

**0907217 [2010] RRTA 75 (16 February 2010)**

**DECISION RECORD**

<b>RRT CASE NUMBER:</b>	0907217
<b>DIAC REFERENCE(S):</b>	CLF2009/32712
<b>COUNTRY OF REFERENCE:</b>	Tunisia
<b>TRIBUNAL MEMBER:</b>	Karen Synon
<b>DATE:</b>	16 February 2010
<b>PLACE OF DECISION:</b>	Melbourne
<b>DECISION:</b>	The Tribunal affirms the decisions not to grant the applicants Protection (Class XA) visas.

## STATEMENT OF DECISION AND REASONS

### APPLICATION FOR REVIEW

1. This is an application for review of decisions made by a delegate of the Minister for Immigration and Citizenship to refuse to grant the applicants Protection (Class XA) visas under s.65 of the *Migration Act 1958* (the Act).
2. The first named applicant claims to be a citizen of Tunisia and the second named applicant, his wife, a citizen of Morocco. The applicants arrived in Australia [in] February 2009 and applied to the Department of Immigration and Citizenship for Protection (Class XA) visas [in] March 2009. The delegate decided to refuse to grant the visas [in] August 2009 and notified the applicants of the decision and their review rights by letter [on the same date].
3. The delegate refused the visa application on the basis that the first named applicant is not a person to whom Australia has protection obligations under the Refugees Convention.
4. The applicants applied to the Tribunal [in] September 2009 for review of the delegate's decisions.
5. The Tribunal finds that the delegate's decision is an RRT-reviewable decision under s.411(1)(c) of the Act. The Tribunal finds that the applicants have made a valid application for review under s.412 of the Act.

### RELEVANT LAW

6. Under s.65(1) a visa may be granted only if the decision maker is satisfied that the prescribed criteria for the visa have been satisfied. In general, the relevant criteria for the grant of a protection visa are those in force when the visa application was lodged although some statutory qualifications enacted since then may also be relevant.
7. Section 36(2)(a) of the Act provides that a criterion for a protection visa is that the applicant for the visa is a non-citizen in Australia to whom the Minister is satisfied Australia has protection obligations under the 1951 Convention Relating to the Status of Refugees as amended by the 1967 Protocol Relating to the Status of Refugees (together, the Refugees Convention, or the Convention).
8. Section 36(2)(b) provides as an alternative criterion that the applicant is a non-citizen in Australia who is a member of the same family unit as a non-citizen (i) to whom Australia has protection obligations under the Convention and (ii) who holds a protection visa. Section 5(1) of the Act provides that one person is a 'member of the same family unit' as another if either is a member of the family unit of the other or each is a member of the family unit of a

third person. Section 5(1) also provides that ‘member of the family unit’ of a person has the meaning given by the Migration Regulations 1994 for the purposes of the definition.

9. 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’**

10. 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.
11. 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.
12. 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.
13. There are four key elements to the Convention definition. First, an applicant must be outside his or her country.
14. 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.
15. 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.

16. 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.
17. 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.
18. 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.
19. 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**

20. The Tribunal has before it the Department’s file relating to the applicants. The Tribunal has also had regard to the material referred to in the delegate's decision, and other material available to it from a range of sources including the applicants’ tourist visa applications.

## **Protection Visa Application**

21. The first named applicant is a [age deleted: s.431(2)] year old married man from Tunisia who describes his ethnicity as ‘North African’ and his religion as Moslem. He speaks, reads and writes French and Arabic and speaks English. He has had 15 years of schooling and lists his previous occupation as cook. The first named applicant lists his mother, eight siblings, two sons and ex-wife as living in Tunisia. His wife, the second named applicant, is aged [age

deleted: s.431(2)] and is a citizen of Morocco. She describes her ethnicity as Arab, her religion as Moslem and speaks, reads and writes English, French and Arabic and speaks [Country 1 language]. The second named applicant has had 15 years of schooling and lists her previous occupation as [occupation deleted: s.431(2)]

22. Only the first named applicant has made specific claims under the Refugees Convention. For convenience, therefore, the Tribunal will refer to the first named applicant as the applicant.
23. In his protection visa application the applicant claims to have left Tunisia for fear of torture and arrest and claims that the photos submitted are evidence of the torture he suffered in Tunisia. He claims to fear harm from the secret police “as they have in the past demanded funds for their corrupted acts” He claims that the authorities in Tunisia will not protect him because they are a tool of the dictatorship of the Tunisian regime “who for years have oppressed and intimidated any opposition” In response to question 48 the applicant said he left Tunisia legally and at question 56 answered that he has not applied for refugee status in any other country.
24. In a statutory declaration attached to his protection visa application and dated [in] March 2009, the applicant made the following claims:

I started working different jobs when I left high school then I got married. The women I loved so much and with her help I started my own business of clothes with her support. When my business started to boom some political parties asked me to help and join them, and I was not really interested in that political area.

I am aware of the dictatorship in my country since late 2002, until now (mafia Tajama Destouri Democracy). This party belongs to the government. They started placing pressure on me to give a donation to the party and I did because I have no other choice I also gave them money because I was really scared for my family and my business as it became too much and I couldn't handle it anymore. I was then called to the police station of [Location 1] from there they took me to the capital of Tunis to a secret police and I was tortured for 3 days and nights. There were about 8 of them threatening me with all sorts of threats and torture. They started bashing me they broke my right shoulder and they done damage to my spine. The last day was when one of them took a blade shaver and started to hurt me with it on my arms and on my chest, I started bleeding and they kept doing it until so much blood came out. After they were done they threw me in the streets. I think they threw me in the streets because they didn't want me to die in their custody. I was so scared to go to the hospital so that the authorities don't find me. I had some people passing by wanting to take me to the hospital, I refused and I asked them to take me to my sister's house. When I got to my sisters house I stitched my wounds and I didn't want to talk to my wife or kids about anything.

My business was shut for nearly one month till I met this guy who comes from a decent family who is [Person 1]. What I found out about [Person 1] was that his [relative] was the leader of human rights in Tunis ([Person 2]) who had too much problem with the government and I decided to join [Person 1]'s party (Hezb Dimocrate Echtiraki). [Person 1] faced a lot of problems because he was the [relative] of [Person 2] and how many times the secret police humiliated and intimated him. I was really impressed with his personality, quality and courage. I started inviting him to my place so that he can

meet my wife and kids and we started surfing the internet at my place and see the reports of human rights violation in Tunisia Several Humanitarian Groups and the report of European Parliament Tunisia Human Rights Watchers. Then he started to introduce me to other members of this party who believe strongly in freedom of speech and democracy and I was enthusiastic to work against this government of bastards and crooks who run this country. I met [name] and [Person 3 and Person 4] early 2004. I was asked along with [Person 3] to deliver pamphlets against the Tunisian Regime at night secretly from house to house to make people aware of the regime we have and how this country's wealth was divided into two parts one for Trabelsi family and the other for Bin Ali family which they eliminate any political decedent in there way. There is no real Politics in Tunisia as is seen by all human rights groups in the world about Tunisia.

We heard about the arrest of [Person 4] in the month of December who had (sic) the guy responsible of printing the pamphlet's and had bad history record with the Tunisia government. I had no choice only to flee the country or I was forced to leave because I knew under torture [Person 4] will reveal all our names. I left the Tunisia on the [date] of December, 2004 which was the last time I saw my then wife and children. I contacted my then wife when I was in Libya but was too afraid to keep in contact. My wife was forced by the government to divorce me and I was always afraid to call my wife not to jeopardise her and my children's life.

