

0902563 [2010] RRTA 312 (23 April 2010)

DECISION RECORD

RRT CASE NUMBER: 0902563

DIAC REFERENCE(S): 98/005509; CLF2007/92682

COUNTRY OF REFERENCE: Sudan

TRIBUNAL MEMBER: Adolfo Gentile

DATE: 23 April 2010

PLACE OF DECISION: Melbourne

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

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Immigration and Citizenship to refuse to grant the applicant a Protection (Class XA) visa under s.65 of the *Migration Act 1958* (the Act).

The applicant, who claims to be a citizen of Sudan, arrived in Australia [in] October 1998 and applied to the Department of Immigration and Citizenship for a Protection (Class XA) visa [in] November 1998. The delegate decided to refuse to grant the visa [in] September 1999 and notified the applicant of the decision and his review rights by letter dated [in] March 2009. This was the renotification of the decision [of] September 1999 (see *Chan Ta Srey v MIMIA* [2003] FCA 1292 Federal Court of Australia, Gray J, V995 of 2003, 12 November 2003).

2. 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.
3. The applicant applied to the Tribunal [in] April 2009 for review of the delegate's decision.
4. 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

5. 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.
6. Section 36(2) of the Act, as in force before 1 October 2001, provided that a criterion for a protection visa is that the applicant for the visa is a non-citizen in Australia to whom Australia has protection obligations under the 1951 Convention Relating to the Status of Refugees as amended by the 1967 Protocol Relating to the Status of Refugees (together, the Refugees Convention, or the Convention).
7. Further criteria for the grant of a Protection (Class XA) visa are set out in Part 866 of Schedule 2 to the Migration Regulations 1994.

Definition of 'refugee'

8. 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.

9. The High Court has considered this definition in a number of cases, notably *Chan Yee Kin v MIEA* (1989) 169 CLR 379, *Applicant A v MIEA* (1997) 190 CLR 225, *MIEA v Guo* (1997) 191 CLR 559, *Chen Shi Hai v MIMA* (2000) 201 CLR 293, *MIMA v Haji Ibrahim* (2000) 204 CLR 1, *MIMA v Khawar* (2002) 210 CLR 1, *MIMA v Respondents S152/2003* (2004) 222 CLR 1 and *Applicant S v MIMA* (2004) 217 CLR 387.
10. 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. These provisions were inserted on 1 October 2001 and apply to all protection visa applications not finalised before that date.
11. There are four key elements to the Convention definition. First, an applicant must be outside his or her country.
12. 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.
13. 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.
14. 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.
15. 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.

16. 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.
17. 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

18. 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.
19. The applicant appeared before the Tribunal [in] July 2009 to give evidence and present arguments.
20. The applicant was represented in relation to the review by his registered migration agent who attended the hearing.
21. The applicant's claims were presented in a statutory declaration, dated [in] July 2009, to the Tribunal as follows:

1. I am a citizen of Sudan. I fled Sudan in 1993 and have not returned since. I fear that if I am forced to return to Sudan I will be subject to arrest, detention, torture and death at the hands of the Sudanese Government ("the Government"), particularly members of the National Islamic Front (NIF). I fear that the Government will target me mainly because of my antigovernment actions and opinions, including my membership of the Democratic Unionist Party (DUP) and my activities as an active DUP member. I fear that I will also be targeted due to my family's opposition to the Government, including my father's membership and activities with the DUP, my brother's membership and activities with the DUP and my father's published articles criticising the Sudanese government.

My childhood and early political involvement

2. I was born in Sudan on [date]. My father is [name] and my mother is [name]. I have two brothers, [Brother 1] and [name] and three sisters, [names].

3. I grew up in Sennar, Sudan until I was around 6 or 7 years old. We then relocated to the south of Sudan around late 1979 where my father took up a position as a lecturer at [University A]. He worked within the [faculty]. We lived here for around 1 and a half years. I recall at the time that there was a significant presence of army and army checkpoints as this was the start of the insurgency in southern Sudan.

4. Towards the end of 1980, when I was around [age] years old, we moved to England where my father undertook post graduate studies. We lived initially in [City 1], Scotland and then we moved to [City 2], [County 1] My brother [Brother 1] was born while we were living in England and is a UK citizen.

5. I spent approximately the next 7 years growing up in England I became fluent in English and completed the majority of my high school studies there. I spent my

formative years living in a free and democratic society and I grew up with a deep respect for democracy and political freedoms such as the right to freedom of speech.

6. Sudan was still ruled by the dictatorship while we were living in England and my parents were active in speaking out against this through their participating in the Sudanese student union. This was a group of Sudanese students who were studying in England. The Sudanese student union would hold conventions, gatherings etc throughout England to protest against the dictatorship. Opposition to the dictatorship encompassed people who were members of the NIF as well as people who were members of the National Democratic Alliance (NDA). The NDA included members from all across the political spectrums, from extreme left to extreme right. Everyone was working together as they all had a common goal of ridding Sudan of the dictatorship.

7. Several of the NIF members we knew in England are now senior members of the NIF, including [names and positions deleted]. My father knew these people personally and I also grew up knowing them. I am familiar with them and they are familiar with me as well.

