itself and its army and police.

[The applicant's] fear is genuine and well founded – there exists and real chance that he would sustain serious harm from the army, the Sudan government and government supporters upon return to his native Sudan This harm includes significant physical injury, ongoing physical harassment and ill-treatment, as well as the threat of deprivation of liberty. The likelihood of this harm is not remote or insignificant.

*Applicant's interview with the department*

28. An interview was held between the applicant and a delegate of the Department of Immigration and Citizenship. The interview was held in English as the applicant confirmed that he did not require the services of an interpreter.
29. In his interview, the applicant confirmed his citizenship of Sudan and that he had no right of residency in any other country. He confirmed his arrival in Australia on a visa.
30. Upon his return from country A to Sudan, the applicant described certain actions. During the months he spent in Sudan, the applicant said that he had been unable to secure employment, despite a wealth of available jobs.
31. He told the delegate that, after his return to Sudan, he had been told that he would be forced to take part in military training in the Darfur region.
32. In answer to the delegate's query as to why he would be wanted for military training given that he was over the conscription age, the applicant said:

They want me to train for public force regarding previous training before university. They used this issue to order me for advanced training, preparing me for civil war and I don't want to be involved in civil war. If you refuse, they take you to military law, not civil law.

33. In answer to the delegate's question as to why he says he was persecuted, the applicant spoke about his detention. He also told the delegate that he was ordered:

to go to the mosque every Friday to attend a religious lesson because they think I will correct society with this idea. They did this for several months then they ordered me to take part in advanced military training. This means that they could take me at any time to be prepared for civil war. When you go to this area, you must kill. For other people to survive, if you not believe this war, when you are in a war, you must kill or you must be killed. If you refuse this order, you will go to the military court where you will get death because you are a soldier refuse the order.

This advanced military camp...while you are in the camp they will get you and send you to the civil war. If you are not dying in this war from the mine, you can come with one hand or leg or you die from disease or lack of food. And become crazy from killing other people. They send you one to brainwash and they..get you to believe you have a war against God's people...And I escaped from [number] camps, it gives me another black point on my record. When they found I am trying to understand their ideology and why they are doing this, so they give us the food that Islam is a very nice religion – no work, this effect on your life. You are not facing this problem because you are not living like us. The Government is affecting your life and your work, it can take you to death and civil war, you must understand how it is – if you are trying to be against them, they believe that you are against God..I study how to deal with them...I have contact with my Shia friend, to have formation about Islam from another side.

34. In answer to the delegate's query as to how the applicant had managed to obtain copies of apparently confidential documents, the applicant said:

You are surprised how we can get documents when we are against the government. They are civilian people like us. They try to help us. [There is] a network between civil people. Some are forced to work in police, army just to survive, it is a job. We can give them money. They are poor. If there is money, they accept it.

35. Following the Departmental interview, the applicant forwarded a translation of the Proscription Order (preventing the applicant from leaving the country) made against him. In accompanying submissions, the applicant's legal representative noted that the Proscription Order had been made following the applicant's renewal of his passport in Sudan. According to the applicant's legal representative:

By renewing his passport, Sudanese authorities were again notified of his presence in Sudan and thus his profile was raised with authorities that were looking for recent university graduates to forcefully enter them into the army...By having a Proscription Order against his name, [applicant] was not able to travel overseas or even access jobs without fulfilling his Defense duties...[applicant] could be called up for defense duty at any moment and this did happen in [date] when Sudanese security agent instructed him to attend military camp in three months time. This is when he decided he should leave Sudan for his safety and did so arriving in Australia on [date]...As a Sudanese who had international exposure, [applicant]'s presence in Sudan was always seen as a threat to the Islamic Government. The thoughts and philosophy that

[the applicant] held were not acceptable by the regime, hence his detention upon arrival in Sudan is evidence to the strict religious code applied by the Government.