25. Also on the Department file are the following relevant documents:

- Certified copies of [Country 1] 'Certificate of Alien Registration' cards for both applicants;
- A certified copy of the applicant's passport issued [in] June 2004 showing travel to [Country 1], China, Turkey, Japan, Jordon, Egypt and Thailand;
- An 'Attestation of Marriage' from the Embassy of Morocco recognising the marriage of the applicants in Seoul [in] 2008;
- Four photographs of scars on a man's torso and arm;
- A letter addressed to the Australian Red Cross from [name deleted: s.431(2)] dated [in] May 2009. This letter, which concerned the applicant's eligibility for ASAS benefits, noted that the applicant "presented as extremely anxious and became visibly upset and to cry on disclosing some of his past experiences and explaining how he is currently feeling" The letter notes that he had been placed on a priority waitlist for counselling;
- Tunisian country information from Amnesty International dated December 2002 and March 2005

### **Application for Review**

26. [In] September 2009 the applicants lodged an application for review.

27. [In] October 2009 the following statutory declaration, dated [in] October 2009, was received:

I was born on the [date] in [Location 1], Tunisia. I have lived there all my life until I fled in December 2004. I did my primary schooling at [school] I completed my secondary schooling at Lycee Mixte in [Location 1], which I finished in 1989. I also completed a two-year diploma at a tourism studies school called [name] in 1991.

When I was living in Tunisia I was married to my wife [name] and had two sons [ages] and one daughter aged [age] from this marriage. My former wife and our children are in Tunisia. In 1998 I started a small business. It was a shop where I sold [items] and imported Chinese [items] Initially, we had a normal life.

I have two brothers and four sisters who all live in Tunis, Tunisia. My mother lives in [Location 1] My father passed away in [year].

From 2002 until 2004 I was harassed by the local government. The government demanded donations from all shop owners. Initially I went along with the demands and gave the donations. The mayor and members of the police would drop by my shop and ask for donations, sometimes every day for a period of a few months. The mayor would request money for the "26 fund" or a "corporation bank" which are both for the "national solidarity funds". I have attached information on these funds from the internet. These funds raise money for government administration as well as for social causes. The contribution is demanded from business owners. We would not get printed receipts for the donations.

Although the government claims it is voluntary, this has never been my experience. The demanded contribution can range from 150 Tunisian Dinars but once they took 1700 Tunisian Dinars off me. The government asks for more depending on the turnover of the business. The government says if you don't pay, your business will be closed down. Every time there is a public celebration or religious festival, you are asked to pay.

In the beginning of 2004, I stopped giving donations because I couldn't give them from the profits of my business. I didn't have enough to feed my family. I told them I don't have the money, I could hardly feed the family and I had debts so I couldn't give money to the government.

At the end of 2003, I started to become involved in the Hezb Dimocrate Echtiraki (The Democratic Socialist Party) which also became known as the Movement of Socialist Democrats. The Democratic Socialist Party was banned by Tajama Destouri Democracy, whose French name is Rassemblement Constitutionnel Democratique. The Arabic name and the French name both mean Constitutional Democratic Rally. I use the Arabic name because Arabic is my native language. Tajama Destouri Democracy is the main governing party. I do not know why the Departmental officer was unable to find information on this party. I attach a copy of material from the internet confirming that the Democratic Constitutional Rally, the Rassemblement Constitutionnel Democratique and the Tajama Destouri Democracy are all names given to the same governing party. There are some opposition parties but they are not at all powerful.

I became involved in the Democratic Socialist Party through my friend [Person 1]. [Person 1's relative] is [Person 2], a prominent human rights activist in Tunisia. He is the leader of an official opposition party but was also a leader of this party (which was banned until recently). I believe that at the last elections the Democratic Socialist party was allowed to run candidates and got a portion of the votes. I attach information from the internet confirming the existence of this organization. I do not know why the departmental officer was unable to find this information but the spelling of names and the order in which words are used can be confusing.

[Person 4], a friend of [Person 1]'s was responsible for printing the leaflets that I helped to distribute. [Person 1] had problems with the government because his [relative] opposed the government and belonged to the Democratic Socialist Party. The Democratic Socialist Party is one of the opposition parties to the dominant party, Tajama Destouri Democracy. I joined the party because of the situation I was put in because of the unfairness of the government. I wanted to protest against them.

From the end of 2003 until I left in late 2004, I participated in secret political activity with the Democratic Socialist Party. I would go with my friends to [town] which is about 20km away from [town]. We used to distribute pamphlets and give them to our friends, leave them at houses and the university. We left about 200 pamphlets each time, sometimes we would give our friends 50 - 100 and they would distribute them to houses. We would distribute them about once or twice a week. Other people would organize the distribution, print the pamphlets and I would go together with [Person 1] since I had a car. The pamphlets showed the oppressed people the things were happening and the wealth of people as was shown on television didn't show the reality of the situation. The pamphlets showed how people are imprisoned and some are in exile to show the government as it is. My role was to distribute leaflets.

Membership cards were not distributed since the party was secret and not allowed. The party had meetings but I've never been to any. As far as I understood from [Person 1], they meet outside of Tunis. I was never asked to attend any meetings. I was never responsible for planning or information.

The Departmental officer said that it was not plausible that I was captured and tortured because I described myself as "not really interested in that political area". I meant that I was not a person with a prominent political profile that you would find on the internet, like [Person 2]. I was politically involved at a local level which in Tunisia is enough to attract the attention of the authorities who monitor all political opposition at every level and consider anyone who takes part in political activities to be a problem to them.

In mid-February 2004, after I refused to pay the demanded donations for the first time, the police took me to the police station in my town. About three policemen came to the bar I was at, at around 7pm, then took me to the police station. They began questioning me. The police officers came up to me and said they had to take me to the head of the police, [Person 5] at the police station.

From the moment they took me out of the police car at the [Location 1] station to when I entered the police station, they were physically assaulting me. In the police station, I was confronted by [Person 5] and between seven to ten police officers. [Person 5] asked me why I hadn't paid. I explained to him that my business was not doing well and I couldn't afford to feed my family and that was why I couldn't pay the "26 Fund" donation. In response, [Person 5] accused me of being a member of the Democratic Socialist Party. I denied this and I said I had nothing to do with it. I was afraid if I confirmed this I would go to jail for being part of a forbidden organization. [Person 5] and the other police officers were extremely physically and verbally abusive and intimidated me. I was punched and kicked and I fell on the ground. I was then put into a dirty room with a toilet in it about 2.5 metres by 3 metres. I then went to the toilet. I was there for 15 minutes then they came and collected me. They then starting swearing about my mother and swore at me. In total, they punched and kicked me for about four hours until 11pm. They took their time. They had coffee and cigarette breaks while they were beating me. Then I slept in the room with the toilet overnight. I suspect they found out about my political activities through informants.



Some different policemen then took me to Tunis the next morning to the secret police headquarters. They took me into the headquarters and it was dark, I couldn't see where it was and I wasn't sure where I was. When I was handed over, the [Location 1] police told the secret police I was supporting the Democratic Socialist Party and handed over a written document. I did not read it or see it but I believe they were documents about me.

The secret police questioned me and kicked and hit me. There were about eight policemen coming in and out of the room. They asked me about certain individuals, but I did not know who they were. I was very fearful of them while they were questioning me. The secret police said to me they suspected me of distributing pamphlets against the government. I denied it and I said they should prove it. They said soon that they would have the evidence that I was distributing the pamphlets and prove it against me. It is a crime in Tunisia to distribute pamphlets critical of the Government. The secret police also asked me why I didn't pay the donations the Government asked for and then they beat me up. They said I was against the government and swore on my mother. I was held in police custody in Tunis for 3 nights. They told me that I would be prosecuted for my political activities.