8. Around 1987, when I was around [age] years old, the dictatorship was overthrown and so my family returned to Sudan. Sudan was in a period of budding democracy after the people had managed to overthrow the dictatorship. There was a general feeling that Sudan would have a bright and positive future. My father took up a position as a lecturer at [University B] and we travelled between the cities of [cities] as required for my father's work. In addition to his work as a university lecturer, my father was also politically active. He wrote articles in various newspapers and took on the position of senior advisor for the candidate in our local constituency. In this role he would organise rallies, conventions and speak publicly about his political

9. In 1987-89, post elections there was a brief period of relative stability in Sudan and people concentrated on resuscitating the workings of the country which had been left in tatters by the military junta. There were several mainstream parties as well as the left wing parties and the NIF, led by Omar Hassan al-Bashir. Initially, many parties were engaged in power sharing in the parliament, but at the same time there was discord between the parties. The NIF was a main instigator of instability at this time. They were a minority party and only had a few seats in the parliament. They wanted more power so the NIF would instigate demonstrations and riots and social discords as a way to undermine the democracy that was in place.

10. In late 1988, the spiritual leader of the Khatmia sect, the largest Sunni Muslim community in Sudan, Mohammed Osman Al-Mirghani, (who is also the president of the DUP), signed a peace deal with the Sudan People's Liberation Army (SPLA) which would end the conflict that had been ongoing in the south for decades. The peace treaty provided that there would be a new constitution in Sudan that would be inclusive of all communities regardless of race, religion and creed. The NIF saw this as a direct threat to their aims of establishing Islamic law in Sudan and began working with the army to undermine the burgeoning democracy.

11. On 30 June 1989 the military, at the direction of the NIF, overthrew the democratically elected government, citing the danger that the peace treaty posed to their aims for Islamic law in Sudan. Sudan has remained in the control of the NIF since this time. The coup was based on the peace treaty signed by the DUP in Addis Ababa in 1985 and the DUP is the only party that remains in exile to this time.

12. After coming to power, the NIF persecuted anyone who was opposed to them. They used emergency laws to repress free speech and "Ghost houses" became common as a means of countering any opposition. Most of the senior members of all political parties, journalists, union leaders, anyone who threatened the NIF regime were either arbitrarily detained, placed under house arrest, kept under surveillance. For example my uncle, [name], was part of the [industry] workers union and was arrested for his involvement in the union. He was held for several weeks, released, re-arrested, released. After this occurred several times people he knew helped him to flee to the United States where he was granted refugee status. Anyone who had been involved in politics was scared of what may happen to them and did what they could to leave Sudan. My father fled Sudan at this time and has not returned since.

13. My father went to [Country A], [Country B], [Country C] and eventually [Country D]. He has remained politically active in exile.

14. My mother, my siblings and I remained in Sudan as my father had to flee extremely quickly and the government was cracking down on potential dissidents leaving the country. It was a period of stress and anguish as we were scared that my father would be caught. Our house remained under surveillance after my father fled. Whenever we received mail, it was clear that it had been tampered with. Members of the neighbourhood arm of the Popular Army, the paramilitary group of the NIF, would come to our house late at night, particularly if we had visitors.

15. I opposed the NIF rule. I had grown up in a politically active family and had been aware of political issues from a young age. I had experienced democracy and political freedoms growing up in the LTK and after growing up attending rallies and calls for democracy, I appreciated how hard won the fall of the dictatorship in Sudan was in 1987. I then experienced the military takeover in 1989. I knew that the NIF rule was completely contrary to what I had grown up with and what my parents had been fighting for. I did not believe that the NIF had the good of the country, or the people, at heart. I saw that they were very corrupt, inflation when up and a small group of elite people had everything while the masses had nothing. The NIF hid behind the cloak of religion which made it very difficult to oppose them. The introduction of Ghost Houses brought political terror to the neighbourhoods. The NIF would recruit, coerce or bribe people in the neighbourhood to conduct surveillance and do in family and friends. They created an atmosphere where you never knew who you could trust. The NIF introduced curfew laws to control people. They introduced compulsory military training for anyone 18 or above, which had to be completed before you could undertake university. They also picked people up randomly on the streets to undergo military training. Thousands were sent to their deaths in the jungles of the south. I had many friends who were kidnapped and forced into these camps. I heard from their family members that some were killed and some just never came back. For all of these reasons I opposed the NIF.

16. In 1990, while I was in my senior secondary school years, I became involved in the student union as a way of expressing my political dissent. I was elected several times by my class to represent them in the student union. The majority of members on the student union supported the democracy alliance and we used the student union as a way of being able to meet to discuss politics. We held gatherings and exhibitions where we would expose practices of the NIF. We held rallies in support of dissidents who had been victims of torture and arbitrary detention. This was quite dangerous at a time when any form of opposition was harshly punished by the NIP. A minority of the student union members were loyal to the NIF so we still had to be careful about how and what we said when we all met.

17. Several of my friends who were members of the union were arrested and tortured as a result of their involvement in these student union activities. I was interrogated several times by NIF security forces about my involvement. The security forces would come to my house at all hours of the night. They would ask me if I knew certain people and who had been at meetings. They would look for any material that showed that the student union was carrying out activities that were opposed to the NIF. These were always very intense interactions and I was very scared the entire time.