36. The delegate decided not to grant the applicant a protection visa. In making his decision, he found no 'indication that the applicant experienced treatment amounting to persecution at the hands of the authorities in Sudan.' While the delegate accepted that the applicant had been stopped at the airport and had been questioned for a week, he had not been arbitrarily detained and his rights appeared to have been respected.
37. The delegate made the following finding:

Whilst I accept that the applicant may be called at any time to serve in the army, I find it hard to accept that he was indeed called for conscription in [date]. He said that he was given three months to enlist and yet he did not leave the country until three months after the supposed notification of conscription. He stated that he was advised of his being called to serve during the middle of [month]. He left the country during the middle of [month]. If the applicant was serious in avoiding the conscription, he should have left the country earlier. It must be noted that he was already in possession of a valid Australian visa in [date]. He could have already left much earlier than he did.

#### *Submissions to the Tribunal*

38. In written submissions to the Tribunal, the applicant's legal representative stated that the applicant feared the following persecution: denial of appropriate employment; denial of further professional student and advancement; the strong probability of further detention and physical ill-treatment (not excluding the possibility of execution).
39. Attached to the submissions was a further statement by the applicant which states, in part, as follows:

When I finished my [degree] the war in south Sudan has been stopped there I have to return to Sudan after [number] years outside Sudan to see my sick father and my family, decide to stay in Sudan with him in [city 1].

Even after this long period away from my country when I came back before [number] months, in [city 1] airport security check [*description of identified anti-regime actions deleted*] and government security agents came to me for week of investigation.

For the reason of my previous political activities and [information deleted], they saying that I am holding wrong idea and these things will corrupt muslim society so they warn me from distribute or talk about these things with any one order me to come to their office every 2 weeks and attend Islamic lessons in Friday in specific mosque ([name] [location]).

Every two weeks they investigate with me about where I have been, what I am doing there why I came back if I have any connection with opposition groups and so on...During the investigation I have been beat, slapped on my face several time (in one time I [injury])

Before 3 months of departure Sudan security told me that they will ask me to be ready to go to military camp (for public defence army) as soldier at any time

they need me to have advance military training and send me after that to war area in Darfur region . I want to mention Sudanese popular defence army is not the main army in sudan it is army belong to Islamic group ruled Sudan so soldier in it will not have the same right like real soldier even there is no salary in it and of course there is nothing after [you] complete you[r] service.

Also this military rule is applied on selective manner for me, and I don't want to involve in civil war most of it is action contrary with rules of human international law (Burning villages and killing children and women) and with my religious and moral, if I refuse this order they will send me to military court to face the punishment.

### *Tribunal hearing*

40. The applicant appeared before the Tribunal to give evidence and present arguments. Earlier hearings had been adjourned at the request of the applicant. The Tribunal hearing was conducted with the assistance of an interpreter in the Arabic (Standard) and English languages.
41. The applicant confirmed that he was born in Sudan. He told the Tribunal that he is a member of a Tribe, which he described as a large tribe opposing the current Sudanese government.
42. In answer to the Tribunal's question as to why he was seeking asylum in Australia, the applicant replied:

I was in opposition to the government. I was prevented from pursuing my studies and was threatened with my life.
43. The applicant told the Tribunal that he had returned to Sudan to see his father, who he had not seen for a number of years and who had suffered from several medical conditions during this time. Although the applicant had engaged in anti-government protests as a university student, he thought that, given the protests had taken place years earlier, the government would no longer be concerned by them. The applicant was fortified in this view given the government's announcement that they would not take action against those who had previously shown some opposition to the government if they were to return to the Sudan.
44. In any case, given that the civil war between the north and south of Sudan had ceased at the time of his return, he thought things were improving in the country and he would not be at risk of any harm.
45. In any case, the applicant had no option but to return to Sudan:

Furthermore, there was nowhere I could return to, except to the Sudan. I had finished studying in [country A] and my visa was about to expire. I had no option to go back without breaching the rules of the country I was in. I had also run out of money and I could not afford to stay where I was.
46. The applicant did not apply for refugee status in country A because of technical reasons deleted. If he had applied for refugee status and then been rejected, he would have been returned to either Sudan or another country. He had previously lived temporarily in another country but has no right to live there. [*Granting of visas in country A deleted*]

Instead he made an application for permanent residence in country B. It has been many months since he lodged the application and he has been told that it is still being processed.