They beat me on the face but my main injury was my dislocated shoulder. I was cut with a shaving razor on my arms, legs and chest repeatedly over time. There was a room at the police headquarters where I was beaten and tortured. I was held with other people in an adjoining room. I was beaten during the night and the day, any time and at any hours. I was unable to sleep for more than an hour at time . I had to sleep standing up. In total, I was held by the police for 4 nights including the night I spent with the police in [Location 1].

I still have a remaining shoulder injury and pain from the dislocation. I have pictures of bruising, which the Department has. The doctor also asked me about the injuries at my health assessment at the Department of Immigration. I still have scars from the cutting.

When the secret police finished torturing me, they left me in the streets in Tunis. I was dizzy and bleeding and exhausted. I think they did this because they might have been afraid I was going to die in their custody. People wanted to take me to the hospital because I had open wounds but I refused because I was scared of the authorities finding me. I asked some passers by to take me to my sister, [name] house in Tunis. I stayed at my sister's house for three days. For a week, I was confused and didn't know what to do. I didn't go and see a doctor because they might have asked me questions about how I got my injuries. If I told them I would get into more trouble with the authorities.

When I started to recover, I travelled back to [Location 1]. I had no other option but to go back to my family. In [Location 1] I resumed my work in the shop. I didn't tell my wife and kids about anything that happened at first. But then I had to tell my wife because she saw my injuries.

I also continued to distribute pamphlets with my friends but with extreme caution. I was torn between worry for my life and my loyalty and commitment to the Democratic Socialist party. However, I continued because I hated the government and because of my beliefs. I thought the Government was corrupt to insist on the donations from shop owners and I thought they were doing a bad job. I wanted there to be a change of government. I was involved in political activity because I wanted to get more support for the opposition party I supported. I felt the best way to get change in out country was to let people know how bad the government was and to encourage them to seek a change.

My activities were clearly of interest to the authorities who prosecuted and convicted me for being involved with an unauthorized party and distributing pamphlets. There is now a warrant out for my arrest and I have a conviction against me for my participation in political activities.

Part of my business was to travel to Algeria to purchase [particular] items. I did this four times from June 2004 to December 2004. I was afraid the first time while I was crossing the border but I noticed I wasn't harassed by the border authorities and so I continued to go another two times because I needed to maintain my business. I was still not sure that the police were going to go through with their threats to prosecute me. I was careful not to attract any attention from customs.

After my third visit to Algeria, in about late November or early December, they arrested my friend, [Person 4], who had been printing and distributing leaflets with me. That made me especially afraid when I heard of his arrest because I know of the sort of torture with which he would have been inflicted. I suspect that with that torture he would have confirmed I was still involved in political activities. I feared that the authorities were coming after us one by one as they had threatened to do when they had detained me. I then decided to leave for good.

I closed down my business in December 2004 and left again to go to Algeria. However, when I got to Algeria I realized I could not stay in Algeria because it is very close to Tunisia and I didn't feel safe. I went back to Tunisia for 12 days [in month] to go somewhere else for good. I did not go out of my house because I was afraid of the authorities.

I had obtained a passport in June from Jendouba, another city in my province. I didn't need to go through the authorities in [Location 1]. Jendouba is about [number] km away from my area. The court hearing was not held until December so there would not yet have been a record of the action against me that the passport authorities would have access to. If I had applied after the court order was made against me I would have not been able to get a passport because there was a warrant out against me. When I fled the country I did not know I had been convicted in my absence as I did not know of nor attend the hearing. I believe I was able to travel in and out of Tunisia in December for the same reason as I was able to get a passport. The authorities had not yet had time to make the decision against me widely known as it was only made on [date] December 2004.

I kept in contact with my wife about a year after I fled. For that year, my wife told me that she was often threatened regarding her employment with [government department], because of her connection with me. She was pressured to divorce me. She divorced me because the Director of the Institute she worked for said she could not continue to work for the Government while she was married to someone who was involved in political opposition. The police had been to see him and told him to tell her that. She divorced me in 2005.

I met my current wife [name] in [Country 1] in 2007. I married her in 2008 in [Country 1] under Islamic Sharia laws at a mosque. She is a citizen of Morocco.

I found out from my brother around June 2009 of a court decision against me. The court decision is attached.

I found out about the decision when my brother, who lives and works in the Tunisian capital, Tunis, traveled to my area to get copies of my children's birth certificates which I had asked him to obtain. While he was there, in [months] 2009, someone told him about the decision. I asked him to get me a copy but he was afraid to involve himself too closely for fear of attracting the attention of the authorities. He appointed a lawyer who obtained a copy and sent it to me.

The Department did not have a copy of this order when they made their decision because I was not aware of it at the time I made my application. My brother obtained the court decision through a solicitor and scanned it and sent it to me by email. The court decision provides that pursuant to the police investigation on [date] 2004 I am sentenced to four and a half years in jail and three years probation. I thought there might be a court hearing sometime because I was told after the police investigations that I had a court hearing. But I didn't know when it would be or whether it was just a threat.

I am very afraid to go back because I am scared I will be imprisoned, tortured and persecuted for my political affiliation. The court order shows that I will be jailed for four years and six months with 3 years probation for "being affiliated with an unauthorized party, and distributing pamphlets". This shows that I am a person of interest to the authorities because of my political activities. I cannot reside anywhere in Tunisia because I would be endangering my family and the police would find me as I have a court decision which sentences me to jail.

I do not have effective protection in a safe third country. I attach a letter from the Moroccan embassy in this regard.

## **The Hearing**

28. The applicant and the second named applicant appeared before the Tribunal [in] November 2009 to give evidence and present arguments. The Tribunal also received oral evidence from the second named applicant. The Tribunal hearing was conducted with the assistance of an interpreter in the Arabic and English languages.
29. Although the applicant was represented in relation to the review by a registered migration agent. The applicant's agent did not attend the hearing.
30. At the commencement of the hearing the Tribunal asked the applicants if it was intended that the second named applicant would give witness evidence at the hearing and advised them that, if so, she would need to leave the hearing room while the applicant gives his evidence. The applicant said his wife would give evidence.
31. The Tribunal commenced by telling the applicant what issues it needed to be satisfied about concerning his claims and that it would be focussing its questions on these issues at the hearing. The issues primarily are: his claimed political involvement and activity, his claim to have been arrested and tortured, his claim to have been convicted, his travel and employment history and why he did not seek protection in other countries he had visited and/or lived in.
32. The Tribunal said that it would like the applicant to provide the original of the document titled 'A Criminal Court Order' as it could place little weight on the poor copy provided and it would like to send the original document to be examined for authenticity. The applicant said the original court document is in Tunisia and that he will try to contact his brother to get it but that may be difficult as there are problems with his brother. Asked to explain the applicant said there have been problems with his ex-wife and brother who had not returned his 15-20 phone calls. The applicant further explained that when he left Tunisia he gave his

land and all his assets to his ex-wife and when his brother found out about this they fought. The Tribunal asked why his brother would be concerned about the applicant leaving his assets to his ex-wife. He responded that he was living in his father's house while his brother lived in capital, about [number] kilometres away, and that he gave his part of the house to his ex-wife who then sold it but that his brother and sisters had a right to their share of it. The applicant said he will try to contact his brother again but that he has not contacted anyone in Tunisia for 5 years except his wife who he phoned from Libya and his brother who he only contacted recently. The Tribunal said it understood from his written evidence that his brother had engaged a lawyer to get this information so it would be possible for him to contact the lawyer directly to request the original document.

