

071940601 [2008] RRTA 145 (2 April 2008)

DECISION RECORD

RRT CASE NUMBER: 071940601

COUNTRY OF REFERENCE: Sudan

TRIBUNAL MEMBER: Paul Fisher

DATE DECISION SIGNED: 2 April 2008

PLACE OF DECISION: Melbourne

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

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

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).

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.

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.

The applicant applied to the Tribunal for review of the delegate's decision.

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

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.

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).

Further criteria for the grant of a Protection (Class XA) visa are set out in Parts 785 and 866 of Schedule 2 to the Migration Regulations 1994.

Definition of 'refugee'

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.

The High Court has considered this definition in a number of cases, notably *Chan Yee Kin v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379, *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225, *Minister for Immigration and Ethnic Affairs v Guo* (1997) 191 CLR 559, *Chen Shi Hai v Minister for Immigration and Multicultural Affairs* (2000) 201 CLR 293, *Minister for Immigration and Multicultural Affairs v Haji Ibrahim* (2000) 204 CLR 1, *Minister for Immigration and Multicultural Affairs v Khawar* (2002) 210 CLR 1, *Minister for Immigration and Multicultural Affairs v Respondents S152/2003* (2004) 222 CLR 1 and *Applicant S v Minister for Immigration and Multicultural Affairs* (2004) 217 CLR 387.

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.

There are four key elements to the Convention definition. First, an applicant must be outside his or her country.

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.

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.

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.

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. The UNHCR *Handbook on*

Procedures and Criteria for Determining Refugee Status, for example, provides some guidance on the issue:

170. There are, however, also cases where the necessity to perform military service may be the sole ground for a claim to refugee status, ie. when a person can show that the performance of military service would have required his participation in military action contrary to his genuine political, religious or moral convictions, or to valid reasons of conscience

The Court in *Mehenni v Minister for Immigration and Multicultural Affairs* (1999) 164 ALR 192 at [19] noted that the Handbook does not suggest that the mere requirement that a person serve, in opposition to genuine religious convictions, in itself necessarily amounts to persecution for a Convention reason. What must be demonstrated is that the punishment feared be imposed discriminatorily for a Convention reason, such as religion or political opinion, or membership of a particular social group such as “conscientious objectors”. 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.

Whether or not an applicant is a conscientious objector, the enquiry must be directed to whether the applicant’s refusal to serve will mean that there is a real chance of discriminatory treatment for a Convention reason. Circumstances *may* arise where this will be the case, for instance where those imposing the punishment do so on the basis that the individuals concerned were being punished as conscientious objectors to compulsory military service; that is, on the basis of their political or religious opinion, or their membership of a particular social group: see *NAEU of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* [2002] FCAFC 259 (Madgwick, Merkel & Conti JJ, 24 October 2002) at [18].

Similarly, *selection for recruitment* may be discriminatory for a Convention reason. In *Applicant S v Minister for Immigration and Multicultural Affairs* (2004) 217 CLR 387, for example, the Tribunal had accepted that the Taliban had practised *ad hoc*, random, forcible recruitment of young men, the only apparent criterion for recruitment being that the young men be able bodied. The High Court held that the Tribunal had erred in failing to consider whether “able-bodied young men” comprised a particular social group.

However, the mere holding of a political opinion or membership of a particular social group by an applicant facing the prospect of harm (including serious harm) is not sufficient to bring that person within the Convention definition. The Federal Court has fairly consistently held that liability for conscription - even of conscientious objectors - will not, of itself, found a Convention claim: eg; *Mijoljevic* and cases there cited. In *Mijoljevic* the Tribunal had found that the obligation to perform military service was universal upon all males in the applicant’s country, and that the relevant laws punishing those who avoided military service were laws of general application. The Tribunal concluded on this basis that the applicant’s pacifist views did not provide a basis upon which it could be satisfied that he was a person to whom Australia owes protection obligations under the Refugees Convention. Justice Branson held

that the Tribunal's conclusion was open to it on the evidence and material before it and that there was no error in the Tribunal's approach.

In *Minister for Immigration and Multicultural Affairs v Israelian* (heard together with *MIMA v Yusuf* and reported as *MIMA v Yusuf.*) (2001) CLR 323 the Tribunal had found that if, on his return to Armenia, Mr Israelian was punished for not meeting his obligation to give military service it would be "the application of a law of common application, imposed by the authorities regardless of ... any political opinion" It was contended that the Tribunal had failed to consider whether the applicant was a member of a particular social group comprised of deserters and/or draft evaders. The High Court held that on the facts of the case, it was open to the Tribunal to conclude that the implementation by Armenia of its laws of general application was did not resulting in discriminatory treatment. As Gaudron J stated at [55]:

The Tribunal's conclusion that the punishment Mr Israelian would face "for avoiding his call-up notice ... would be the application of a law of common application" necessarily involves the consequence that that punishment would not be discriminatory and, hence, would not constitute persecution. In that context, the question of Mr Israelian's membership of a particular social group comprised of deserters and/or draft resisters became irrelevant.

In *Erduran v Minister for Immigration and Multicultural Affairs* [2002] FCA 814, Gray J observed, at [28] that:

...when an issue of refusal to undergo compulsory military service arises, it is necessary to look further than the question whether the law relating to that military service is a law of general application. It is first necessary to make a finding of fact as to whether the refusal to undergo military service arises from a conscientious objection to such service. If it does, it may be the case that the conscientious objection arises from a political opinion or from a religious conviction. It may be that the conscientious objection is itself to be regarded as a form of political opinion. Even the absence of a political or religious basis for a conscientious objection to military service might not conclude the inquiry. The question would have to be asked whether conscientious objectors, or some particular class of them, could constitute a particular social group. If it be the case that a person will be punished for refusing to undergo compulsory military service by reason of conscientious objection stemming from political opinion or religious views, or that is itself political opinion, or that marks the person out as a member of a particular social group of conscientious objectors, it will not be difficult to find that the person is liable to be persecuted for a Convention reason. It is well-established that, even if a law is a law of general application, its impact on a person who possesses a Convention-related attribute can result in a real chance of persecution for a Convention reason. See *Wang v Minister for Immigration & Multicultural Affairs* [2000] FCA 1599 (2000) 105 FCR 548 at [65] per Merkel J. Forcing a conscientious objector to perform military service may itself amount to persecution for a Convention reason.

In *SZAOG v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCAFC 316, where the Tribunal had found that the applicant genuinely objected to the Chechen conflict and the Russian military methods of dealing with that conflict, Emmett J (Beaumont J agreeing), expressed at [46] the opinion, consistently with Gray J's opinion in *Erduran*, that:

[w]hile it may be possible for conscientious objection itself to be regarded as a form of political opinion, the question would still need to be asked whether the conscientious objection to military service had a political or religious basis or whether conscientious objectors, or some particular class of them, could constitute a

particular social group. If a person would be punished for refusing to undergo military service by reason of conscientious objection stemming from political opinion or a religious view, or the conscientious objection is itself political opinion, it may be possible to find that the person is liable to be persecuted for a Convention reason.

The Tribunal notes that North J did not agree with the majority in that case, delivering a powerful dissenting judgment, quoting, at [10], paragraph 171 of the UNHCR's *Refugee Handbook*, and setting out thereafter various authorities supporting the proposition expounded in the Handbook:

‘Where... the type of military action, with which an individual does not wish to be associated, is condemned by the international community as contrary to basic rules of human conduct, punishment for desertion or draft-evasion could, in the light of all other requirements of the definition, in itself be regarded as persecution.’