47. The applicant had gained his degree in a specific field and knew that this would be a useful expertise in the Sudan. The applicant returned to Sudan confident of his specialty and confident that he would easily find a job, given that very few people had his qualifications in this area.
48. When he returned to Sudan, the applicant took with him two bags: one suitcase and one piece of hand luggage. In his hand luggage he had some CDs, pictures, photos, his laptop, documents and his qualification papers. When he got to customs in Sudan, both bags were searched and his laptop, the CDs, photographs and documents were confiscated.
49. The applicant told the Tribunal that he did not anticipate any problems in re-entering Sudan.
50. The applicant was questioned about the items that were confiscated.
51. Because of the search and questioning at the airport, the applicant told the Tribunal that his security file was reviewed by the government. This file had been compiled as a result of the applicant's student activities while at the university, where he had been involved in an opposition group and had been the leader of different groups. During the time the applicant was studying the Government had cracked down on students by prohibiting all activities within the university, apart from studying. Students found to be breaching the prohibitions were interrogated.
52. Following the prohibition, the applicant became involved in discussions with other students about the ban and other political issues. [*Details of his activities deleted*]
53. The applicant had been arrested as a result of his political agitation at the university and his fingerprints recorded. When, following his return to Sudan, his file was assessed by government officers, a renewed interest had been taken in his earlier student activities. As a result of this, the applicant found that he was unable to find work and was prohibited from leaving the country.
54. Following the search by customs officers, the applicant was ordered to report weekly to a mosque after prayers for a one hour lesson on how to be a good Muslim. The applicant described it to the Tribunal as a process of brainwashing.
55. Once a fortnight the applicant was ordered to report to the Security Department. During these sessions, the applicant would be interrogated and sometimes beaten. The applicant showed the Tribunal where an injury had occurred during such a beating, and which subsequently healed. Following the interrogations, which would last anywhere between an hour and a day, the security officer would give the applicant his next reporting date. The applicant would then sign an agreement agreeing to appear on that next occasion.
56. During one of these interrogation procedures, the interviewing officer told the applicant to prepare himself to attend the new military training camp which was still being

completed. The applicant was not given details of the location of the camp, apart from being told it was in the Darfur area, nor was he given details as to when precisely it would be opened, simply that it was 'preparing to be opened.'

57. The applicant understood that if he were sent to the camp, he would be forced to fight against his countrymen in the Darfur area and he did not want to do this. He told the Tribunal that to be sent to such a training camp in the Darfur area was akin to being given a death sentence because the conditions were so awful. Because of his fear of being sent to the camp, the applicant went into hiding and began to consider how he could get out of the country.
58. The applicant has a friend who has a high position within a government department. The applicant sought the assistance of this person to help him to leave the country. The official told him that the applicant had a travel prevention order against his name. Such an order is kept confidential. Without the assistance of the friend, the applicant would have been unaware that such an order had been issued against him.
59. The applicant succeeded in leaving Sudan. He had tried to leave the country on a number of prior occasions. On each of these occasions, problems had arisen with the exit process arranged for him by the friend.
60. The applicant told the Tribunal that he was relying on the official's help, and the friend had to choose the time when the applicant could safely leave. When, finally, the applicant managed to leave the country, his visa for entry to Australia was about to expire.
61. The friend accompanied the applicant to the airport and throughout the check-in procedures, leaving him in the transit lounge ready to board the aeroplane. While he was in the lounge, a soldier came up to the applicant and asked to see his passport. As a bribe, the applicant put all his remaining Sudanese money into the passport before handing it to the soldier. The soldier took the money and allowed the applicant to board the aeroplane.
62. The applicant disputed the Tribunal's suggestion that Sudanese men are called for military service between the ages of 18 and 33. The applicant said that this was untrue and that the standard age of being called up for such duty can be 18 to men in their 50s. The applicant told the Tribunal that if he were forced to return to Sudan, he thought that he would most certainly be arrested, questioned and subject to further investigation, particularly if it was discovered that he had applied for refugee status in Australia.