33. The Tribunal asked the applicant why he came to Australia. He said he was working in [Country 1] and his passport was about to expire and he needed to have a current passport to renew his [Country 1] working visa. He went to the Tunisian embassy in [Country 1] but they refused to renew it telling him he was "requested by the Tunisian authorities" and "needed to go to prison". He said he could only apply for a new passport from within Tunisia after he had served 10 years in jail and that they were not allowed to renew his passport in [Country 1]. The applicant said that if he went back he thought he would have to go to prison. Seeking clarity on this issue the Tribunal asked the applicant three times if the embassy staff told him he had been sentenced to prison time. After several indirect answers he said no, they did not but he thought he would have to do prison time.
34. The Tribunal asked why he thought he would have to go to prison as, in his written evidence, he said that he only found about the court order in May or June of this year. The applicant said that when he was arrested in [month deleted: s.431(2)] 2004 he had a 'search file' and everyone who has a search file has to go to court but they did not tell him the date and time. He said he was sentenced in his absence. The applicant said he knew he was sentenced and if he went back to Tunisia he would have to go to jail. The Tribunal asked exactly when and how he found out he was sentenced. The applicant explained that he contacted his brother as his was the only phone number he had because he needed someone to get his children's birth certificates. He said when his brother went to his town to get the birth certificates he was told the applicant had been sentenced.
35. The Tribunal asked the applicant why, in his tourist visa application, he answered no to the question 'have you been charged with any offence that is currently awaiting legal action'. He responded that he knew he had to leave [Country 1] and had to do everything he could to get the visa. He also said that when he applied for the tourist visa he did not know he had been sentenced. The Tribunal pointed out that there are two questions on the application one that relates to being convicted of a crime and the other in relation to having been charged and pointed out that he had said earlier in the hearing he knew he had been charged. The applicant responded that he really didn't know and he didn't want to involve his life in Tunisia he just wanted to explain his life in [Country 1].
36. The Tribunal asked why he chose Australia and he responded he thought he would be able to get refugee status here. He said Australia is an organised, elegant country that recognises

human rights and he had heard on the news that Australia supports different causes, for example starvation in Africa. He said he first wanted to go to Europe but it does not recognise human rights.

37. The Tribunal asked the applicant how he came to live in [town deleted: s.431(2)] after arriving in Sydney. He said his wife knows a Moroccan man married to an Australian who lives in [town deleted: s.431(2)] and they stayed with him for 2 days and then rented their own house. He said they only stayed in Sydney for one day and did not know anyone else in Australia.
38. The Tribunal asked the applicant to explain when he graduated with his diploma. He said he graduated from his diploma in 1991/1992 and first married in 1995. The Tribunal asked if his current passport is his first; he said no, it was a renewal of a passport first issued in 1998 or 1999.
39. The Tribunal then asked the applicant to explain all the overseas travel he had done both from within Tunisia and later. The applicant explained his travel thus:
  - Libya End of 1999 for 3 or 4 days by himself for the purpose of tourism.
  - Algeria Many times as it was only [number] kms from his home in Tunisia.
  - Ireland October 2000 to 2001 to work for 3-4 months at a hotel in [town].
  - Libya [date deleted: s.431(2)] December 2004 – [date deleted: s.431(2)] June 2006.
  - Egypt [date deleted: s.431(2)] June 2006 -[date deleted: s.431(2)] August 2006 for tourism (left and returned to Libya) and later for one day before travelling to Morocco.
  - Morocco [date deleted: s.431(2)] January 2007 for 7 days for tourism.
  - [Country 1] [date deleted: s.431(2)] February from Morocco with a 2 hour airport stopover in Paris.
  - China 3 visits from Korea because he was in Korea on 90 day visas. He stayed in China for 7 days on each occasion in order to apply for a new 90 day [Country 1] visa.
  - Thailand Twice for tourism. First [in] July 2008 for 10 days and then [in] October for 5 days.
  - Japan Spent 3-4 hours en-route to [Country 1] but had a visa for 90 days.
  - Morocco [date deleted: s.431(2)] August 2007 for 20 days spending one day in Turkey en-route.
40. The Tribunal asked the applicant how he came to work in [Country 1] and if he applied for a work visa from overseas. He said that Tunisian citizens do not need visas and he went to Korea by chance because he likes Asia. He said that when he went to [Country 1] he had no plans to stay as he thought he would go to Japan but he found he liked [Country 1], liked his job and was comfortable there so he stayed. The applicant said he got work rights and

temporary residency in [Country 1] [in] 2007 for one year and then [in] 2008 for another year until [date deleted: s.431(2)] 2009.

41. The Tribunal asked the applicant to explain his employment history up to the time he left Libya. The applicant explained his employment thus:
- 1993/94 [Hotel 1] Tunisia.
  - 1994/95 [Hotel 2] Tunisia.
  - 1995 - 1998 Various jobs - nowhere permanent
  - 1998 – 2004 Small business selling [items].
  - 2000/2001 Four month [occupation] job in [town], Ireland.
  - 2005/2006 [Occupation] at [Company A], Libya.
  - 2006 [Occupation] at [Company B]), Libya.
42. The Tribunal put to the applicant that he had claimed in his tourist visa application that he had worked at the ‘[Hotel 3]’ in Tripoli from [date deleted: s.431(2)] January 2004 until [date deleted: s.431(2)] May 2005 which was different to the evidence he had given today. The applicant explained that the staff from the company he worked for, [Company A], stayed at the [Hotel 3] and “they were like the same company”. The applicant said he was paid by [Company A] but worked at the [Hotel 3]. Asked if the dates were correct and he started work there in January 2004, the applicant said he arrived in Libya in December 2004 so he started at [Company A] then. He said it should be 2005. The Tribunal also put to the applicant that he claimed in his tourist visa application that he worked at [Hotel 1] from [date deleted: s.431(2)] June 2000 to [date deleted: s.431(2)] September 2003 which is not what he told Tribunal today. He said he did not know and maybe, because he wanted to get the visa, he did not pay much interest to the dates. The Tribunal said that it raised concerns about his credibility given that there appeared to be inconsistencies, in relation to his employment history, between the evidence he provided today and the information contained in his protection visa application and his tourist visa application.
43. The Tribunal asked the applicant why he did not apply for protection in [Country 1]. He responded “they don’t give asylum there”. The Tribunal told the applicant this was not correct and that authoritative information before the Tribunal supported this explaining that [Country 1] is a signatory to the Refugees convention and that he could have applied for asylum there. The applicant said “I asked around and was told that [Country 1] only gives visas to people from Iraq involved in the war and then not to everyone” The Tribunal put to the applicant that he could have claimed protection in Paris, Japan or [Country 1] and this undermines his claim to have been fleeing persecution. He responded that he only had the idea [for asylum] when his passport was going to expire and then he had no other choice.
44. The Tribunal adjourned the hearing for 20 minutes to allow the applicant to have a break before resuming to discuss his specific claims of persecution.