Decision to flee Sudan

18. Despite being in exile, my father was still active in speaking out and writing articles against the government from overseas. People with active family members outside of Sudan were increasingly being subject to arrest and were also being denied visas to travel outside of Sudan. My mother, my siblings and I were scared that the government may take revenge against us for our father's writings so we decided that we should leave Sudan while we still could. I believe that the only reason why we could get visas was because a family friend of ours worked in the passport office. She was [a high ranking police officer] We knew her very well so she helped arranged passports for myself and my family. We were also assisted by a distant family member who was [position deleted: s.431(2)]. He helped us obtain tickets and entry visas for [Country A].

19. Towards the end of 1993, we flew to [Country A] from Sudan. A family friend assisted us at the airport to obtain our boarding passes and to ensure that we could pass through security.

20. I lived in [Country A] for around two months before we obtained temporary entry visas to [Country D]. My father was living in [Country D] at this time.

21. I lived in [Country D] for a few months. There was more freedom to express our opinions about the Sudanese government in [Country D] than in Sudan. In [Country D] it was possible to gather with other Sudanese to discuss politics and there was also some tolerance for freedom of speech. I would regularly meet with other Sudanese community members in community clubs to discuss issues relating to Sudan. However, it is not possible to get a permanent visa to remain in [Country D], your stay is always dependent on whether you have a job. I wanted to continue my studies and I could not do this in [Country D] so I had to leave.

Student activities in India

22. In 1994, I obtained a student visa to India. India is a popular destination for students from Sudan as it is an English education, it is possible to obtain entry into a college there and the cost of living is cheaper than other English speaking countries. Many other Sudanese and other Africans had studied in India before me.

23. Around [month] 1994, I commenced a [subject] Degree at [University C] in [City 3], India. There were thousands of Sudanese students studying in India and there were many Sudanese unions which were representative bodies for the Sudanese students studying in India. All across the country there was a power struggle in the unions between the pro NIF and the pro-democratic students.

24. There were many reported clashes during the time I was studying in India arising out of the different treatment of pro-NIF students by the Sudanese Government. Before 1994, all Sudanese citizens could apply for scholarships to study overseas. In

1994, the Sudanese government formed the opinion that students were forming a hot bed of resentment while studying overseas so they suspended all scholarships, except for pro-NIF students. This took effect immediately and anyone who was not pro-NIF had to find other means of support in order to complete their studies. The pro-NIF students continued to receive assistance from the Sudanese government in order to complete their studies. These students had undergone paramilitary training in Sudan and although they posed as students, the real reason they had been sent to India was to infiltrate the students and stifle any opposition.

25. We had a Sudanese student union at [University C] where I was studying. I was an active member of this union. I joined as soon as I commenced studying. Through my union, I participated in the broader Sudanese student unions in India by attending conferences and gatherings in cities such as [City 4] and [City 5], where there were larger Sudanese student numbers. At these conferences we discussed ways of assisting the students who were stranded after the Sudanese government had ceased their scholarship program. We approached UNESCO and other organisations for assistance for these students. Because there were large numbers of students who had been affected by the discontinuation of the scholarships, there was a lot of tension between the pro-NIF students and the prodemocratic students. The pro-NIF students tried to take control of the Sudanese union to prevent the pro-democratic students speaking out about the discontinuation of their scholarships, the treatment of their families in Sudan and the treatment of students who had been returned to Sudan. We were informed by other members of the union that student who returned to Sudan, particularly those who had been active in speaking out about the issues in Sudan while overseas, faced retaliatory measures including arbitrary detention and torture. The students who had been forced to return before completing their studies due to the discontinuation of their scholarships were prevented from completing their studies in Sudan. There were many clashes in India when elections for the unions took place as pro NIF student resorted to violence. These clashes led to the involvement of Indian police on several occasions. I was present in [City 4] and [City 5] representing my section of the union at the times of these clashes. Despite the pro-NIF students being a minority of the Sudanese students studying in India, they managed to obtain around 40 per cent control of the union as they had the funding to support them and would resort to underhanded means to win power. This included threatening other students standing for union places and threatening or coercing other students to vote for them.

26. As a member of the union, I had close contact with the students and other union members. The other students and union members knew who I was. The pro-NIF students would report back to senior NIF security officials in Sudan on what was happening in India so I have no doubt that NIF security forces would have been aware of who I was. We knew from reports of returned students that we would be punished in Sudan upon our return for our activities in India.

27. Towards the end of 1996, I discontinued my studies in India. I obtained a visitor visa to [Country D] where my family was then living.

28. The visitor visa did not give me any right to stay permanently in [Country D]. I was forced to leave [Country D] to renew my visitor visa every two months. After several months, I obtained employment as a hotel receptionist and then as a customer service representative at [employer]. My continued stay in [Country D] then became dependent on my ongoing employment. I wanted to resume my studies so I began looking into student visas in various countries. I applied for a visa for the United States but this was refused because of tensions at the time between the US government and Sudan. As I was leaving the US Embassy, I saw the Australian

Consulate and decided to apply for a visa to Australia. I applied for a study visa to Australia to assess my education options. This visa was valid for around 6 months.