In the United States, the Handbook has been held to provide significant guidance in construing the Convention: *Immigration and Naturalization Service v Cardoza-Fonseca* 480 US 421 (1987) at 439 footnote 22. In Australia, a similar view was expressed by Kirby J in *Applicant A & Anor v Minister for Immigration & Ethnic Affairs & Anor* [1997] HCA 4; (1997) 190 CLR 225 at 302. Other Australian authorities emphasise that the Handbook provides a practical guide for the determination of refugee status: *Chan Yee Kin v Minister for Immigration and Ethnic Affairs* [1989] HCA 62; (1989) 169 CLR 379 at 392 per Mason CJ; *Minister for Immigration & Multicultural Affairs v Yusuf* [2001] HCA 30; (2001) 180 ALR 1 at 171 per Kirby J; *WADA v Minister for Immigration & Multicultural Affairs* [2002] FCAFC 202 at [42] per Gray, Nicholson and Emmett JJ; *WACW v Minister for Immigration & Multicultural & Indigenous Affairs* [2002] FCAFC 155 at [17] per Gray, Nicholson and Emmett JJ.

11 The leading academic text J C Hathaway, *The Law of Refugee Status*, Butterworths, Toronto, 1991, p 185 states:

‘... the specific form of military service objected to may be fundamentally illegitimate, as when it contemplates violation of basic precepts of human rights law, humanitarian law, or general principles of public international law. Where the service is itself politically illegitimate, refusal to enlist or remain in service cannot be construed as a bar to refugee protection.’

See also GS Goodwin-Gill, *The Refugee in International Law*, Clarendon, Oxford 1996, p 59 and, for an interesting case note which examines the issue of the grant of asylum in cases of selective conscientious objection, see K Kuzas, ‘Asylum for Unrecognized Conscientious Objectors to Military Service: Is There a Right Not to Fight?’ *Virginia Journal of International Law* vol 31, 1990-1991 p 447.

12 The Canadian courts have applied this approach. In *Zolfagharkhani v Canada* [1993] 3 FC 540, the Court of Appeal upheld the claim of an Iranian to object to military service on the ground that it would involve him in the conflict with Iranian Kurds in which chemical warfare was being used. MacGuigan J said at 555:

‘The probable use of chemical weapons, which the Board accepts as a fact, is clearly judged by the international community to be contrary to basic rules of human conduct, and consequently the ordinary Iranian conscription law of general application, as applied to a conflict in which Iran intended to use chemical weapons, amounts to persecution for political opinion.’

Zolfagharkhani was followed in *Ciric v Canada* [1994] 2 FC 65 which upheld the claim of a Serbian who refused to fight in the Yugoslav civil conflict because the conflict involved violation of human rights and atrocities abhorrent to the world community.

13 The same approach has been applied in a series of cases at the appellate level in the United States: *Barraza Rivera v Immigration & Naturalization Service* 913 F2d 1443 (9th Cir 1990) especially [10]; *Ramos-Vaszuez v Immigration & Naturalization Service* 57 F3d 857 (9th Cir 1995) especially [13], [14] and [18]; *Martirosyan v Immigration & Naturalization Service* 229 F3d 903 (9th Cir 2000) especially [8]-[10].

14 The House of Lords endorsed this approach last year when Lord Bingham said in *Sepe & Anor v Secretary of State for the Home Department* [2003] UKHL 15 at [8]:

‘There is compelling support for the view that refugee status should be accorded to one who has refused to undertake compulsory military service on the grounds that such service would or might require him to commit atrocities or gross human rights abuses or participate in a conflict condemned by the international community, or where refusal to serve would earn grossly excessive or disproportionate punishment.’

15 As noted above, the appellant in this case objects to returning to military service because of the methods used by the Russian army against civilians in the Chechen conflict, particularly the targeting of civilians as part of the strategy of the federal forces.

The requirements for a group constituting a particular social group were expounded by the High Court of Australia in *Applicant S v Minister for Immigration and Multicultural Affairs* (2004) 217 CLR 387. In their majority joint judgment, Gleeson CJ, Gummow and Kirby JJ. set out at [36] the correct approach to the question of whether a group falls within the scope of the term *particular social group* for the purposes of the Convention:

Therefore, the determination of whether a group falls within the definition of "particular social group" in Art 1A(2) of the Convention can be summarised as follows. First, the group must be identifiable by a characteristic or attribute common to all members of the group. Secondly, the characteristic or attribute common to all members of the group cannot be the shared fear of persecution. Thirdly, the possession of that characteristic or attribute must distinguish the group from society at large. Borrowing the language of Dawson J in *Applicant A*, a group that fulfils the first two propositions, but not the third, is merely a "social group" and not a "particular social group". As this Court has repeatedly emphasised, identifying accurately the "particular social group" alleged is vital for the accurate application of the applicable law to the case in hand

Section 91S of the Act provides that where the Convention basis for a protection visa applicant's fear of persecution is his or her membership of a social group comprising a family and derives from persecution or the threat of persecution of another family member, the fear must be disregarded unless there was an underlying Convention basis for the threat to the family member.

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.

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.

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

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.

Background

The applicant is an adult national of Sudan, although he was born and grew up in Country 1 where Parent WX works.

The applicant arrived in Australia in the early 2000s, as the holder of a visa issued to him in the early 2000s.

In the early 2000s, the applicant lodged a Protection Visa application with the Department. In response to Question 40 on the form, the applicant indicated that he is seeking protection in Australia so that he does not have to go back to Sudan.

In response to Question 41, *why did you leave that country*, the applicant states:

I left Sudan because I didn’t feel safe. Due to time restraints I will provide a more detailed statement regarding this question in the next two weeks.

In response to Question 42, *what do you fear may happen to you if you go back to that country*, the applicant stated as follows:

I fear that I will be harmed if I return to Sudan. Due to time restraints I will provide a detailed statement regarding this question in the next two weeks.

In response to Question 43, *who do you think may harm or mistreat you if you go back*, the applicant replied:

The authorities of my country.

In response to Question 44, *why do you think this will happen to you if you go back*, the applicant responded:

One of my reasons is that I will be forced to do military service in Darfur, which is an extremely dangerous place to be.

In response to Question 45, *do you think the authorities of that country can and will protect you if you go back? If not, why not*, the applicant responded:

No. They will force me to do military service in Darfur and place my life in great danger.

In the early 2000s the department received a Statutory Declaration by the applicant setting out in more detail his background and protection claims. The contents of the declaration are as follows:

[Information about the applicant's statutory declaration amended in accordance with s.431 as it may identify the applicant].

1. I am making this statement in support my application for a protection visa (subclass XA).
2. I am a citizen of Sudan but was born in Country 1 in the late 1900s and have lived there most of my life as a temporary resident. I was able to get temporary residency in Country 1 because Parent WX is a contract worker there and thus has been able to sponsor me. She/he works for a company as a professional. She/he has had this job since I was born. Her/his contract ends in the early 2000s as there is a new policy to employ Country 1 citizens. As a result I will not be able to extend my residency and be forced to go back to Sudan.
3. All of my family have also spent most their lives in Country 1. A few years ago, when my siblings went to University in Sudan, all my family apart from my Parent WX moved back to City I in order to be with them.
4. While I lived in Country 1, I went back periodically to Sudan for holidays. I used to go back to Sudan to visit my family in the North of Sudan and City I. I would go back almost every year and stay with them for several weeks during the school holidays. When I went back to Sudan during the holidays, the situation was generally bad but I was too young to be politically aware.
5. Because I was a temporary resident in Country 1, I was not permitted to undertake tertiary study there. Due to this I had to go back to Sudan to go to university. I left Country 1 in the early 2000s and lived and studied in Sudan for many years until the early 2000s. I went to University in City I Because of conflict, this was interrupted for a year in the early 2000s This was because the university refused to issue students with an accreditation number to prove that they had graduated. The students decided to protest against this by giving speeches and handing out pamphlets. I participated in these protests. I told other students that this was their right to be able to get an accreditation number. As a result of the protests, the authorities arrested some students. When these students were arrested, the students and I protested until they received a court hearing and were released. Some of my friends were subject to injury during arrest. I heard this indirectly afterwards when they spoke out about their arrest.
6. The university was closed because of the troubles from the early 2000s for many months After my friends got arrested, I returned to Country 1 because I was scared of getting in trouble with the Sudanese authorities.
7. Eventually, the university offered to negotiate with students regarding their accreditation numbers. Some students negotiated but others were against negotiation. This created conflict within the student body. As I was amongst the group that was pro-negotiation, I got injured on one occasion by other students opposing it. In the end, the university gave me my accreditation number.
8. There is compulsory military service in Sudan. If you refuse to do it, you may be arrested and imprisoned for 3 or 4 years. I managed to defer my military service in the past because I was a student. I received an identification card which showed that I had postponed military service. A copy of this is attached.