### **Independent evidence**

#### *Treatment of Sudanese citizens accused of political dissent*

Collated information on the treatment of Sudanese citizens accused by the government of political dissent generally or similar activities is provided by the Sudan Human Rights Organization in Cairo (SHRO-Cairo). SHRO-Cairo publishes on an *ad hoc* basis *The Sudanese Human Rights Quarterly* which documents the situation of human rights in Sudan with regard both to the region of Darfur and other parts of the country. Issue No 25 of the *Quarterly* described events involving citizens accused of political dissent:

The Situation of Human Rights (May 1- September 30, 2007): Mohamed Hassan Daoud  
SHRO-CAIRO SECRETARIAT

Between May 1st and the ending September of 2007, the violation of human rights and fundamental freedoms was never abated. Many violations were committed against the right to free press, peaceful assembly, and organization. Many citizens were arbitrarily arrested, while many suffered long months in unlawful detention without charge. Acts of violence continued unabated, including extra-judicial killings in the regions of Darfur and Southern Kordofan. The ultra-violence of police forces by firearms to suppress popular demonstrations resulted in scores of murdered people and injured victims.

... On September 20, an armed group shot eight employees working with the World Vision relief agency. Three persons were seriously injured; Mohamed Hamid al-Mahdi and 'Abd al-Rahman Eissa were shot in the head. The UN said that the attacks on relief workers increased by 150% in June this year compared by June last year.

(Sudan Human Rights Organization – Cairo 2007, *The Sudanese Human Rights Quarterly*, Issue No. 25, November, Sudan Human Rights Organization – Cairo website, pp.7-16 <http://www.shro-cairo.org/quarterly/No25E.pdf> – Accessed 31 January 2008 ).

### *Darfur*

63. The US State Department's Country Reports on Human Rights for 2007 ([\\ntssyd\REFER\Research\usdos\2007us\\_rep\Sudan2007.htm](http://www.refugeerelief.org/Research/usdos/2007us_rep/Sudan2007.htm)) includes the following information on Sudan:

In Darfur government forces, janjaweed, Darfur rebel groups, and tribal factions committed serious abuses during the year, including the reported killing of approximately 1,600 persons. Government, janjaweed militias, and tribal factions razed numerous villages, committed acts of torture, and perpetrated violence against women. Darfur rebel groups were also responsible for rape and attacks on humanitarian convoys and compounds to steal equipment and supplies, resulting in injury to humanitarian workers. Civilians continued to suffer from the effects of genocide. In 2004 then-U.S. Secretary of State Colin Powell testified before the U.S. Senate Foreign Relations Committee that "genocide has been committed in Darfur and that the Government of Sudan and the Jingaweit (janjaweed) bear responsibility." Many times during the year President Bush referred to actions in Darfur as genocide. According to the UN, more than 200,000 persons have died, 2.2 million civilians have been internally displaced, and an estimated 231,000 refugees have fled to neighbouring Chad since the conflict began in 2003. Despite the presence in Darfur of the African Union-led international monitoring force (African Union Mission in Sudan or AMIS), security remained a major problem throughout the year.