Australia

29. I arrived in Australia on [date] 1998. When I got to Australia I thought about what was happening back in Sudan and that I would never be able to return there as I feared that I would be persecuted by the NO forces upon my return. [Country D] had only ever been a temporary destination as it is not possible to claim asylum there. It is only possible to live there while you are sponsored by an employer or a spouse which does not give permanent residence in [Country D]. Even my father, who has been outside of Sudan for 20 years now, does not have permanent permission to reside in [Country D] He is sponsored by his employer and is only allowed to have his wife and children under 18 included in his visa.

30. On [date] November 1998, I applied for a Protection visa in Australia. My application was refused by the Department of Immigration on [date] September 1999. I did not have an ongoing legal advisor at that time and I mistakenly believed that I needed to provide supporting documents to the Refugee Review Tribunal at the time I lodged my appeal. I was waiting to receive additional supporting documents so by the time I lodged my appeal I had missed the date to lodge the appeal by one day. As a result, the Refugee Review Tribunal held that they had no jurisdiction to hear my case.

31. I sought legal advice from a private solicitor within the African community. I do not think that this person was very familiar with protection claims. I am not sure what he did on my behalf. I believed that I was granted a Bridging Visa E which kept me lawful.

32. Around this time I was forced to change accommodation in order to find work. I had been relying on my own savings and had permission to work. I was living in Sydney when I lodged my application. I advised my lawyer and I believe he advised DIAC of my change of address to the suburbs of Sydney As time went by I continued to move further and further away from the inner city in order to find work and affordable accommodation.

33. I was very stressed after the refusal of my RRT application. I was very fearful of being deported. There was a lot of information in the media about the treatment of asylum seekers and refugees at the time that increased my fears of getting in touch with the authorities, including the Tampa incident, the indefinite detention of asylum seekers etc.

34. The situation in Sudan was escalating at the time and I had genuine fears that I would face persecution if I were returned. The leadership of the DUP originates in the Khatmia sect, Sudan's largest Sunni Muslim group. They were religious teachers in origin and also sponsored trade and education and contributed to the development of society. The NIF was confiscating DUP properties at the time and carry out extrajudicial harassment of political opponents in Sudan. I came to know about detentions that happened to people I had been friends with and participated in union activities in Sudan. They were detained in the government "Ghost Houses". The security forces would use emergency laws to arrest people in the middle of the night. Junior members, the foot soldiers of the NIF, would carry out these activities. Many of the people who had been junior members of the NIF security at the start of the coup were now senior members within the security forces. They were very familiar with people on a personal level as they used to operate in local neighbourhoods. They

would be aware that I had not been living in Sudan for a very long time and I knew that I would be questioned about this if I returned. However, I knew that because I had missed my Tribunal lodgement date by one day, the Australian government would not give further consideration to my claims.

35. Because of my fears of being persecuted if I returned to Sudan, I remained in Australia. I travelled around Australia from Sydney, throughout Queensland, the Northern Territory and Western Australia I worked on farms, stores, cattle ranches and in restaurants. I got to see a lot of the Australian outback and met some great people.

36. In late 2007, I was in Perth when I came into contact with [Person A], a lawyer working for [refugee organisation]. I discussed my circumstances with him and based on his advice, I presented myself to the Department of Immigration. [Person A] submitted a 48B request to the Minister for Immigration on my behalf asking the Department of Immigration to allow me to have my claims for protection reassessed. I understood that this request was being considered by the Department of Immigration. I obtained new evidence and up to date information supporting my claims and provided this to the Department of Immigration. I contacted Amnesty International in Sydney, where I was now living. They independently verified my claims and provided information to the Department of Immigration in support of my application.

37. Around the end of March 2009, I received a letter from the Department of Immigration renotifying me of the original decision of [date] September 1999 to refuse my protection visa. I applied to the Refugee Review Tribunal within the allowed period of time.

Ongoing fears of persecution

38. I continue to fear that I will face persecution at the hands of the Sudanese government, particularly the members of the NIF if I am returned to Sudan I wish to respond to the findings of the Department of Immigration in 1999 that it would be safe for me to return to Sudan.

39. I believe that I am personally known to the NIF. The NIF members who I knew personally when I was growing up in Sudan were junior members at the time but have now moved up the ranks and are senior members of the NTF in the security forces and the government. These people will be aware that I oppose the Government and that I support the DUP. They will also be aware of my father's opposition to the Government and the activities he has engaged in on behalf of the DUP while in exile. These people will be aware that I have not lived in Sudan for over 16 years now and that my family left for political, not economic reasons.

40. My father's activities within the DUPINDA have continued unabated from exile. Through community conventions and regional media, he had continually raised concerns about the plight of the Sudanese in their war torn country and about the suppression of human rights in Sudan He is a career academic who has always been committed to educating Sudanese and raising issues that affect the future of the country. [Information relating to the applicant's father's political writings deleted: s.431(2)]. We are from the Bidayria tribe. My family is from the Bidayria tribe in the north but we also have extended clan members in the west and south west who have suffered directly from the conflict in Darfur In addition to his general opposition to what is happening in Darfur, this cultural connection this is one of the reasons why

my father has been so active in criticising the government about the genocide in Darfur.

41. My father also regularly participates in DUP and NDA conferences in [Country A], [Country C], the UK and [information deleted in relation to activities in Country D]. His participation in the DUP, and profile within the party, is confirmed in the correspondence from [Person B], [position] of the DUP which I provided to the Department of Immigration in 2008.