45. Upon resumption the Tribunal told that applicant that, in relation to his specific claims of persecution, his two statutory declarations, one dated [in] March 2009 provided to the Department and one dated [in] October 2009 provided to the Tribunal, contained significant inconsistencies. The Tribunal said that it would commence by asking questions regarding these inconsistent matters.
46. The Tribunal asked the applicant if he became politically active and joined the Democratic Socialist Party after meeting [Person 1] and he responded yes. Asked when this was he said the start of 2002. The Tribunal asked when he joined the party and he said that when he was introduced to [Person 4] he joined the party. The Tribunal asked if this was at the start of 2002 and he said yes.
47. The Tribunal noted that the applicant had claimed that he was not given a membership card because the party was illegal and asked him why he thought this. He responded that [Person 1] told him they don't have membership cards because it is illegal and not approved by the government. He said the main person he had contact with was [Person 1]. The Tribunal put to the applicant that independent country information showed that the Movement of Socialist Democrats had stood candidates for election and asked him how it could be an illegal party if it had stood candidates for elections. The applicant said there were no elections in 2001/2002. The Tribunal said it was referring to before and after that time to which the applicant said he didn't know anything about this. The Tribunal asked if it was correct that he did not know anything about the Party's activities before 2002 and he said yes. The applicant said he had no interest in politics before then but after seeing the way the government treated him he had had enough of the government and that was when he "was some kind of forced to join the group". The Tribunal asked what he meant when he said he was forced to join and he responded "because they asked so many things of me, they were hitting me, they were bashing me, they were calling me names" that I said I need to join a group, I need to do some change". The Tribunal asked him to explain when "they were hitting and bashing him" and he said "the beatings started in 2004 but in 2002 they used to take lots of lots of money from me". The Tribunal put to the applicant that he had just said he had to join because he was being hit and punched and, in his next statement, that they did not hit him until 2004. The applicant responded that the beatings did not happen until 2004. The Tribunal again put to the applicant that he had just said that the reason he joined was that he was forced into it because he was being hit and punched. The applicant said "it didn't happen like that" and said that the government forced him to give money but this money was not for the poor people but for the President's wife or her relations. He said [Person 1] spoke to him about this and he was helping deliver leaflets but he did not know he was joining. He said he would not have joined if he knew what was going to happen. The Tribunal asked the applicant to clearly state if he joined a political party or not. He responded yes.

48. The Tribunal asked the applicant if he was claiming to have been arrested and tortured before or after he met [Person 1]. He said after; it was the start of 2004. The Tribunal said that in his statutory declaration [in] March 2009 he had said in the period after his claimed arrest that “my business was shut for nearly one month till I met this guy who comes from a decent family who is [Person 1]”. The applicant responded “yes, but then I wasn’t being hit, they were taking lots of money from me”. The Tribunal said it was clear from his first statutory declaration that he claims to have been arrested and tortured and, after that, met [Person 1] however this appears to be a different claim to that in his second statutory declaration when he said he was arrested and tortured after he met [Person 1]. The applicant said the lady [Adviser A] who typed the [first] declaration for him did not take her time but that the asylum seeker people gave him time and he felt very comfortable with them. He said that everything he told them, they wrote down. The Tribunal said it had two inconsistent statutory declarations before it which raises significant issues. The applicant said in 2002 they were just taking money and that’s when he met [Person 1] and joined the party but he did not know what he was getting himself into; he just felt he needed to do something.
49. The Tribunal asked the applicant to explain his political activity between 2002 and 2004. He said that he started giving out pamphlets and booklets at the start of 2002, in March or April in [town deleted: s.431(2)]. He said that because he had a car he used to take [Person 1] to Jendouva but he had no political activity in Jendouva; he just used to drop [Person 1] off. The Tribunal clarified that he was claiming that he started delivering political material in March or April 2002 and he said yes. The Tribunal asked if he undertook any political activity other than delivering pamphlets and he said no.
50. The Tribunal asked the applicant when exactly he was arrested. He said February 2004. The Tribunal asked what date and he said it was the start of February, maybe the [dates deleted: s.431(2)]. The Tribunal asked what day of the week it was and he said Thursday and that he was at a bar at night when arrested.
51. The Tribunal asked the applicant which people he met from the Party and when. He said he met [Person 1, Person 4 and Person 2] who is [Person 1’s relative].
52. The Tribunal asked the applicant when he stopped paying money to the government and he said it was the end of 2003 and that 10 days later they came and took him to the police station. The Tribunal said that this was inconsistent because he said he was arrested in February 2004 which was not 10 days after the end of 2003. The applicant said he stopped giving them money at the end of 2003 but they kept coming and asking for money and it was 10 days after the last time they asked for money that he was arrested.
53. The Tribunal asked the applicant to describe what was happening in Tunisian politics presently to which the applicant responded that he fled at the end of 2004 and went to Libya and was scared. He said he was mentally tired and did not give a lot of attention to politics.



He said he saw on the internet that the President has been elected again for a fifth time and this is like a dictatorship. The Tribunal asked how his party went in the elections and he said he has followed it on the internet and knows that in 2008 his party changed its name to Harakat Dimoukratinne Ecthirakienne and that it is an opposition party only in name. The Tribunal asked what vote they received in the last election and the applicant said he did not know because he has stopped following them because they are only opposition by name. The Tribunal asked the applicant to describe key features of the Party when he was a member such as who its leader was, what its party colour was, the name of its newspaper etc. The applicant said the leader was [Person 2], its colours were red and black, its picture was “holding a torch” and that it did not run a newspaper at the time although maybe it does now. The applicant again said that he did not know what he was getting himself into when he joined so “he was like a victim” and if he knew he was going to get arrested and tortured he would not have joined. The Tribunal asked if he could name any other opposition parties to which he replied that there are only two opposition parties in Tunisia; the Nahda Islamic party and the Socialist Democratic Movement. He said there are other organisations but not parties.

54. The Tribunal asked the applicant if he wanted to make any comments about the photographs he had submitted to the Department and which the Tribunal has before it. He said they are photos of the torture and are like “the fingerprints of what I went through in Tunisia”. The Tribunal asked the applicant about his claim to have “sewed himself up” He said he had a big wound but could not go to the hospital because he would be reported and put in jail. He said he just needed one stitch to put it together. The Tribunal asked the applicant about his claim to have been arrested and tortured and again pointed out the inconsistencies between his two statements. The applicant said that the photographs prove he was tortured and that the police must have found out he was a member and had been distributing pamphlets against the government.
55. The Tribunal asked the applicant if he was charged with a crime at the time of his arrest in 2004 and he responded that they documented all his answers and put them in a file called a “search file” and that “everyone knows what this means”. He said they accused him of joining an illegal party and that he had signed the report and was told it would be sent to the capital city and “that is when I knew I was going to get charged”.
56. The applicant said that after his arrest he was distributing pamphlets in secret and was looking for a way to get out of the Party but everyone said it “if you started with it you have to continue with it” He said that when [Person 1] asked him if he wanted to get out of the Party he said no.
57. The Tribunal asked the applicant how he was able to leave the country when there was a court order for him issued [in] December 2004. He said “it was like luck, by chance” and

that although the ruling was [in] December because he was not present they usually allow about 3 months for the police to find you before putting your name on the internet and at the airport and borders. The applicant said he went away after they arrested [Person 4].

58. The Tribunal then outlined the country information detailed below and highlighted that the applicant could have applied for protection in [Country 1] and that the Movement of Socialist Democrats was not an outlawed or illegal party.

#### **Evidence of the Second Named Applicant**

59. The Tribunal took evidence from the applicant's wife (and second named applicant) and said the applicant had suggested she talk about the tourist visa application. The Tribunal said it has concerns that the applicant had ticked the box indicating he had no charges pending and also that his employment history was inconsistent with that provided at the hearing and in his protection visa application. The second named applicant said that the reason they did not declare the pending charges was because if they did so they would not have got the visa. The Tribunal asked the second named applicant why her husband had not applied for asylum in [Country 1] and she said that [Country 1] only give asylum to Iraqis and Palestinians. She said they used to give it to Algerians affected by terrorism as well but they did not give everyone asylum. The second named applicant said that she filled in the applicant's employment history and may have recorded some of it incorrectly. The second named applicant said she does not know any of the applicant's family and that when she first met him he always wanted to be alone however, as she got to know him, she realised he has a good heart and was a good person. She said that after she got to know him he very slowly started to tell her his problems.
60. The Tribunal invited the applicant to comment on his wife's evidence and make any concluding comments. The applicant said he agreed with his wife. Regarding the inconsistencies he reiterated that he did not have enough time with [Adviser A] and that she only spent ten minutes with him as she had another client. The applicant apologised for the tourist visa application made in [Country 1] saying he "probably wrote the wrong thing but just had to flee that country".