The government's human rights record remained poor, and there were numerous serious abuses, including: abridgement of citizens' rights to change their government; extrajudicial and other unlawful killings by government forces and other government-aligned groups throughout the country; torture, beatings, rape, and other cruel, inhumane treatment or punishment by security forces; harsh prison conditions; arbitrary arrest and detention, including incommunicado detention of suspected government opponents, and prolonged pre-trial detention; executive interference with the judiciary and denial of due process; forced military conscription of underage men; obstruction of the

delivery of humanitarian assistance; restrictions on privacy and freedoms of speech, press, assembly, association, religion, and movement; harassment of internally displaced persons ( IDPs) and of local and international human rights and humanitarian organizations; violence and discrimination against women, including the practice of female genital mutilation (FGM); child abuse, including sexual violence and recruitment of child soldiers, particularly in Darfur; trafficking in persons; discrimination and violence against ethnic minorities; denial of workers' rights; and forced labor, including child labor, by security forces and both aligned and non-aligned militias in Southern Sudan and Darfur.

There were no reports of political prisoners; however, the government held an undetermined number of political detainees, including members of opposition parties. Security forces arrested numerous persons suspected of supporting rebels in Darfur Security forces reportedly detained without charge, tortured, and held incommunicado political opponents. Detentions of such persons generally were prolonged. Security forces frequently harassed political opponents by summoning them for questioning, forcing them to remain during the day without questioning, and then ordering their return the following day--a process that sometimes continued for weeks.

64. According to the Amnesty International Report 2008, accessed on 29 May 2008, (<http://thereport.amnesty.org/eng/regions/africa/sudan>):

In February, the Prosecutor of the International Criminal Court (ICC) presented evidence of war crimes and crimes against humanity in Darfur to the ICC Pre-Trial Chamber against Ahmad Muhammad Harun, former Minister of State for the Interior then Minister of State for Humanitarian Affairs, and Janjawid militia leader Ali Mohammad Ali Abdel-Rahman (Ali Kushayb). In April the ICC Pre-Trial Chamber issued arrest warrants for the two men. The government of Sudan said it would refuse to hand them over. In December the UN Security Council failed to agree a Presidential Statement supporting the ICC Prosecutor's condemnation of Sudan's failure to cooperate with the ICC.

All major parties to the conflict committed violations of international human rights and humanitarian law including unlawful killings, arbitrary detention, attacks on humanitarian personnel and equipment, torture and ill-treatment, and hostage-taking.

Armed groups continued to proliferate, mostly breakaway factions of the Sudan Liberation Army (SLA) and the Justice and Equality Movement (JEM). There were said to be more than 30 armed groups by the end of 2007, including armed groups representing Arabs. Armed groups were increasingly divided along ethnic lines.

#### *Military service*

65. The Immigration and Refugee Board of Canada (IRB), on 28 February 2007 provided the following information regarding military service in Sudan.

Desertion from Sudan's national service is punishable by a jail term of up to three years (SHRO June 2003; Denmark 2001, 73). Deserters could also reportedly be fined (ibid.). According to Sudan's 1992 National Service Act, provided in the 2001 Danish fact-finding mission report, those who fail to present themselves for recruitment, or try to avoid military service "through



deceit, or by inflicting any harm to [themselves]" could face a two- to three-year jail term (ibid.; see also The Des Moines Register 24 Dec. 2005)."

66. The Danish Fact Finding Mission (FFM) of 2000 reports that "Military service is compulsory for all males aged 18 and over, the recruitment age being adjusted from time to time."
67. The Danish Fact Finding Mission of 2001 reported that: "Besides the regular Sudanese army the National Congress (NC) party has its own military branch called the Popular Defence Forces (PDF)." The PDF was created by the Government in 1990 and has its legal basis in the Popular Defence Forces Act 1989. (War Resisters International, 1998) The Danish 2001 Fact Finding Mission reported that: "Under the 1989 Popular Defence Forces Act (attached as Annex 5 [of the Report]), PDF recruits must be at least 16 years old and Sudanese citizens. In 1992 service in the PDF became obligatory for all students, both male and female. Completion of service was a precondition for entering further education."
68. The January 2005 Report of the International Commission of Inquiry (UN ICI) to the United Nations Secretary-General (UN SG) states that:

For operational purposes, the Sudanese armed forces can be supplemented by the mobilization of civilians or reservists into the Popular Defence Forces (PDF) ... According to information gathered by the Commission, local government officials are asked by army Headquarters to mobilize and recruit PDF forces through tribal leaders and sheikhs. The Wali is responsible for mobilization in each State because he is expected to be familiar with the local tribal leaders."