42. My longstanding involvement with the DUP is also confirmed by [Person B] in the correspondence I provided to the Department of Immigration in 2008.

43. In 1998, in support of my protection visa application I provided two letters from the DUP in London confirming my and my father's involvement in the DUP and also a letter from the DUP in [Country C] which confirmed my involvement in the DUP. In the decision to refuse my protection visa dated [date] September 1999, the case officer stated that she believed the letters of support provided with my application were not genuine and unreliable. I dispute this finding, as the letters were genuine. I understand that the Department of Immigration checked the letter from the DUP with the UK and [Country C]. I understand that the DUP staff in [Country C] confirmed our involvement in the DUP, but the letter was discounted as there was no record of it at the [Country C] office. I believe it is unfair to discount this letter, simply because they did not have proper record keeping processes in place. The Department of Immigration sought to verify the letter from the UK with [Person C], who was [position] of the DUP in the UK at the time, rather than with [Person D] who had written the letter. [Person D] was very well known to us from Sudan and had provided the letters of support as he was personally aware of our involvement and circumstances. The letter provided by [Person D] described our personal circumstances, and is clearly not just a letter that is provided generically to anyone who asks. We did not personally know [Person C], the person the Department of Immigration spoke to, and as we were not living in the UK we were not recorded as members of the DUP in the UK. Around two years ago, I was told by [Person B], the current [position] the DUP, that they had been experiencing problems with [Person C] who has now left the DUP and fled the UK. We understand from [Person B] that [Person C] has relocated to somewhere in the Middle East and the DUP suspect that he has been working with for the NIF to inform on dissidents and undermine the operations of the DUP.

44. My brother, [Brother 1] is a UK citizen and lives in [City 6] in the UK. He is a [office holder] for the DUP in the UK. [Information about Brother 1's political activities deleted: s.431(2)].

45. I believe that I would be targeted upon my return to Sudan because of my past activities and because of my family's profile within the DUP. I believe that I would be detained by government security forces at the airport for interrogation as soon as I arrive. These security forces take extreme measures against people they suspect of not supporting them, including beatings, torture, arbitrary detention and even execution. If I were released by the security forces, I believe that I would be kept under surveillance, as is common in Sudan.

46. I would find it unbearable not to be able to exercise my right to free speech or association when I know that there are many people who are being subjected to violations of their human rights. It would not be possible for me to live in Sudan and not speak out about what I know is happening there, which would further bring me to the attention of the security forces and put my life in danger.

47. The regime in Sudan is currently under pressure from world bodies for the atrocities that have been committed in Sudan, particularly in the South and in Darfur. They are particularly sensitive to any criticism and are known to resort to all types of measures to stifle criticism and retain their power. There is ample country information detailing how the Sudanese government treat citizens who speaks out against the atrocities the government has committed.

48. For the first time in history, the sitting President of a country is facing International Criminal Court charges of genocide. This has led to further isolation of the regime and panic within the regime that they will lose their power. I believe that they will not hesitate to retaliate against anyone who speaks out against the regime. In addition to my known anti-government opinions, I believe that I may be at further risk as someone who has been living in a Western country and who may be considered part of the Western plot to hold the President to account for his actions.

49. I would also be at danger of being captured on the street by government security forces and being forced to undertake military service. If you are suspected of being a dissident, the government is more likely to send you to a conflict zone or a remote rural area so they can test your loyalty to the regime and minimise your freedom of movement.

50. As noted in paragraph 40 above, I am from the Bidayria tribe and have extended clan members in the west and south west who have been affected by the conflict in Darfur. As many people from Darfur have fled to urbanised areas for medical treatment or to seek shelter, they have become targets. In Khartoum and other major urban centres there has been an increase in arrests, detention and confiscation of property over the last few years of people who are deemed to be sympathetic to the situation in Darfur or who may come from western Sudan. The security forces may use this connection as a basis to legitimise their questioning of me as they will be able to identify that I have extended clan members in western Sudan through my name and family background. This will give the security forces an initial basis to question me, which will then give them the opportunity to further question about my political views and actions.

51. In light of the above, I believe that I am a refugee and that Australia owes me protection obligations.

22. The above declaration was accompanied by a submission by the applicant's adviser which included a letter of support from [name deleted: s.431(2)], dated [in] June 2009; [information relating to articles written by the applicant's father deleted: s.431(2)].
23. Tribunal also received a fax [in] July 2009 from the applicant which included a copy and a translation of the communiqué from a conference of the DUP (UK and Northern Ireland Branch) held [date and information regarding Brother 1 deleted: s.431(2)].
24. At the Tribunal hearing, the applicant essentially reiterated his written claims and provided some further clarification as follows:
 - He contacts his father roughly once a month and his father visits other countries when he is sponsored by various employers.
 - He was familiar with people who were in the DUP and activists in India.
 - He said that his case does not only concern political but also ethnic issues.

He described his father's place in the DUP and his continuing work on its behalf; his consistent opposition to the NIF. The DUP now is 'doing it hard' - it has its headquarters in the UK and nuclei in Eritrea and Ethiopia. DUP people are not usually able to put their point of view where they are hosted.