#### **Letter to the applicant after the hearing**

61. [In] December 2009 the Tribunal wrote to the applicants detailing information regarding the Tunisian Democratic Party and the [Country 1]'s protection obligations. These matters were discussed with the applicant at the hearing but, as he was unrepresented at the hearing, the Tribunal wanted to give the applicants the opportunity to again carefully consider the material. Comments were invited by [date deleted: s.431(2)] December 2009.

62. [In] January 2010 this letter was reissued as, due to an administrative error, the letter had been sent to the wrong address. Comments were invited by [date deleted: s.431(2)] January 2010.

### **Applicant's response to the Tribunal's letter**

63. [In] January 2010 the following statutory declaration dated [in] January 2010 was received in response to the Tribunal's letter:

As I said in my statutory declaration of [date] October 2009, in 2003, I started to become involved in the Hezb Democrate Ectiraki (The Democratic Socialist Party). To clarify what I said in that statutory declaration, this party may also be known as the Movement of Socialist Democrats but I am not sure. I do not know if the Democratic Socialist Party officially changed its name to the Movement of Socialist Democrats. I do not know what the process would be in Tunisia for a political party to change its name. I do not know whether the Democratic Socialist Party is known by any other names. My involvement in Tunisia was with a political party I knew as the Democratic Socialist Party.

In Tunisia, it is common for political parties to change their names or be known by more than one name. The Islamic Party in Tunisia, is known as the Islamic Party by its members and by the public, but it is referred to by the Government as The Movement of Nahda (Renaissance).

I did not apply for asylum when I was living and working in [Country 1] as I did not know that I could apply. I lived in [Country 1] for approximately 2 years and during that time, no-one told me that I could apply for asylum there. I spoke with other people of Iraqi nationality living in [Country 1] and they told me that only people from war torn countries could apply for asylum in [Country 1].

When my passport was about to expire in [Country 1] in approximately June 2009, I went to the Tunisian embassy to renew my passport. The embassy staff told me that because there was unrest in my country, they could not renew my passport and I would have to return to Tunisia to renew my passport. I did not want to become illegal in [Country 1] and have my work rights taken off me, so I travelled to Australia instead. I arrived in Australia in February 2009 and applied for asylum as soon as I could in March 2009.

### **Country Information**

64. The following general information is drawn from the United States 2008 Country Report on Human Rights Practices in Tunisia released on 25 February 2009 and accessed by the Tribunal on 30 September 2009 <<http://www.state.gov/g/drl/rls/hrrpt/2008/nea/119128.htm>>:

Tunisia is a constitutional republic with a population of approximately 10 million, dominated by a single political party, the Democratic Constitutional Rally (RCD). Zine El Abidine Ben Ali has been the president since 1987. The international community generally did not consider the 2004 presidential election to be free and fair. President Ben Ali ran against three opposition candidates and was declared the winner with approximately 94 percent of the popular vote. In concurrent elections for the Chamber of Deputies, the RCD won 152 of the 189 seats. During the year the indirect elections for some members of the Chamber of Advisors, the upper house of parliament, resulted in a heavily pro-RCD body. The civilian authorities generally maintained effective control of the security forces.

There were significant limitations on citizens' right to change their government. Local and international nongovernmental organizations (NGOs) reported that security forces tortured and physically abused prisoners and detainees and arbitrarily arrested and detained individuals. Security forces acted with impunity sanctioned by high-ranking officials. There were also reports of lengthy pretrial and incommunicado detention. The government infringed on citizens' privacy rights and

continued to impose severe restrictions on freedoms of speech, press, assembly, and association. The government remained intolerant of public criticism, and there were widespread reports that it used intimidation, criminal investigations, the judicial system, arbitrary arrests, residential restrictions, and travel controls to discourage criticism by human rights and opposition activists. Media freedom was severely restricted during the year and corruption was a problem...

#### Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment

The law prohibits such practices; however, according to human rights organizations, security forces tortured detainees to elicit confessions and discourage resistance. Reported abuses included sexual abuse; sleep deprivation; electric shock; death threats; submersion of the head in water; beatings with hands, sticks, and police batons; suspension, sometimes manacled, from cell doors and rods resulting in loss of consciousness; and cigarette burns. According to international human rights groups, on occasion, police and prison officials used threatened and actual sexual assault against prisoners' wives and daughters to extract information, intimidate, and punish. Charges of torture in specific cases were difficult to prove, and authorities generally did not take steps to investigate allegations or punish perpetrators. There were several allegations that authorities often denied victims of torture access to medical care until evidence of abuse disappeared. The government maintained that it investigated all complaints of torture and mistreatment filed with the prosecutor's office and noted that alleged victims sometimes accused police of torture without filing a complaint, a prerequisite for an investigation. However, according to defense attorneys and local and international human rights groups, police routinely refused to register complaints. In addition, judges dismissed complaints without investigation and accepted as evidence confessions allegedly extracted through torture. The government can open an administrative investigation of allegations of torture or mistreatment of prisoners without a formal complaint; however, in those cases the results were not made public or available to the lawyers of affected prisoners.

Consistent with an effort to extract information or coerce confessions, reports of torture were more frequently associated with the initial phases of interrogation/investigation and in pretrial detention centers more than prisons. Human rights activists, citing prisoner accounts, identified facilities at the Ministry of Interior (MOI) as the most common location for torture. Political prisoners, Islamists, and persons detained on terrorism-related charges allegedly received harsher treatment than other prisoners and detainees...

Police assaulted human rights and opposition activists throughout the year.

Political prisoners were separated from the general prison population and were under the authority of security forces working for the Department of State Security in the MOI and Local Development instead of Ministry of Justice (MOJ) officials. Other inmates were instructed to stay away from political prisoners and were punished severely for making contact with them. In addition, Human Rights Watch (HRW) reported that the government continued to keep some political prisoners, most of whom were outlawed Islamist party An-Nahdha leaders in small-group isolation; however, the government released the remaining ah-Nahdha prisoners on November 4. Former An-Nahdha President Sadok Chourou, one of those released on November 4, was subsequently rearrested on December 3, shortly after giving an interview to the London-based satellite television station Al-Hiwar. He was sentenced to one year in prison for membership in an unauthorized organization on December 13.

The law prohibits arbitrary arrest and detention, but the government did not observe these prohibitions.

#### Role of the Police and Security Apparatus

The MOI controls several law enforcement organizations including the police, who have primary responsibility within the major cities; the National Guard, which has responsibility for border security and policing smaller cities and the countryside; and state security forces, which monitor groups and

individuals that the government considers to be a threat, such as opposition parties and leaders, the media, Islamists, and human rights activists.

In general law enforcement groups were disciplined, organized, and effective; however, incidents of petty corruption and police brutality took place. Law enforcement organizations operated with impunity sanctioned by high-ranking officials. Police attacked dissidents and oppositionists.

The law provides that the police must have a warrant to arrest a suspect, unless the crime committed is a felony or is in progress; however, arbitrary arrests and detentions occurred. The penal code permits detention for up to six days prior to arraignment, during which time the government may hold suspects incommunicado. This requirement, however, was not always observed...