WRI's 1998 Survey stated: "PDF training involves military training, civil defence training and patriotic and cultural education (1989 law, art. 14) and is considered to be an instrument of religious indoctrination." The Danish FFM report 2001 noted: "The PDF training contained a considerable element of Islamisation, and many Christian students therefore had serious problems when they were recruited to the PDF." The Report also noted that although women were recruited into the PDF on a voluntary basis, they were not sent on active service, although "There were women's battalions which stayed behind the front lines where recruits worked as nurses, etc."

69. The National Service Act 1992, contained at annex 4 of the Danish 2001 FFM Report outlines the general laws and penalties of avoiding or postponing military service. War Resisters' International's 1998 Survey noted that: "The right to conscientious objection is not legally recognised." It also stated that: "Avoiding military service is punishable by two to three years' imprisonment (National Service Law, art. 28)."

*[Country information deleted deleted under section 431]*

## **FINDINGS AND REASONS**

### **Country of nationality**

70. The Tribunal has a copy of the applicant's passport on file. The Tribunal accepts that the applicant is a citizen of Sudan and is outside his country of nationality.

## Assessment of claims

71. The applicant claimed that if he were forced to return to Sudan, he feared that he would be subject to further detention and physical ill-treatment, he would be forcibly conscripted to attend a military training camp in the Darfur region and that he would be denied employment as well as further professional advancement.
72. The Tribunal found the applicant to be a credible witness. His written claims and oral evidence were internally consistent, were corroborated by documents contained on file and were in accordance with country information considered by the Tribunal. The applicant is highly qualified person. The Tribunal accepts that a person with the applicant's qualifications would be in demand to work in this area. The Tribunal accepts that, with his qualifications, the applicant could have expected to have a successful career in Sudan, or in country B, if accepted as a permanent resident. The Tribunal accepts that the applicant only travelled to Australia because he had a valid visa to do so and needed to get out of Sudan to avoid being sent to a military camp in the Darfur region. The Tribunal is satisfied that the applicant only applied for refugee status in Australia to avoid being sent back to Sudan.
73. I accept that the applicant's luggage was searched when he returned to Sudan after a period of absence. I accept that airport officers confiscated items from the applicant. As a result of this, I accept that the applicant was subjected to interrogation and forced to report fortnightly to the police for further interrogation and weekly for lessons the applicant described as brainwashing exercises.
74. I accept that during his police interrogation sessions, the applicant was threatened with being sent to a military training camp somewhere in the Darfur region, once the camp had been properly set up. I am satisfied that this threat co-incided with the Proscription Order issued against the applicant, which prohibited the applicant from obtaining work or from leaving the country. Although the order is a confidential one not made available to the person who is the subject of the order, I am satisfied that the applicant was able to obtain a copy through unofficial means. The existence of the order is consistent with the applicant's inability to secure work of any kind in Sudan, which, given his high-level education and qualifications would otherwise be difficult to understand.
75. I accept the applicant's evidence that he was told that the training camp had been set up and he would be called up for military duty within three months. I accept that from that point the applicant went into hiding and began to look for ways to leave Sudan.
76. I do understand the concern of the delegate that the applicant did not leave Sudan for some months despite being the holder of a valid visa for entry to Australia. At the Tribunal hearing, (which was face to face, unlike the Departmental interview, which was by telephone) the applicant sought the services of an Arabic interpreter. As a result, he was able to give clearer and more comprehensive evidence. I accept that whilst the applicant had sought to leave Sudan prior to this time, he had been unsuccessful in doing so. This is because, given that a Proscription Order was in place, he would have been unable to leave the country at all without the assistance of someone in authority. I accept that the applicant sought and gained the assistance of a friend, in his bid to leave Sudan. I accept that the applicant was unsuccessful in leaving the

country on other occasions due to problems encountered by the official (his friend) The situation was critical by his departure date because of the imminent expiry of the applicant's visa for Australia. I accept the applicant's evidence that the official accompanied him through customs and to the transit lounge in the airport and that the applicant bribed an airport officer who sought to examine his passport before he was able to board the aeroplane for Australia.