He said that were he to return he would be targeted not only by the government but also by vigilantes on its behalf. The people whom he knew and who knew him are now in positions of power as senior officials who are staunch supporters of the regime. They remember him from his time at school and in India. They had been sent to India as spies for the NIF. They were familiar with members of the union of which he was one. His uncle was imprisoned and his father is black-listed. He would be in grave danger and they would be forewarned about his arrival. He stated that the elite would now do anything to maintain the power that they have. His time in England and in Australia has confirmed his political views and he has been exposed how rights and the rule of law work. He would be unable to remain silent in Sudan.

He made reference to Amnesty International material which was on its way to him (and which the Tribunal received [in] July 2009), in addition to other documents provided which support his case.

The Tribunal discussed relocation to other parts of Sudan with the applicant. He stated that this would not be an option for him as the government has 'spies' everywhere and bases its intrusion into the lives of people on the tribal system. "Ghost houses" still exist and no part of Sudan would be safe for him.

25. [In] July 2009 the Tribunal received a submission from the applicant's adviser to which were attached the following:

A fax from the applicant's father dated [in] July 2009. This summarises his political involvement in Sudan and elsewhere over a period of almost 50 years.

[Information relating to an on line article published by the applicant's father deleted: s.431(2)].

Letter from Amnesty International dated [in] July 2009 to the applicant enclosing information regarding the current human rights situation in Sudan with particular focus on issues affecting the applicant.

26. The situation in Sudan is illustrated by the following excerpts:

The U.S. Department of State, BUREAU OF DEMOCRACY, HUMAN RIGHTS, AND LABOR, 2009 Country Reports on Human Rights Practices –Sudan – released on 11 March 2010

Sudan, a republic with an estimated population of 40 million, is governed according to a power-sharing arrangement established by the 2005 Comprehensive Peace Agreement (CPA), which ended the 22-year civil war between the north and south and established an interim Government of National Unity (GNU). The CPA calls for national elections to be held in 2009; however, elections did not occur during the year. The GNU is composed of the National Congress Party (NCP), dominated by Islamists from the north and ruled by authoritarian President Omar Hassan al-Bashir and his inner circle, and the Sudan People's Liberation Movement (SPLM), the political wing of the Sudan People's Liberation Army (SPLA) led predominantly by Christians and practitioners of traditional indigenous religions from the south. The most recent national elections were held in 2000; Bashir was reelected, and his political party won 340 out of 360 seats in the parliament in deeply flawed elections

boycotted by all major opposition parties. The SPLM is the ruling party of the semiautonomous Government of Southern Sudan (GOSS), established in 2005. The GOSS ratified a separate constitution in 2005. A referendum to determine whether the south will become an independent entity is scheduled for 2011. The country experienced several violent conflicts during the year. While civilian authorities in the north generally maintained effective control of the security forces and government-aligned militia outside of Darfur, there were frequent instances in which elements of the security forces and government-aligned militia acted independently in Darfur. In the south, civilian authorities generally maintained effective control of security forces, but there were frequent instances in which elements of the security forces acted independently.

...

The following human rights abuses occurred: abridgement of citizens' right 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, incommunicado detention of suspected government opponents, and prolonged pretrial detention; executive interference with the judiciary and denial of due process; obstruction of the delivery of humanitarian assistance and the expulsion of humanitarian NGOs; restrictions on privacy; restrictions on freedom of speech; restrictions on the press, including direct censorship; restrictions on freedoms of assembly, association, religion, and movement; harassment of IDPs; harassment and closure of human rights organizations; violence and discrimination against women, including female genital mutilation (FGM); child abuse, including sexual violence and recruitment of child soldiers, particularly in Darfur; preventing international human rights observers from traveling to/within Sudan; trafficking in persons; discrimination and violence against ethnic minorities; denial of workers' rights; and forced and child labor.

...

b. Disappearance

The government was responsible for politically and ethnically motivated disappearances.

There was one reported development regarding the up to 2,500 cases of Darfuris detained by the NISS following the May 2008 JEM attack. By the end of 2008 authorities had released most of the detainees, but several hundred were still reported missing at the end of that year. On April 5, authorities released Barood Sandal, a prominent human rights lawyer arrested in the days following the May 2008 attack, after the prosecutor dismissed the case for lack of evidence. NISS agents immediately arrested him again and held him until April 23.

There were no developments in the case of Abdelillahi Widaa, cofounder of the NGO Darfur Forum for Reconciliation and Peaceful Coexistence, who turned himself in to the NISS for questioning in May 2008. As of year's end his whereabouts were unknown.

An estimated 15,000 Dinka women and children were abducted from villages in Southern Sudan, mainly from 1983 to 1999; thousands of these persons remain unaccounted for. In contrast with the previous year, the government Committee to Eradicate the Abduction of Women and Children (CEAWC) did not receive

government funding and did not return any previously abducted persons. The UN Children's Fund (UNICEF) estimated that 4,000 Dinka abductees remained in South Darfur.

Gunmen in Darfur abducted humanitarian workers and UNAMID personnel (see section 1.g.).

...

c. Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment

The Interim National Constitution prohibits such practices; however, government security forces continued to torture, beat, and harass suspected political opponents and others.

Government security forces beat and tortured persons in detention, including members of the political opposition, civil society activists, and journalists. These persons were often subsequently released without charge.

...

d. Arbitrary Arrest or Detention

The Interim National Constitution prohibits arbitrary arrest and detention without charge; however, the government continued to arbitrarily arrest and detain persons, often under the National Security Act.