9. Now that I have finished my university degree I can no longer defer military service. Unless I do military service, my degree will not be recognised and I will not be permitted to work. I will also be imprisoned. People who undertake military service get sent to Darfur. Many of my friends have been sent there. Some have escaped and are in hiding. As far as I am aware none have been caught yet.
10. I do not want to go to Darfur as it is a very dangerous area ruled by gangs and tribes. Many Sudanese soldiers get killed there. I am very afraid for my personal safety and I think that if I will suffer serious harm if I have to go to Darfur I'm also scared that I might get killed. In addition, the army treats its recruits badly. Soldiers don't get enough money for food or transport and have to live in awful conditions.
11. If I refuse to do military service, I will be prosecuted in a military court and put in jail. As a result, I will be denied official documentation and will not be allowed to leave the country until I do it.
12. Some people are able to avoid military service because they are associated with one of the political parties in Sudan. Life is very difficult if you are not associated with one of the political parties. I am not associated with any of them and so will most definitely have to do military service.

The applicant also submitted a copy of his tertiary certificate from University in City I, as well as untranslated copies of the applicant's birth certificate and a document stating that his military service had been postponed.

In the early 2000s, the protection visa application was refused by a delegate of the Minister. The delegate accepted the applicant's claims with respect to his background and the fact that he would be obliged to perform military service. However, after having referred to country information he concluded that military service in Sudan is a conscription law or government deployment policy of general application, which applies to all Sudanese citizens and is not subject to arbitrary application. The delegate noted that penalties apply for refusing to perform military service, but did not consider that such penalties would be persecution but rather considered they would merely be prosecution and would not be excessive or persecutory punishment within the meaning of section 91R of the Migration Act. Further, it would not be imposed for a convention reason but would merely be the enforcement of a law of general application.

The delegate felt that the applicant's reluctance to undergo military service was simply indicative of a dislike or fear of combat because of what would potentially happen to him but did not accept that he would suffer disproportionately severe punishment for evading military service on account of his race, religion, nationality, membership of a particular social group or political opinion. He felt that there was no country information to support that the applicant would be treated differently because he is Sudanese-born in Country 1; because of his religion or political opinion or any other convention-related reason.

The delegate also noted that the applicant had a valid visa entitling him to re-enter and reside in Country 1 until the early 2000s and felt that, at that point, the applicant could avail himself of a further right to enter and reside in Country 1 given his personal circumstances. In doing so, the delegate relied the Country 1 Nationality Law, although it is unclear on what basis he felt that this assisted the applicant as it referred to nationality being granted to ex-patriots who had been resident in Country 1 for at least 10 consecutive years, whereas the applicant has, in fact, spent most of the last 10 years studying in Sudan. Despite this, the delegate concluded the applicant had no well-founded fear of persecution in Country 1 and that that

country therefore afforded him, even in the event that he did have a protection claim with respect to Sudan, effective protection from any such claim.

Review Application

In the early 2000s the applicant applied to the Tribunal for a review of the delegate's decision.

A few months later the Tribunal wrote to the applicant inviting him to attend a proposed hearing scheduled for later that month, an invitation to which the applicant acceded mid that month.

Late that month a further Statutory Declaration by the applicant dated late that month was submitted to the Tribunal. The Statutory Declaration was in the following terms:

[Information about the applicant's statutory declaration amended in accordance with s.431 as it may identify the applicant].

1. I make this Statutory Declaration in support of my Application for Review with the Refugee Review Tribunal.
2. I say that my original Statutory Declaration to the Department of Immigration and Citizenship remains true and valid.
3. My Parent YZ and Parent WX are both Sudanese. In the late 1900s my Parent WX moved to Country 1 and Parent YZ arrived a few years later. In the late 1900s, I was born in Country 1 and lived there until the end of high school. I was not allowed to study in Country 1 because I am a Sudanese citizen. I am not a Country 1 citizen because my parents are Sudanese. I have no Country 1 passport or work permit. I am on a visa, which needs to be renewed regularly. If I was on a working visa, it would only be for a specific amount of time. My residency is contingent on Parent WX, and her/his contract as a professional in a company finishes in the early 2000s.
4. Military conscription is the law in Sudan. Depending on what your political affiliations are, you could be sent to a dangerous zone such as Darfur, or a safe place such as City I, or avoid service all together. People are selected for service depending on their relationship with officials. People affiliated with government may even avoid military service altogether. There is widespread bribery to be exempt from service. Also, if you are not a member of a political party, it is very difficult to get a job in Sudan. However, priority is given to members and supporters of the governing party.
5. I am not affiliated with any political party because I was born in Country 1 and moved permanently to Sudan when I was a youth to attend University. The penalty for failing to do service is usually three years imprisonment. If I am sent to jail I am fearful that I might be tortured or mistreated there. I am opposed to the war in Darfur. All the people of my country are my siblings and I believe war is wrong. I do not want to be involved in either the party in power or its opposition. The political situation in Sudan is not stable.
6. Due to my apolitical stance, I encountered problems when I was at University. For example, in the early 2000s, a coalition of opposition parties organised a demonstration at my university. I was not a member of any political party and I did not partake in any student demonstrations for either the government or the opposition party. On that day one of my friends and I went to a lecture, however there were no other students there because they had been instructed not to attend classes on that day by the students in support of the opposition, who were demonstrating. The opposition students physically injured my friend and me because we did not support the opposition. The staff

of the university and lawyers also became involved trying to deal with the demonstrations. Those students held our neutral views against us. I did not have any other support in Sudan as I do not know a lot of people there. I finished university in the early 2000s.

7. If I were to return to Sudan I would be immediately conscripted and will face danger because I believe I will be placed in dangerous military zones. In Sudan, the government doesn't treat everyone alike. They discriminate against people who have no affiliation or connection to political parties. They take conscripts to Darfur, a highly dangerous area.
8. I would be discriminated against because of my heritage, namely being from the Danagla people. In Northern Sudan, Danagla are non-Arab tribes (Nuba tribes). The government constructed a dam called the Kajbar Dam to force non-Arab tribes to leave the area. I am related to the Danagla people. [Information about the applicant's history deleted in accordance with s.431 as it may identify the applicant]. I only speak Arabic because it is the official language. The Government targets this tribe and recruits them for military service because they want to eliminate such non-Arab tribes.
9. I may also be targeted due to imputed political opinion. [Information about the applicant's family history deleted in accordance with s.431 as it may identify the applicant]. She/he was imprisoned many times because she/he is a member of this party, which broke away from alliance with the Government in 1999/2000 and joined the opposition. In the early 2000s at university, I was asked many questions by the "National Conference Party" (otherwise known as the "Front Party") about Person B's involvement with the 'Alshabi' party. After the questioning, I was worried and unsure about what would happen to me. In the same year, I was also asked many questions by some staff from the university. They asked me whether I was sympathetic to the government and whether I was related to Person B. I am afraid that because of Person A and Person Bs' political activities the government of Sudan will persecute me.
10. My Country 1's residency expires in the early 2000s so if I try to return I may not be allowed to enter the country. Also the Country 1 government co-operates with Sudanese government in handing over those supporting the opposition. I am worried that I will be associated with Person A and Person Bs' support of the opposition. For example a well-known person Person C was originally from Darfur living in Country 1 for many years in opposition to the government in Sudan. He was wanted by the Sudanese government because of his opposition and the Country 1 government handed him back to the Sudanese government.