Detainees have the right to know the grounds of their arrest before questioning and may request a medical examination. They do not have a right to legal representation during the pre-arraignment detention. Attorneys, human rights monitors, and former detainees maintained that authorities illegally extended detainment by falsifying arrest dates. Police reportedly extorted money from families of innocent detainees in exchange for dropping charges against them.

In cases involving crimes for which the sentence may exceed five years or that involve national security, pretrial detention may last an initial period of six months and may be extended by court order for two additional four-month periods. For crimes in which the sentence may not exceed five years, the court may extend the initial six-month pretrial detention by an additional three months only. During this pretrial stage, the court conducts an investigation, hears arguments, and accepts evidence and motions from both parties. Complaints of prolonged pretrial detention were common...

The law provides for an independent judiciary; however, the executive branch and the president strongly influenced judicial procedures, particularly in political cases. The executive branch exercised indirect authority over the judiciary through the appointment, assignment, tenure, and transfer of judges, rendering the system susceptible to pressure. The president headed the Supreme Council of Judges, composed primarily of presidential appointees.

The civil court system is a three-tiered hierarchy. At the first level, there are 51 district courts, in which a single judge hears each case. At the second level there are 24 courts of first instance, which serve as the appellate courts for the district courts but also have original jurisdiction for more serious cases. The Court of Cassation (or Supreme Court) serves as the final court of appeals. The Supreme Court considers only arguments pertaining to points of law. The organization of the criminal court system is similar to that of the civil court system. In most cases the presiding judge or a panel of judges dominates a trial, and attorneys have little opportunity to participate substantively.

#### Trial Procedures

The law extends the same trial procedure rights to all citizens, and it provides for the right to a fair trial; however, according to international and domestic NGOs, this did not often occur in practice.

Trials in the regular courts of first instance and in the courts of appeal are open to the public. By law the accused has the right to be present at trial, to be represented by counsel (provided at public expense for the indigent), and to question witnesses; however, judges did not always observe these rights in practice. The law permits the trial in absentia of fugitives from the law. Both the accused and the prosecutor may appeal decisions of the lower courts.

The law provides that defendants are presumed innocent until proven guilty; however, that presumption was sometimes ignored in practice, especially in politically sensitive cases. Defendants may request a different judge if they believe the assigned one is not impartial; however, judges are not required to recuse themselves. Juries are not used...

Lawyers and human rights organizations reported that courts routinely failed to investigate allegations of torture and mistreatment and accepted as evidence confessions extracted through torture. These

groups also reported that the summary nature of court sessions sometimes prevented reasoned deliberation and that erratic court schedules and procedures deterred observers of political trials.

#### Political Prisoners and Detainees

The number of political prisoners remained unknown. Human rights organizations alleged that the government had arrested and imprisoned approximately 2,000 persons since 2005 without sufficient evidence that they had committed or planned to commit terrorist acts. Human rights activists and lawyers alleged that many of these detainees were tortured in MOI facilities and forced to sign confessions under duress.

All remaining An-Nahdha leaders in prison were pardoned, however one was subsequently re-arrested soon after his release.

#### Respect for Civil Liberties, Including:

The constitution provides for limited freedom of speech and of the press; however, the government generally did not respect these rights in practice. The government restricted press freedom and severely intimidated journalists, editors, and publishers into practicing self-censorship. Security forces closely monitored both foreign and domestic press activity.

Individuals were not free to criticize the government without fear of reprisal, and the government restricted some types of speech. The law prohibits individuals from discussing national politics on foreign radio or television channels during the two weeks prior to national elections, with up to a 25,000 dinar (approximately \$20,833) fine per offence. Security forces often questioned citizens seen talking with foreign visitors or residents, particularly visiting international human rights monitors and journalists. The government also attempted to prevent private meetings with foreign diplomats and to influence public meetings by surrounding meeting places with scores of plainclothes policemen...

The law provides for freedom of assembly and association, but the government severely restricted this right in practice.

The law requires groups wishing to hold a public meeting, rally, or march to obtain a permit from the MOI at least three days before the proposed event and to submit a list of participants. Authorities routinely approved permits for groups supporting the government and generally refused permission for dissenting groups. As in previous years, NGO leaders reported difficulty in renting space to hold large meetings, maintaining that police pressured venue managers to prevent them from renting space. Hotel managers and businesses denied any specific ban on renting space to opposition groups; however, they acknowledged cooperating with the MOI and accommodating its requests when possible.

The government used police and other state security forces to monitor, control, and sometimes break up demonstrations. In general, demonstrators and security forces did not resort to violence; however, there were some exceptions, such as scuffles ensuing from demonstrators' attempts to cross police lines barring access to a demonstration site or demonstrators not dispersing when ordered by police.

The law provides for freedom of association; however, the government generally did not respect this right in practice. The law requires that new NGOs apply for registration with the government. If the government does not reject the application within 90 days, the NGO is automatically registered. The government routinely blocked registration of new independent NGOs by refusing to provide receipts for their applications. Without such a receipt, NGOs were unable to counter the government's assertions that they had not applied to register and therefore were not allowed to operate. In such cases NGOs could be shut down, their property seized, and their members prosecuted for "membership in an illegal organization." Several protestors in Gafsa were arrested or prosecuted on this charge after they participated in a demonstration against governmental corruption and unemployment.

The law authorizes the courts to cancel passports and contains broad provisions that both permit passport seizure on national security grounds and deny citizens the right to present their case against seizure or to appeal the judges' decision. The MOI is required to submit to the courts requests to seize or withhold a citizen's passport through the public prosecutor; however, the ministry routinely bypassed the public prosecutor with impunity.

Many citizens, particularly journalists, reported difficulty applying for or renewing their passports and accused the government of blocking their applications solely on the basis of political opposition. Former An-Nahdha leader Mohamed Sedki Labidi has been deprived of his passport for the last 13 years without a court decision...

According to the constitution, no citizen can be exiled from the country nor prevented from returning; however, the government used administrative control measures as a type of punitive internal exile. Administrative control measures, which take effect upon a convict's release from prison, are similar to parole restrictions, except that they may be applied to prisoners even after they have completed their sentences. The government requires those individuals to stay "in the area of their residence," which is determined by the government and may be anywhere in the country. They also may be required to report to a police station frequently each day at times determined only the previous evening. At the police station, they may be forced to wait hours before they are allowed to sign in, making normal employment impossible. Numerous Islamists released from prison in recent years have been subjected to such punishment.

#### Respect for Political Rights: The Right of Citizens to Change Their Government

There were significant limitations on citizens' right to change their government. The law provides that citizens shall directly elect the president and members of the Chamber of Deputies for five-year terms, but irregularities routinely called into question the legitimacy of elections. The ruling party has maintained power continuously since the country's independence in 1956, dominating the cabinet, the legislature, and regional and local governments.

#### Elections and Political Participation

In the 2004 national elections, President Ben Ali faced three candidates and officially received 94.9 percent of the popular vote to secure a fourth term. Ben Ali has ruled since 1987. The third opposition candidate, Mohamed Halouani of the at-Tajdid party, cited government restrictions and other irregularities to explain why he received less than one percent of the official vote count. According to official election returns, more than 90 percent of registered voters went to the polls; however, independent NGOs estimated that the actual turnout was closer to 30 percent.

Irregularities characterized the polling. A coalition of three local independent NGOs--the LTDH, CNLT, and Tunisian Association of Democratic Women (ATFD)--cited as serious problems the opposition's lack of media access during the campaign and media bias in favor of the ruling party. Opposition candidates and other observers also cited voter intimidation as well as restrictions on disseminating campaign materials and organizing campaign events.