...

Political Prisoners and Detainees

The government held an undetermined number of political detainees. Security forces detained without charge, tortured, and held incommunicado political opponents. Detentions of such persons often were prolonged.

On January 14, authorities arrested without charge Popular Congress Party (PCP) founder Hassan Abdalla al-Turabi and PCP Secretary of Foreign Relations Bashir Adam Rahmaand. Both were released on March 8. Two days before the arrests, Turabi had called for President Bashir to appear before the ICC.

On February 15, authorities arrested PCP Deputy Secretary General Kamal Omar and subsequently sentenced him to eight months in prison for defamation and publication of false news. The charge was in relation to an article he had written in 2006 in which he claimed the NISS discriminated against a group of Darfuris. He spent two months in prison before being released upon appeal.

The government detained persons who participated in political protests (see section 2.b.).

The government did not permit international humanitarian organizations to have access to political detainees.

...

b. Freedom of Peaceful Assembly and Association

Freedom of Assembly

Although the Interim National Constitution and law provide for freedom of assembly, the government severely restricted this right in practice. The government formally banned all rallies and public demonstrations in the country, although this was not always enforced.

Islamic orders associated with opposition political parties, particularly the Ansar (Umma Party) and Khatmiya (Democratic Unionist Party), continued to be denied permission to hold large public gatherings, but did hold regular opposition rallies on private property. Government security agents occasionally attended opposition political meetings, disrupted opposition rallies, and summoned participants to security headquarters for questioning after political meetings.

Authorities prevented persons from meeting to discuss the elections planned for April 2010.

Police use of excessive force to disperse persons resulted in injuries.

On March 11, at Dilling University in Southern Kordofan State, a group identified as students, former students, and NISS officials broke up an authorized student forum. The NISS officials and others attacked the group of approximately 200 students with sticks and iron bars. Ten students were reportedly injured.

On December 7, authorities in Omdurman arrested 146 persons, including SPLM Secretary General Pagan Amum and Head of Northern Sector Yassir Arman. Many, including Yassir Arman, were beaten by police. The arrests followed an SPLM-led demonstration aimed at delivering a memo to the National Assembly speaker calling for progress on pending key legislation needed for CPA implementation. Authorities also arrested an additional 120 persons in protests in the northern cities of Wad Madani, El Obeid, and El Hasahisa. All those arrested were released by the following morning.

On December 14, police arrested several high-ranking opposition party members, including prominent Umma Party member Mariam Al-Sadiq, along with approximately 100 other protesters as the group attempted to march to the National Assembly following a political rally in Omdurman. Security forces used excessive force and tear gas to disperse the crowd of approximately 300 demonstrators. Authorities released those arrested by the following morning.

Authorities took no action against security forces that used excessive force.

...

Freedom of Association

The Interim National Constitution and law provide for freedom of association, but the government severely restricted this right in practice. There were 76 officially registered political parties as of August 31. The law effectively prohibits political parties linked to armed opposition to the government. SLM/MM was not permitted to register. The government continued to harass some opposition leaders who spoke with foreign organizations or embassies.

The government impeded the work of the UN High Commissioner for Refugees (UNHCR) and delayed full approval of UNHCR activities, particularly in North and

South Darfur In some cases it cooperated with the UNHCR and other humanitarian assistance organizations in assisting refugees and asylum seekers. In previous years the government defied agreements and targeted refugees and asylum seekers for abuse, although specific information regarding whether this occurred during the year was not available. The government permitted refugees from Eritrea and Ethiopia to remain in the country and travel to Khartoum.

In the south the GOSS cooperated with the UNHCR and other humanitarian organizations in providing protection and assistance to IDPs and returning refugees.

The government required citizens to obtain an exit visa to depart the country. While the issuance of exit visas was usually pro forma and not used to restrict citizens' travel, the government did deny some humanitarian workers exit visas.

Authorities regularly impeded and monitored political party and NGO meetings and activities, and arrested participants.

For example, on June 23, in the state of Khartoum, authorities prevented a public discussion on elections by an NGO. Authorities told the organizers that they needed prior approval to hold the event.

On August 6, the NISS disrupted a public talk about the upcoming elections. Security forces dispersed the crowd from the Sudanese Congress Party and ordered the organizers to cancel the event. The organizers had reportedly obtained all the necessary permissions and clearances to hold the public event.

On September 9, the NISS prevented three organizations from holding a symposium on elections at Khartoum University.

In the south authorities obstructed the activities of Democratic Change (SPLM-DC).

On July 3, SPLA soldiers arrested two members of the recently formed SPLM-DC. One of the men was released on July 13 and stated that SPLA members beat him while in custody. The other person was reportedly beaten so severely that he required hospital care and was subsequently released by the SPLA.

27. The Tribunal also makes reference to the letter from Amnesty International provided by the applicant which confirms many of the statements made in the US Department of State reports.
28. The Tribunal has also considered the country information provided by the adviser in her submission.

FINDINGS AND REASONS

29. The applicant is a [age deleted: s.431(2)] male of Muslim religion. He travelled to Australia on a valid Sudanese passport and an Australian visitor visa of three months' duration granted in [Country D] [in] September 1998 In light of this documentation the Tribunal finds that he is a citizen of Sudan and will consider his claims against that country.
30. Over a period of almost thirty years the applicant has travelled and lived in a number of countries including the UK, [Country D], India, [Country A] and [Country B]. There is no evidence before the Tribunal which would indicate that he has the right to enter and reside in any country other than Sudan or that he has protection in any third country.