Tribunal Hearing

The applicant appeared before the Tribunal in the early 2000s to give evidence and present arguments. He was accompanied by an observer who took no part in the proceedings but remained in the hearing room with the consent of the applicant. The Tribunal hearing was conducted with the assistance of an interpreter in the Arabic (Standard) and English languages.

In the course of its introduction the Tribunal put to the applicant that it's understanding of the convention basis of his claim is that it involves objection to military service, his apolitical stance, his relatives' political involvement, and his race as a non-Arabic Danagla or Nubian from the North. The applicant indicated that those are the main reasons and that there are a lot of difficulties being in Sudan. He says that he doesn't have the rights that every other Sudanese has and that if he is required to do his military service he will be chosen to go to Darfur. The applicant indicated that because he is considered to a Sudanese citizen he is not permitted to study in Country 1. He would return to Sudan for his summer holidays.

The applicant was asked about his claim that his friends had been arrested and injured. He said that he had been caught between opposition and government groups, although he was not connected with either group.

The applicant was asked whether he had problems from being in favour of negotiating with the university management. The applicant indicated that at university some students supported the government and some support the opposition. The opposition supporters organised a strike but he and a friend wanted to continue studying and when they were found studying during the strike they were injured by some of the opposition supporters.

The applicant was asked to confirm that he had, in fact, got his accreditation and qualifications from the university and he agreed that he had. The applicant was asked whether there was any ongoing risk to him as a result of what had happened to him at university. The applicant explained that because Person A and Person B had been involved in a political party in Sudan, his name was automatically linked to that party. When asked why this is, he said it was because Person B was very well known. The applicant also noted that all government jobs are reserved for government supporters and not being an Arab he didn't belong to the government and the only thing that they might ask him to do is military service, and within the military service the only option is to go to Darfur. He said that the government's tactic is to choose non-Arabs and then put them into the military and send them to Darfur. They are from a number of different tribes but they are not Arabs. The applicant noted that there is a dam being built and people were trying to cross over to the other side of this structure and they had their land confiscated and many people were affected by this.

The applicant was asked then to confirm whether he considers there is any ongoing risk to him as a result of what happened to him in university. The applicant replied that the direct risk for him is military service. He said that he has tried to postpone it by getting some sort of valid visa in Australia. He also told them he wanted to go to Country 1. The postponement he asked for has expired however, and therefore there is no choice for him but to go to Darfur. He said it is not the same for everybody but it depends who they belong to. Members of the government parties may choose to go to City I to do their military service. He himself has finished university but there is no way under the present regime that he would be allowed to get a job in Sudan.

The applicant was asked whether he was saying that he would be denied a job within the government or any job at all and he maintained that nowhere in Sudan would he be able to get a job. The Tribunal asked whether the applicant was suggesting that no non-Arabs have jobs in Sudan. The applicant said no, but if you are not a member of a party that supports the government then you have no chance.

The Tribunal asked him to clarify whether there are no good jobs available or no government jobs available or no jobs whatsoever. He said that within the field he has studied for; there would be no opportunity for him. He said that you have to know somebody of influence.

The applicant was asked why, if that were the case, he was allowed to study and get a degree. He said that's because you pay for that privilege. He said that whatever happened at university accompanies you because you are well-known or it becomes well-known at that stage who you support or which group you belong to. They know all about you from your university days.

The Tribunal queried whether he was not seen as apolitical or if not, then on what basis he was linked, for example, to Person B's political activities. The applicant said he had been questioned by a government official first about his connection to Person B. He was interrogated about this. He was then not given the mark he deserved in that subject. The same government official assessed him at the end of his course and he only just passed, a friend of his had the same problem. His friend had subsequently gained residency in Country 1. The applicant was asked how his friend had managed to get Country 1 residence and he said that Parent WX was still there and he was taken in under his Parent WX's guarantee. Asked whether his friend was working in Country 1, he said that he is still not working there but he is a resident. It was noted that the applicant had claimed that his right to reside in Country 1 derived from his Parent WX's right to continue working there and that his Parent WX's contract had ceased following a change of policy. The applicant was asked what evidence there was of such a policy especially given that he had just said that his friend's parent continues to work there. The applicant replied that his friend's parent's contract had been renewed because the company needed him at the time. The applicant was then asked to clarify whether the reason for the non-renewal of his Parent WX's contract was connected to government policy or was just connected to the demand for his services. The applicant indicated that that policy had changed; foreigners and companies had been instructed to shed their foreign staff. The Tribunal indicated that it was unaware of any such policy, and that it may be helpful to the applicant's case if he could produce evidence of such a policy in Country 1.

The applicant was asked about military service and what precisely was the evidence of his having been called up and/or having his military service deferred. The applicant was asked to explain the document that he had submitted untranslated at folio 55 of the departmental file. The document was read out and interpreted and it purported to be a national service postponement card. The applicant said that the card originally expired in the early 2000s but since then he has had his postponement extended by providing evidence that he was still studying. The Tribunal noted that the card contained a reference to a particular battalion, and the Tribunal asked whether that would be the group to which the applicant would be attached for the duration of his military service. The applicant replied that that simply indicated the recruiting year, which applied to him. Asked about the address on the card; the applicant indicated that the card recorded his address at the time he originally became eligible for military service.

The applicant was asked when he finished his studies and he said in the early 2000s. The applicant was then asked when he should have reported for duty and how he had managed to avoid this. He indicated that he asked for a further extension on the basis that he still had a residency right in Country 1 and wanted to return there to try and renew that residency. They agreed to extend it in order for him to exercise that option. The applicant was asked when and where the Sudanese authorities had agreed to this. He said that they told him he had to do his military service before he travelled to Country 1 unless he had evidence of residency there. However, he showed them the recent residency permit and they gave him permission to leave but they only did so having been convinced that he would be returning. He didn't have his university certificate at that stage.

The applicant was asked to clarify the significance of the documents at folios 56 to 58 of the departmental file. He indicated that it was his birth certificate indicating his place of birth in Country 1 and nationality being Sudanese, showing that his Parent WX had also been born in Sudan in the mid-1900s and was also a Sudanese national. The applicant was asked to

confirm the dates in Arabic on the stamps in his passport, in order to indicate when he had last departed Sudan. He confirmed that this was indicated on page 25 of his passport at folio 31 of the departmental file, which indicates that his last departure was in the early 2000s.

The applicant was asked why he objects to perform military service. He said that firstly he would be discriminated in the military service on the basis of his race. If that were not the case, he would be recruited to perform skilled professional work in City I in accordance with his qualifications. He has not been trained as a soldier but as a skilled professional, but despite this he would be sent to fight in Darfur.

The applicant was asked what the main reason was for his objection and he said that it was because he would be sent to Darfur to do one thing – to fight his own people and to kill or be killed by his own people. The applicant was asked why he doesn't want to go to Darfur and he said that to be sent to the area is dangerous as again, he firstly hasn't been trained and secondly, he is not convinced he should be fighting his own people.

He was asked why he does not think that he should be fighting those people and he said that they are discriminated against by the government in terms of their denial of access to services such as health and education and that the government is trying to exterminate them. He said that Darfur people are given no choice but death. The applicant was asked whether he considered it was an unjust war and he agreed that it is. The applicant was asked whether he thought he would be treated any differently to anyone else performing his national service. He said that he would.

The applicant was asked whether he had any objection to performing his military service in accordance with his training and not in Darfur and he said that would be ideal. The applicant was asked what evidence he has to support the proposition that there is discrimination within the military against non-Arabs. He said that they pretend to treat people equally but it is not the case. The applicant was asked whether he knows anybody that this has happened to. He said that he did not – that he had spent all his time in university or in Country 1 and he wasn't involved with anyone else. He did hear in a phone conversation of one person who was asked to go to Darfur who was a non-Arab. He also referred to the government grabbing people off the street to be recruited to the military. The applicant was asked whether he himself is from Darfur and he said that he is not – that he is from the North. The applicant was asked how then being sent to Darfur would involve fighting against his own people. He said that the government's goal is to fight non-Arabs and Darfur is not Arab. He said that the government won't accept non-Arabs as Sudanese.