77. The country information as set out above gives details of Sudan's poor human rights record. It is a country where violations against the right to free press are frequent and where citizens are subject to arbitrary arrest and detention. This information is consistent with the applicant's experience upon returning to Sudan recently.
78. The country information dealing with the current situation in the Darfur region confirms the applicant's evidence that conditions in military training camps in the Darfur region are atrocious. The country information also confirms that the fighting in the Darfur region involves violations of international human rights and humanitarian law including unlawful killings and arbitrary detention. Evidence of war crimes and crimes against humanity in the Darfur has been presented to the International Criminal Court against the former Minister of State for the Interior, Ahmad Muhammad Harun, and the Janjawid militia leader, Mohammad Ali Abdel-Rahman.
79. Country information also indicates that, upon return to the Sudan, the applicant would be suspected of anti-government activities, in light of his earlier university agitation, his actions viewed as anti-regime and his actions in leaving the country in contravention of the Proscription Order. On the basis of country information, the Tribunal accepts that the applicant risks being arrested on return to Sudan for contravening the Proscription Order and on that basis, risks being detained, imprisoned and physically ill-treated.
80. The Tribunal accepts that the applicant fears returning to Sudan in the reasonably foreseeable future because he left the country in breach of the Proscription Order and in order to evade military duty in the Darfur area, and, because, given his earlier agitation at university and his actions of what was seen as anti-regime literature, he would, upon his return, be treated as a political dissident.
81. On the basis of all the evidence, the Tribunal finds that the applicant has a well-founded fear of persecution in the reasonably foreseeable future.

**Essential and significant reason s91R(1)(a) and s91R(1)(c)**

82. For the reasons set out below, the Tribunal is satisfied that the applicant has a well-founded fear of persecution should he return to Sudan because of the anti-regime political opinion imputed to him on the basis of his earlier involvement in student protests and his other actions [*deleted in accordance with s431*]
83. I am satisfied that upon his return to Sudan after a long absence, the applicant came to the attention of the government at the airport. I am satisfied that following him being detected, the applicant was subject to fortnightly reporting to the police when he was interrogated and, on occasion, assaulted. I accept the applicant's evidence that he suffered an injury as a result of this assault. On the evidence of the applicant, I am satisfied that the decision of the government to call him up for military training in the

Darfur training was done as punishment for the anti-regime political opinion imputed to him. I am satisfied that once the applicant had been put on notice to serve at a training camp in the Darfur a Proscription Order was put out against him prohibiting him from being employed or from leaving the country. While the military conscription may be a law of general application (as the country information suggests), I am satisfied that, in the applicant's circumstances, the decision to call the applicant up amounts to systematic and discriminatory enforcement of the law against him for the essential and significant reason of his imputed political opinion

### **Serious harm**

84. The Tribunal finds that the harm threatened is serious harm, in that it involves the threat of arrest, detention and death should the applicant be forced to return to Sudan.

### **Protection obligations s36(3)**

85. Although the applicant has applied for permanent residency in country B, there is no evidence before me that his application has been granted. In these circumstances, the applicant has, on the evidence before me, no legally enforceable right to enter and reside in another country. Section 36(3) of the Act does not apply.

### **Relocation**

86. Given the applicant's circumstances, I am satisfied that relocation is not an option available to him.

### **CONCLUSION**

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

### **DECISION**

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

<p>I certify that this decision contains no information which might identify the applicant or any relative or dependant of the applicant or that is the subject of a direction pursuant to section 440 of the <i>Migration Act 1958</i>. Sealing Officer's I.D. PRDRSC</p>
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