31. The Tribunal finds that the applicant is a credible witness. He has provided the Tribunal with a number of documents which corroborate his story and which coincide with independent country information.
32. The essence of his claims is that he would be persecuted on return to Sudan for reasons of his political opinion and for reason of his membership of a particular social group, namely his family, given that his father has a profile as a political activist.
33. The applicant claims that he participated in anti-government activities over a number of years both in Sudan and in India as a student; he further claims that he was well known at the time and that the persons who were his contemporaries and who did not share his political views or were plants of the repressive state, are now in positions of power thus they can identify him. He would be further exposed to persecution because of the political activities of his father who has, for almost 50 years been battling for democracy and the rule of law in Sudan [information relating to the applicant's father's writings deleted: s.431(2)].
34. The Tribunal accepts the applicant's claims of his work in the DUP and student associations in the UK and in India. The above country information indicates that the current regime does not tolerate any opposition and deals with any kind of challenge to the *status quo* by extrajudicial means. It has a history of covert security operations against any dissident opinion and once taken into custody persons do not have any due process to fall back on or any recourse for the abuses which are committed during detention even if the detention were lawful.
35. The Tribunal accepts that the applicant has a profile of activism and that despite the passage of time and because of his encounters with people who are now in positions of power he would be identified and harmed. The Tribunal thus finds that the applicant faces a real chance of persecution for reasons of his political opinion, now or in the reasonably foreseeable future, should he return to Sudan.
36. The applicant has also claimed that he would be persecuted or his situation would be exacerbated because of his belonging to a particular social group, that is, his family, in the sense that his father before him has a profile as an activist, was harmed because of it and has been in other countries for a long time because of this.
37. It is well established that a family is capable of constituting a particular social group within the meaning of the Convention. However, this is subject to s.91S of the Act, which provides that the following matters must be disregarded in determining whether a person has a well-founded fear of being persecuted for reasons of membership of a particular social group that consists of the person's family:
 - (a) any fear of persecution, or any persecution, that any other family member has experienced, where the fear or persecution is not for one of the Convention reasons; and
 - (b) any fear of persecution, or any persecution, that the applicant or any other family member has experienced, where it is reasonable to conclude that the fear or persecution would not exist if it were assumed that the fear or persecution mentioned in (a) above had never existed.

38. Therefore, a person who is pursued because he or she is a relative of a person targeted for a non-Convention reason does not fall within the grounds for persecution covered in the Convention definition.
39. In this particular case the reason for the persecution which the applicant's father has experienced does fall within the reasons contemplated by the Convention (political opinion) therefore s.91S does not apply.
40. Given its earlier finding, the Tribunal does not strictly need to consider the claims relating to the applicant's father, however, given that the activities of the applicant were, for a time at least, occurring at the same time as his father and given that it was, in fact, the departure of the father from Sudan which increased the chance of persecution for the applicant, the Tribunal finds that this connection increases the chance that the applicant would be identified on return and places him at an increased level of risk given that his father is still active in his work against the regime in Sudan. The Tribunal therefore finds that the applicant's membership of a particular social group, that being his family, is also an essential and significant reason for which he faces persecution on return.
41. The focus of the Convention definition is not upon the protection that the country of nationality might be able to provide in some particular region, but upon a more general notion of protection by that country: *Randhawa v MILGEA* (1994) 52 FCR 437 per Black CJ at 440-1. Depending upon the circumstances of the particular case, it may be reasonable for a person to relocate in the country of nationality or former habitual residence to a region where, objectively, there is no appreciable risk of the occurrence of the feared persecution. Thus, a person will be excluded from refugee status if under all the circumstances it would be reasonable, in the sense of "practicable", to expect him or her to seek refuge in another part of the same country. What is "reasonable" in this sense must depend upon the particular circumstances of the applicant and the impact upon that person of relocation within his or her country. However, whether relocation is reasonable is not to be judged by considering whether the quality of life in the place of relocation meets the basic norms of civil, political and socio-economic rights. The Convention is concerned with persecution in the defined sense, and not with living conditions in a broader sense: *SZATV v MIAC* [2007] HCA 40 and *SZFDV v MIAC* [2007] HCA 41, per Gummow, Hayne & Crennan JJ, Callinan J agreeing.
42. The Tribunal has considered whether the applicant could reasonably relocate to another part of Sudan to avoid the harm which he fears. Having considered the country information cited above and practicability of such relocation, as well as the information provided by the applicant, the Tribunal finds that relocation is not a reasonable option in terms of *Randahwa* above.
43. In light of the above evidence and discussion, the Tribunal finds that the applicant faces a real chance of persecution for the Convention reasons of political opinion and membership of a particular social group, now or in the reasonably foreseeable future, should he return to Sudan, thus his fear of persecution is well-founded.

CONCLUSIONS

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

DECISION

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

I certify that this decision contains no information which might identify the applicant or any relative or dependant of the applicant or that is the subject of a direction pursuant to section 440 of the *Migration Act 1958*.

Sealing Officer: PRMHSE