The applicant was asked whether he knew any other non-Arabs who have been required to do military service but he said that there were not many people that he knows and he could only think of one called Person E. He was asked where Person E had been sent but he said that he didn't know.

The Tribunal questioned whether this fear on the part of the applicant was well-founded as it hadn't seen any evidence of government policy of sending non-Arabs to Darfur. He said that it is not done officially or not advertised and that some people just go along with this. The applicant was asked whether anything happens to those people and he said that they are forced to go and do it for military service.

The applicant was asked about whether there was any evidence of his Person B's political involvement or any evidence that this would reflect on him in an adverse way given his

apolitical stance at university. The applicant explained that he is known because Person B is well-known for political activities. The Tribunal asked what Person B does but the applicant said he doesn't know. He said he had last had contact with him in the early 2000s. The applicant was asked whether Person B was working then but he said he didn't know but he believed he was working in the commercial field. The applicant was asked where Person B lives and he said in City I. The applicant was asked whether Person B lives openly or has problems with the authorities. He said he had been arrested many times, most recently in the early 2000s. The applicant was asked whether there was any evidence of Person B's political profile and he said that he is not sure – that he could try to find some but that they worked secretly. The applicant was asked that if Person B works secretly then how any connection with the applicant would be known or cause him problems. The applicant replied that Person B is well-known to the government and the government has information about him and the group he is a part of. The applicant was asked whether he thought his relationship to Person B placed him at risk if he returns to Sudan and he said that he did. He asked why he would have problems for this reason now if he hadn't had before and he said in the past he had just been studying. The Tribunal noted that he had been there for several years and the applicant replied that he had become known as a student not as an activist. The Tribunal pointed out that it was this fact that he was known as being apolitical and questioned how then he would be at risk and the applicant noted that he had been interrogated about Person B. He also said he was discriminated against at university. The Tribunal noted that he had, nevertheless, passed and got his degree and the applicant agreed that that was the case.

The applicant was then asked about Person A's political activities. The applicant said that Person A had left Sudan in the late 1900s and come to Australia. Also he has a different name to the applicant unlike Person B [information about the applicant's history deleted in accordance with s.431 as it may identify the applicant].

The applicant was asked to confirm whether he was suggesting that people who were well connected politically and/or who can pay a bribe can avoid military service. He agreed that was the case. He was asked then whether he could pay a bribe and avoid military service or make it more palatable experience. He replied that this is done through connections and it is not done openly. People use their influence to access their connections but he doesn't have any such access.

The applicant was asked about his immediate family and where they are located. He said that Parent WX is in Country 1 and the rest of the family are in Sudan. He was asked whether anything has happened to them – do they have any problems but he said they are just studying. He then said that Sibling Z is a professional working at the university. He/she said that that is a mandatory post qualification placement and he/she doesn't actually get paid for it. The applicant was asked whether his sibling is treated any differently to an Arabic graduate. He suggested that normally he/she would do such a placement at a medical facility but he/she has been allocated to a university. The applicant was then asked why his sibling has not been excluded altogether from the profession in the way he suggested that he would be as a non-Arab. The applicant replied that it is not as clear as the Tribunal is suggesting.

The applicant was asked whether his other siblings have experienced any problems and he replied that they have not – that they are still at school.

The applicant was asked whether there was anything else he would like to add or whether he felt the Tribunal had covered everything, as it had become evident that the interpreter would have to leave shortly. The applicant replied that he believed the Tribunal had covered

everything. The applicant was asked whether he wished to ask the Tribunal anything further. He asked the Tribunal to indicate whether there were any issues in respect of which it still had doubts or required further information. The Tribunal indicated that it accepted the applicant's claims with respect to his past history but questioned whether there was actually a real chance of the applicant's fears being realised, e.g., his fear of being sent to Darfur if he does his military service.

The applicant referred again to the discrimination he experienced at university and that he considers that he deserved much better results than he was given. The Tribunal reiterated its concerns about whether that amounted to persecution or was merely discrimination as the Tribunal believed on its own it was. The applicant acknowledged that he had been able to get the results he had worked for.

The Tribunal noted that the interpreter had to leave, and offered to adjourn the hearing to another day if the applicant felt that he wished to provide additional information by way of oral evidence. However, the applicant said he thought that everything had been covered. The Tribunal nevertheless indicated to the applicant that it would summarise its concerns in writing and request additional information from him.

Post Hearing

In the early 2000s the Tribunal received a number of newspaper articles faxed from the applicant's representative extracted from the online version of the Sudan Tribune, in the early 2000s and downloaded, referring to an appeal to rescue Nubia and stop building the Kajbar Dam, referring to the disregard the government is showing in that project for the rights of the Nubias who have been forcibly relocated, and a second article entitled "Sudan Arrests Kajbar Dam Activists" dated 4 September 2007 and noting that between 27 and 29 August 2007, a number of members of the Committee Against Building the Kajbar Dam had been arrested by the Sudanese authorities.

After the hearing, the Tribunal wrote to the applicant pursuant to ss 424A and 424(2) of the Act, incorporating the following:

[Information about the Tribunal's ss424A and 424(2) of the Act amended in accordance with s.431 as it may identify the applicant].

- You have claimed among other things that because you are not an Arab, if you return to Sudan you would be compelled to perform your military service by being sent to fight in Darfur. However, the 2006 US State Department Report on Human Rights Practices in Sudan contains only limited references to discrimination against non-Arabs in such areas as government employment and contracts:

Societal Abuses and Discrimination

Some non-Muslim businessmen complained of petty harassment and discrimination in awarding of government contracts and trade licenses. Christians reported pressure on their children in school; teachers and media characterized non-Muslims as nonbelievers. There also were reports that some Muslims received preferential treatment regarding limited government services, such as access to medical care, and in court cases involving Muslim against non-Muslim. However, non-Arab Muslims and Muslims from tribes and sects not affiliated with the ruling party, such as in Darfur and the Nuba Mountains, stated that they were treated as second-class citizens and were discriminated against in government jobs and contracts in the north and government-controlled southern areas. For example, the employment application of the Ministry of Energy and Mining

emphasizes nationality, creed, and tribe; Muslims associated with the NCP were given preference in government employment.

- Furthermore, although the same report refers to *rebel groups* forcibly conscripting young men and sending them to serve on the frontline, it makes no mention of the *government* engaging in such activity:

In the IDP camps in Darfur and refugee camps in Eastern Chad, rebel groups often conscripted teenage males. Conscripts faced significant hardship and abuse in military service, often serving on the frontline.

This information is relevant because it might suggest that even if you are compelled to perform your military service in Sudan, you would not face a real chance of experiencing serious harm capable of amounting to persecution on account of your non-Arab ethnicity.

...the Tribunal now invites you to provide additional information concerning:

- Discriminatory treatment of non-Arabs in the Sudanese armed forces,
- The likelihood of a conscript being sent to fight in Darfur;
- Evidence of your Person B's political profile in Sudan;
- The termination of your Parent WX's employment contract in Country 1; and
- The new Country 1 policy you referred to in your statutory declaration restricting employment opportunities for non-citizens in Country 1

The Tribunal received a response from the applicant, in the form of a statutory declaration in the following terms:

[Information about the applicant's response amended in accordance with s.431 as it may identify the applicant].

1. I am making this statutory declaration in response to a section 424(2) letter sent to me by the RRT in early 2008.
2. My previous statutory declaration to the Refugee Review Tribunal remains true and valid apart from the following. In my previous statutory declaration, early 2000s, I said that my Country 1's residency expires in the early 2000s. In fact it expires several months later. I was referring to Parent WX's work contract, on which his own residency is contingent, and believed that it expired early 2000s. I have since spoken to Parent WX and she/he has told me that his/her contract expires in the early 2000s, and I have learned that my own residency does not expire until later. I apologise for my mistake.
3. I wish to clarify the issue concerning the discriminatory treatment of non-Arabs in the Sudanese armed forces. The government has discretion to decide who they send to serve in what areas of Sudan They tend to send non-Arabs to Darfur, and they are able to find out your ethnicity because they have all the records of the conscripted peoples' backgrounds. I know of two men, my colleagues at university in Sudan, Person E and Person F, whose military conscription service cards were confiscated and they were sent to Darfur, even though they thought they would continue to serve in City I This is not an official policy, but it is common practice and so is well known to the non-Arab tribes in West Sudan, because it is what happens to them. Because I live in Country 1, I don't personally know people that are being sent to Darfur, but I hear about people being persecuted in the army. This treatment in the army is another form of the discrimination against the Nuba tribes in Sudan Persecution

of the Nuba tribes is widespread. For example during 2007, either in July or August, there was a government raid where they took over the land of the Danagla people to make way for the Kajbar dam. The government had tried to confiscate the land but some people tried to refuse them, so the land was taken from them by force. During this raid, most of the land was burned and people were forced to leave their homes. Many people who opposed this takeover were also imprisoned. After the land was taken there were demonstrations by the people who were concerned about their land being taken over and the government shot and imprisoned some of the people demonstrating.

4. Being sent to Darfur by the army is even more likely to happen to you if you are not affiliated to the ruling National Party. If you are a non-Arab and belong to the National Party you are unlikely to be made to go to Darfur, you are more likely to be allowed to do your military service in City I or another safer area. If you are a member of the opposition 'Alshaab' party you are likely to be sent to Darfur. However it is even worse if you are not a member of any political party, as then you know no one to help you avoid being sent there. It all depends on your connections. I am not a member of any party and so don't have support from anyone, or any contacts to help me. Because of this and being from a non-Arab minority I believe that I will be forced to do my military service in Darfur. This is also what I have been told by people at university.
5. I would also like to provide more information about the political profile of people in my family. First I would like to clarify that Person B is a member of the 'Alshaab' political party. I do not know what he does as a member of the party, but he has been imprisoned many times. Also, a few of my family members have been persecuted because of their political actions. They are active members of the opposition "Alouma" party. They are both active in political activities Because of this they have been imprisoned many times. Because of my family's political profile I fear that I will be targeted because the government and the army will assume I share their political opinions. My name is also a problem because my name is similar to Person B's and that makes the connection clearer. As I have mentioned in previous statutory declarations I have been questioned when I was at university about Person B's actions, and my interactions with him.
6. I fear that the combination of being from a non-Arab minority that is widely discriminated against, as well as being suspected of having political ties to opposition parties, but in reality having no political contacts or affiliations to help me, will mean that I am very vulnerable to persecution, especially in the army.
7. I also would like to clarify the issue of my Parent WX's employment in Country 1 and my ability to remain there. My Parent WX's work contract expires shortly. His/her visa is contingent on this. It probably will not be renewed because it has already been renewed once before and there is a government policy in Country 1 which gives preference in employment to Country 1 citizens. Once it expires, he will have to return to Sudan if he does not obtain some other work or another contract, which because of this employment policy is unlikely.
8. Even if my Parent WX's contract is renewed, I will not be permitted to remain there, unless someone else sponsors me. There is a law in Country 1 that if you are over 25, you cannot be sponsored by your parents, you need an independent sponsor. My last renewal of my residency was the last time

I could rely on my Parent WX's visa, to renew again I would need to be sponsored by a Country 1 citizen. This is very unlikely because of the policy I have mentioned of giving employment preference to Country 1 citizens. Currently I am not permitted to work in Country 1, due to the restrictions currently placed on non-citizens. Therefore when my residency expires in the early 2000s, I will almost certainly have to return to Sudan Even if I did find a sponsor I would have no security because my sponsor could choose to have me removed at any time.

Country Information

In addition to the 2006 US State Department's Country Reports on Human Rights Practices extracted in the 424A letter sent to the applicant, the Tribunal now has access to the 2007 report released on 11 March 2008 and accessed on 25 March 2008 from <http://www.state.gov/g/drl/rls/hrrpt/2007/100506.htm>, which 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 neighboring 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 pretrial 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.

Some non-Muslim businessmen complained of petty harassment and discrimination in awarding of government contracts and trade licenses. Christians reported pressure on their children in school; teachers and media characterized non-Muslims as nonbelievers. There also were reports that some Muslims received preferential treatment regarding limited government services, such as access to medical care, and in court cases involving Muslim against non-Muslim. However, non-Arab Muslims and Muslims from tribes and sects not affiliated with the ruling party, such as in Darfur and the Nuba Mountains, stated that they were treated as second-class citizens and were discriminated against in government jobs and contracts in the north and government-controlled southern areas. For example, the employment application of the Ministry of Energy and Mining emphasizes nationality, creed, and tribe; Muslims associated with the NCP were given preference in government employment.

In the IDP camps in Darfur and refugee camps in Eastern Chad, rebel groups often conscripted teenage males. Conscripts faced significant hardship and abuse in military service, often serving on the front line. There were reports that abducted, homeless, and displaced children were discouraged from speaking languages other than Arabic or practicing religions other than Islam.

The UK Home Office 2007 Country of Origin Information Report on Sudan', published on 15 November 2007 and accessed from <http://www.homeoffice.gov.uk/rds/pdfs07/sudan-211107.doc> on 22 November 2007, includes the following:

Conscientious Objection, Desertion and Evasion

9.16 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)."

Military Service: West Sudan (Darfur)

9.25 The USSD report for 2006 also stated that: "The Government continued to forcibly conscript citizens for military service as part of mandatory military service for male citizens, and government-allied forces and **rebels continued to recruit and accept child soldiers in Darfur.**" [*emphasis added – note that the 2006 USSD report is in this respect identical to the 2007 report, the relevant paragraph of which has been extracted above*]

North Sudan – Nubians

17.09 The International Crisis Group (ICG) published a Report, 'Sudan's Other Wars', in June 2003 which stated that the Nubian community had never fully recovered from its mass relocation from the banks of the Nile in the 1960s as part of the then government's Aswan Dam programme. The 'Urgent Action', published on

29 September 2004 by SHRO-Cairo, outlined the threat of new dam-building projects:

“GOS [the Government of Sudan], like GOE [the Government of Egypt] is waging a secret war against Nubians in the north. Its deliberate policies to de-populate the Nubian lands through the persistent ! [sic] lack of economic and social development and making plans to construct more dams on Nubian land is meant to disrupt the stability of the area and an attempt to change the structure of the Nubian society by forcing Nubians to abandon their ancestral homes. In fact, an attempt to build Kajbar dam in the heartland of Nubia was suspended temporarily when the Nubians protested loudly and sent their out cry abroad to alert the international community to come to their help and stop the plans to construct the dam...GOS is actively working now to construct another dam in Hamadab area (Merowe Dam), which will devastate the Nubian antiquities and historical sites that have yet to be fully excavated.”

In March 2007, Conscience and Peace Tax International made a submission to the 89th Session of the Human Rights Committee entitled *Conscientious Objection to Military Service: Issues for the Country Report Task Forces*. The report on Sudan, accessed from http://www2.ohchr.org/english/bodies/hrc/docs/ngos/CPTI-sudan_en.pdf on 25 March 2008, includes the following:

There have been no reports of persons seeking exemption from military service in Sudan on the grounds of conscientious objection.

Three explanations, operating in combination, might be put forward:

- 1) No legislative provision for the recognition of conscientious objection exists,
- 2) The recruitment procedures in practice are not such as would lend themselves to the assessment of such claims. Forced recruitment into opposition armed groups and government-allied militias is widespread in conflict zones; “compulsory national service” has also in the recent past been enforced by random, forcible methods.
- 3) Avoidance of military service is widespread and unimpeded among the population outside the conflict zones; to plead conscientious objection is unnecessary.

....

Apart from the special case of those who are seeking to proceed to higher education, persons recruited have, as is usually the case in situations of forcible recruitment, tended to come from “the more vulnerable social groups”, in the words of the Danish Immigration Service report. Most vulnerable of all are ethnic minorities, particularly those who have been “internally displaced”. In the 1990’s, those who had fled the conflict in the South were at particular risk of being recruited and being sent into the front line after only cursory training of between one and two months. Not surprisingly, casualties were disproportionately high. By 2001, the recruitment of southerners had reportedly declined because so many had defected to the SPLA when deployed. At that time displaced members of ethnic minorities from Darfur - the Fur, Zagawet, Masalet - were targeted, along with the Nuba from central Sudan. This in turn caused problems when the Darfur conflict erupted. This has reportedly caused a shift in emphasis towards conscription from the rural Arab population, traditionally done indirectly through tribal leaders and sheikhs. (This form of indirect conscription is also reported from the SPLA controlled areas in the South, where it allegedly frequently led to under-age recruits being offered in place of those of more economic value to the community. The incidence of urban “round ups” was already much

reduced by 2001; according to some reports these have ceased altogether in the most recent years.

FINDINGS AND REASONS

Country of Nationality

The applicant entered Australia on an apparently valid Sudanese passport evidently issued to him on the basis of his birth in Country 1 to Sudanese parents. He has also produced evidence of his Sudanese university qualifications and the deferral of his Sudanese military service obligations.

There is no evidence before the Tribunal to suggest that the applicant either holds or is eligible for citizenship of any other country. Despite being born in Country 1, he would not appear to be eligible for citizenship of that country, as when the nationality law changed in the early 2000s, he had been studying in the Sudan on a full-time basis since the early 2000s, and he continued to do so for several years. He therefore appears ineligible under Article 9 of that country's nationality regulations, as reproduced in the delegate's decision, as he would not at the time of applying for citizenship be *an adult who has resided in the Kingdom for at least ten consecutive years* (9(a)), nor would he both *hold a vocation of which the country is in need* (9(d)), and *be earning money through legal means* (9(e)).

Accordingly, the Tribunal finds that the applicant is a national of the Sudan and has assessed his claims against that country.

Assessment of Protection Claims

At the hearing the Tribunal found the applicant to be a credible witness as far as his *evidence* was concerned. It accepts that he was born in Country 1 to Sudanese parents, returned to his country of nationality to undertake his tertiary studies, experienced some problems during the course of his tertiary studies from fellow students who resented his failure to participate in political protests and also from one particular lecturer who suspected the applicant of links to anti-government parties.

The applicant's evidence was not entirely consistent. His first statutory declaration suggests a higher level of political involvement, where he states that:

The students decided to protest against this by giving speeches and handing out pamphlets. I participated in these protests. I told other students that this was their right to be able to get an accreditation number. As a result of the protests, the authorities arrested some students.

The applicant subsequently appears to have resiled somewhat from this position, stating at the hearing that on the occasions his friends were arrested and tortured that he had been caught between opposition and government groups, although he was not connected with either group.

However, this does not appear to be a material inconsistency, as the problems the applicant experienced at university do not appear to have either amounted to persecution in their own right – the applicant asserts at worst that he received lower marks than he had merited but he nevertheless was awarded his degree – nor to have given rise to any serious ongoing concerns. As the applicant also acknowledged at the hearing, apart from his concerns about

military service, the only possible concern flowing from his university days is the view that he has some family connection to an opposition party through his paternal uncle.

The Tribunal also has some reservations about the applicant's post-hearing statement, as explained below, for the reason that at times it differs both substantially and materially from his oral evidence at the hearing.

In any event, despite by and large accepting that applicant's *evidence*, the Tribunal does not agree with the applicant's *opinion* with respect to the risks he claims to face in the event that he returns to the Sudan. There are a number of reasons for this. Firstly, nothing serious appears to have happened to the applicant to date apart from being beaten by some fellow students for being conformist. He does not claim to have actually experienced any persecution in the past from the Sudanese authorities themselves, and despite a few difficulties, he graduated from his university with an engineering qualification. Secondly, the applicant was allowed to depart from the Sudan to return to Country 1 despite his outstanding military service obligations, which is quite inconsistent with the suggestion that the Sudanese authorities have an adverse interest in him. Thirdly, although the country information indicates that in general the human rights situation in the Sudan is poor, the Tribunal is unable to find country information which lends support to the applicant's specific claims.

The Tribunal's analysis is now set out under each of the Convention grounds against which the applicant has made claims.

Race/Non-Arab Ethnicity

The applicant claims to be at risk of persecution for reason of his non-Arab ethnicity. The Tribunal accepts that the applicant is from the non-Arab of the Nuba race. However, he appears to have experienced no problems in the past for this reason, and despite evidence of *discrimination*, there is no country information before the Tribunal to suggest that non-Arabs in the Sudan are persecuted outside of the conflict regions such as Darfur, where the conflict is between Arabs and non-Arabs, and in the north where the Nuba are experiencing displacement and associated problems. The Tribunal notes the evidence submitted by the applicant relating to the Kajbah dam dispute but has no evidence before it suggesting that the applicant himself is in any way connected to this dispute, or likely to be so connected by the Sudanese authorities. The applicant, on his own evidence, has never resided in the North of Sudan, and for the relatively minor part of his life that he has even resided in that country he appears only ever to have resided in City I

The applicant asserts that if compelled to perform his national service he will be sent to fight in Darfur because he is a non-Arab. However, he has produced no evidence to support this assertion, and the Tribunal has been unable to find any evidence that there is a real chance this will occur. The Tribunal notes that in his post-hearing statutory declaration the applicant deposes that this had happened to two friends of his, Person E and Person F, but this is at odds with the applicant's evidence at the hearing when he was specifically asked this question and said that he did not know of any people who had been sent to fight in Darfur. The applicant did specifically refer at the Tribunal hearing to Person E having been conscripted, but said that he did not know where he had been sent to perform his national service. The Tribunal does not, therefore, accept that the applicant's friends were in fact sent to Darfur as claimed.

The only evidence before the Tribunal of conscripts being sent to the front, in the latest US State Department reports extracted above, concerns those conscripted by the Darfur 'rebels' themselves. The country information does not support the proposition that non-Arabs are selectively sent to fight in Darfur, nor indeed that they are recruited selectively in the *Applicant S* sense or discriminated against in the Sudanese military generally.

On the evidence before it, even the possibility of discrimination on grounds of ethnicity in connection with the applicant's national service appears no more than remote to the Tribunal, given that the applicant has had no difficulty extending his exemption beyond the completion of his university studies, and been permitted to depart the Sudan and return to Country 1 despite outstanding military service obligations.

The Tribunal therefore does not accept that there is a real chance that the applicant will face persecution in the reasonably foreseeable future for reason of his race or non-Arab ethnicity.

Political Opinion

Actual Political Opinion

The Tribunal does not accept that the applicant is actively involved in or concerned about politics. On the contrary despite being involved in a demonstration at one point, he also went to considerable lengths to remain apolitical at university, and his subsequent refusal to join with students who refused to negotiate participate in a student strike for this reason led to him and a friend being physically attacked for refusing on one occasion by their fellow students who were politically active. The Tribunal accepts that this incident occurred, but does not accept that there is any real prospect of a recurrence given that he has now completed his undergraduate degree.

The applicant asserts that a lack of political affiliation will hamper his employment prospects, noting that if you are not a member of a political party it is very difficult to get a job in Sudan. The Tribunal accepts that the lack of a political opinion can nevertheless found a claim under this Convention ground. As the Federal Court of Australia observed in *Saliba v Minister for immigration and Multicultural Affairs*, (1998) 89 FCR 38, at 49:

... for *Convention* purposes, a claimant's political opinion need not be expressed outright. It may be enough that a political opinion can be perceived from the claimant's actions or is ascribed to the claimant, even if the claimant does not actually hold the imputed opinion.

The country information before the Tribunal supports the assertion that there is discrimination in government employment, to some extent in private employment, against those not affiliated with the government. However, it does not follow from this that the applicant, who is after all a qualified professional, would not be able to obtain some employment in the private sector. The Tribunal accepts that this constitutes discrimination, but finds that it does not amount to persecution for the purposes of s.91R as there is not a real chance that in the reasonably foreseeable future by, for example, denying the applicant's capacity to earn a livelihood of any kind, where the denial threatens his capacity to subsist.

The applicant also asserts that a lack of political affiliation will lead to him being discriminated against in the performance of his national service obligations by being sent, for example, to serve in a dangerous zone such as Darfur. Again, the applicant has not produced, and the Tribunal has been unable to find, any evidence to support this assertion.

There is no suggestion, and the Tribunal does not accept, that the Sudanese authorities themselves have targeted the applicant in the past or that there is a real chance he may encounter serious harm in Sudan in the reasonably foreseeable future for reason of his actual political opinion, including the lack of any specific political allegiance. On the contrary, the fact that he had his military service exemption extended and was allowed to depart for Country 1 suggests that there is no such concern.

Actual or Imputed Anti-government Opinion based on Objection to Performing National Service.

Although he initially claimed to have no objection to performing military service *per se*, and later said to the Tribunal that he would have no objection to doing so as long as he was assigned duties in keeping with his educational qualifications, the applicant nevertheless asserted that the war the Sudanese authorities are conducting in Darfur is an unjust war being waged on discriminatory grounds and that for ethical reasons he wants no part in it.

The Tribunal has some reservations about whether the applicant genuinely holds those beliefs, given the form in which his concerns were initially expressed, as well as his general detachment from political activity while at university, but is nevertheless prepared to accept that as a non-Arab the applicant may have legitimate ethical concerns about performing military service in an army involved in a civil war against a separatist movement comprising a significant minority of non-Arabs, and that if voiced, such concerns might be capable of being perceived as the holding of a political opinion. However, the Tribunal does not accept that the applicant will express any such concerns if he does return to the Sudan, in light of his stated apolitical position.

Neither does the Tribunal accept that there is a real chance of the applicant encountering serious harm capable of amounting to persecution in the reasonably foreseeable future whether because of those concerns or for reason of any imputed anti-government opinion which might be said to follow upon his objection to performing national service. Although penalties apply in Sudan for refusing to undergo military service, the Tribunal is aware of no information to suggest that objection to the performance of military service is viewed as the expression of a political opinion. Even if that were the case, given that the applicant was allowed to depart from the Sudan despite his outstanding military service obligation, apparently having been given permission to do because he had Saudi residency and wished to try to extend it, the Tribunal does not accept that the applicant would be imputed with any such opinion.

The Tribunal does not accept therefore that there is a real chance that the applicant will encounter serious harm capable of amounting to persecution in reasonably foreseeable future for reason of an imputed political opinion based on any objection to performing national service.

Imputed anti-government opinion based on relatives' political activities

The applicant asserts that at least one of his relatives has a political profile and has attracted the adverse attention of the Sudanese authorities in the past, as a consequence of which that attention has also been focussed on the applicant. The Tribunal has some concern about the magnitude of this claimed profile, as it has been unable to find any independent references to the relatives who the applicant claims are politically active, and the applicant himself has failed to produce any such evidence, despite having been invited to do so. If Person A were

indeed a prominent member of this group the Tribunal might have expected that independent evidence to that effect would be able to be obtained. In fact, not only could the Tribunal find no such evidence, it could not even find any reference to the political party itself (for example, the 2007 Political Handbook of the World contains no such reference), whereas references abound, for example, to the political party the applicant's relative in Australia is said to belong to. However, even if the applicant's relatives are or have been involved in such groups, the fact that the applicant has experienced no serious harm on account of these claimed political connections in the past leads the Tribunal to conclude there is no real chance of him doing so in the reasonably foreseeable future.

Membership of a particular social group

The applicant's claims raise the issue of whether he faces a real chance of persecution for reason of his membership of a particular social group on at least two discrete bases.

Family

The applicant's family is clearly capable of constituting a particular social group for the purposes of the Convention, and the applicant has claimed that he may be targeted owing to the political links of certain family members, thereby bringing this claim within the scope of s.91S. However, for the same reasons as are set out in repudiation of the applicant's claim to be at risk of persecution for reason of his imputed anti-government opinion based on his relatives' political activities, the Tribunal finds that there is not a real chance that he will encounter persecution in the reasonably foreseeable future for reason of his membership of the particular social group comprising his family.

Conscientious Objectors or Conscripts or Draft Evaders

The applicant's claims also raise the possibility of persecution for reason of his membership of a particular social group comprising conscientious objectors (whether full or partial) and/or draft evaders. Such categories are also, in the opinion of the Tribunal, clearly capable of constituting particular social groups for the purposes of the Convention, although in the particular Sudanese situation the Tribunal does not accept that the first category is a cognisable group, in light of the country information indicating that there is not only no provision for conscientious objection, there are also non known instances of it and, apparently, no difference in the way conscientious objectors as opposed to any other people trying to avoid military service are treated.

Sudanese law does, however, recognise and makes specific provision for conscription and also penalises draft evaders and, for that matter, deserters. Country information makes reference to such groups, and the Tribunal accepts that they are cognisable and otherwise satisfy the criteria set out in *Applicant S*. As these laws are laws of general application, penalising a person for breaching of them would not, in the ordinary course of events, constitute persecution for a Convention reason, but would merely amount to the enforcement of a law of general application. However, the applicant also claims that in connection of his national service he will be discriminated against because of his race and/or his political affiliation, whether in the course of performing it, by being assigned unpalatable duties, or possibly even by being denied the opportunity of avoiding altogether, an opportunity apparently afforded those with political connections. Implicitly, the applicant may also be suggesting that if he is punished for avoiding or attempting to avoid military service, he may be punished more harshly for one of these Convention reasons.

The Tribunal does not accept that this is so. The fact, if it be a fact, that some elites are able to avoid military service, does not necessarily mean that its imposition upon everyone else is discriminatory. It may simply mean, as the applicant's evidence of bribes being paid to secure this outcome, that military service can be avoided by corrupt methods if you have the right connections. The evidence does not suggest, however, that non-Arabs, for example, are targeted for that purpose. Although they may have been in the past, the Conscience and Peace Tax International report extracted above suggests that the reverse is now true, and that as a consequence of the evident unreliability of non-Arab, Darfur or south Sudanese conscripts in conflicts against their own people, the Sudanese military has been targeting rural Arabs in its recruiting efforts as it does not consider members of those minority groups to be reliable in front-line duties.

A consequence of this is that the Tribunal finds that there is no more than a remote chance that the applicant would be sent to perform such duties in the course of his national service, or could thereby come to be required to perform some of the deplorable acts for which the Sudanese military has rightly been condemned in respect, for example, of the conflict in Darfur, which might render the performance of his national service persecutory in its own right in the manner referred to in paragraph 170 of the Refugee Handbook and outlined by North J in his dissenting judgment in *SZAOG*, whether because the duties would of themselves be so repugnant, or because they would be duties to which the applicant was opposed on the basis of a genuine moral conviction. As the applicant himself testified, he would not have any problem with doing military service if he were able to do so in a manner consistent with and appropriate to his qualifications.

On the basis of the country information before it, and the applicant's experiences with the Sudanese authorities to date, the Tribunal does not accept as well-founded the applicant's fear that he will be punished or discriminated against in connection with the performance of his military service if he returns to the Sudan. It finds that there is no more than a remote chance that he will experience persecution in the reasonably foreseeable future for reason of his membership of any of the particular social groups described above.

Consideration of Claims Cumulatively

The Tribunal has also considered, but rejected, the possibility that the claims raised by the applicant under the different Conventions grounds might cumulatively give rise to a well-founded fear of persecution in the reasonably foreseeable future.

CONCLUSIONS

Having considered the evidence as a whole, 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

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

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 *Migration Act 1958*

Sealing Officer's I.D. Iward