On July 28, the president approved of a law requiring presidential candidates to be elected heads of political parties who had held that position for at least two years.

In 2008 the government conducted elections for half of the 126 seats in the Chamber of Advisors, a second parliamentary chamber created in 2002. The voters consisted of 4,555 officials, including municipal counselors, mayors, and the 189 members of the Chamber of Deputies. Only 305 of the 4,555 voters belonged to opposition parties. The law specifies that seats must be allocated among various regional and professional organizations, including 14 seats for the UGTT, which refused to name candidates, citing a lack of independence and democracy in the candidate selection process. The president directly appointed 20 candidates. The majority of elected members of the chamber were members or supporters of the ruling RCD party.

The president appoints the prime minister, the cabinet, and the 24 governors. The government and the party are closely integrated; current and former senior government officials constitute the top ranks of the RCD. The president of the country is also the president of the party, and the party's vice president and secretary general each hold the rank of minister. All members of the RCD politburo hold ministerial rank based on their current or former government service.

RCD membership conferred tangible advantages. For example, there were widespread reports that RCD members and their families were much more likely to receive educational and housing benefits, small business permits, and waivers on zoning restrictions.

To reduce the advantages wielded by the ruling party, the Electoral Code reserves 25 percent of seats in the Chamber of Deputies (47 of 189) for the seven officially recognized opposition parties and distributes them on a proportional basis to those parties that won at least one directly elected district seat. In the 2004 elections, five of the opposition parties gained seats under that provision. The RCD holds the remaining 152 seats.

In 2006 authorities authorized the establishment of the Green Party for Progress (PVP), the first new political party created since 2002. The government refused to recognize an environmental political party, Green Tunisia Party, despite its long-pending application.

The government partially funded legal opposition parties. The government raised the public subsidy for operational costs of opposition parties represented in parliament to 270,000 dinars per party (approximately \$225,000) per year. Opposition parties represented in the chamber who publish newspapers received additional funding. By law the government prohibits the establishment of political parties on the basis of religion, language, race, or gender....

## 65. The Movement of Socialist Democrats

There is no authoritative information before the Tribunal that a political party named the Democratic Socialist Party exists or has ever existed in Tunisia. However the Movement of Socialist Democrats, formed in 1978, was officially recognised in 1983. There is no independent information before the Tribunal that the Democratic Socialist Party changed its name to the Movement of Socialist Democrats in 2008.

The following general information is drawn from the website *Encyclopedia of the Nations* and accessed by the Tribunal on 30 September 2009:

<<http://www.nationsencyclopedia.com/Africa/Tunisia-POLITICAL-PARTIES.html#ixzz0f0kFY6eN>>

The Constitutional Democratic Rally (RCD) dominates the country's political life. Its leader from its founding as the Neo-Destour Party in 1934 to 1987 was Habib Bourguiba. In the first national elections, in 1956, all 98 seats in the Constituent Assembly were won by the National Union, a united front of the Neo-Destour Party with the UGTT, the National Union of Tunisian Farmers, and the Tunisian Union of Craftsmen and Merchants. In the November 1959 elections for the National Assembly, the Communist Party (Parti Communiste Tunisien) presented a list of 13 candidates in Tunis and Gafsa; elsewhere, the Neo-Destour Party was unopposed, and the ruling party won all 90 seats at stake. From 1959 to 1994, the RCD (acting in 1981 as part of a National Front with the UGTT) held a monopoly of Assembly seats.

Banned in 1963, the Communist Party was the first opposition group to be fully legalized under the political liberalization of 1981. Two other parties, the Movement of Social Democrats (Mouvement des Démocrates Socialistes) and the Movement (or Party) of Popular Unity (Mouvement (Parti) de l'Unité Populaire), failed to retain their provisional authorization when each fell short of receiving a 5% share of the total vote in the November 1981 election but nevertheless were formally legalized in 1983. The principal Islamist party, An Nahda, has been outlawed. In 1992, it was hit hard by the jailing of many of its senior leaders.



Due to a change in the 1994 electoral code to guarantee the opposition would win seats, opposition parties such as the Movement of Social Democrats (MDS) entered the Chamber of Deputies. As a result of the October 1999 legislative elections, there are five officially recognized opposition parties represented in the Chamber of Deputies: Movement of Social Democrats (MDS) holding 13 seats; Unionist Democratic Union (UDU) holding 7 seats; Party of People's Unity (PUP) holding 7 seats; Movement for Renewal (MR), the communist party, holding 5 seats; and the Social-Liberal Party holding 2 seats. The RCD held 148 of the 182 seats as of 1999. The Islamist an-Nahda remains an outlawed party. The At-Tajdid Movement is a sixth legally recognized political party, although it is not represented in the legislature.

In October 2002, an eighth political party in Tunisia was legally recognized, joining the 6 other opposition parties aligned against the RCD. Called the Democratic Forum for Labor and Liberties, it was headed by Dr. Mustapha Ben Jaafar. Legislative elections are next set for 2004.

The *European Forum for Democracy and Solidarity*, accessed 30 September 2009, records the following specific information about the Movement of Socialist Democrats <[http://www.europeanforum.net/country/tunisia#elections\\_and\\_political\\_situation](http://www.europeanforum.net/country/tunisia#elections_and_political_situation)>:

*Mouvement des Démocrates Socialistes (Opposition) (Movement of Social-Democrats)*

Secretary-general: Ismail Boulahia

The party was founded in 1978 by Ahmed Mestiri and his associates, liberal dissidents from the then ruling Parti Socialiste Destourian (PSD), the predecessor of the RCD. The party was only officially recognised by the government in 1983, and unsuccessfully participated in the legislative elections of 1989, after which Mestiri retired from his post as the party's secretary general, and from politics altogether. He was replaced by Mohamed Mouadda, who was incarcerated in 1995 and convicted in 1996 to 11 months in prison for publishing a letter addressed to president Ben Ali, denouncing the degradation of the human rights situation and civil liberties in Tunisia. However, he was released in December 1996 under a conditional pardon as a result of pressure from national and international movements. In 1997 Ismail Boulahia, the last founding member of the party still in function, was called upon to become secretary-general despite a boycott from members of party still loyal to Mouadda. The latter refused to recognise the new direction, and was re-elected to his position in 2001. However, later that same year he was incarcerated yet again after being connected to Rached Ghannouchi, the leader of the unauthorised (and illegal) Islamist al-Nahda party. Mouadda was offered a presidential pardon in 2002, and reconciled himself with Boulahia (who had taken over the leadership in the meantime) and the new leadership of the party.

The party successfully participated in the 2004 legislative elections, obtaining 14 seats in the Chamber of Deputies, making it the largest (opposition) party in the Chamber. Secretary-general Boulahia supported the candidacy of the incumbent president Ben Ali during the presidential elections that same year. As already mentioned, the Movement of Social-Democrats offers almost the same program as the RCD, apart from being more Arab nationalist and socialist.

The following information is drawn from the website 'Political Parties in Tunisia' accessed 30 September, <[http://www.tunisiaonline.com/elections2004/parties\\_politiques/parties\\_politiques01.html](http://www.tunisiaonline.com/elections2004/parties_politiques/parties_politiques01.html)>:

Movement of Socialist Democrats

Founded on June 10, 1978 - Visa granted on November 19, 1983

Secretary General:: Ismail Boulahya

Newspapers:: "Al Mostaqbal" (Arabic periodical)

"L'Avenir" (French periodical)

Participation in previous legislative elections:

November 1981 - April 1989 - March 1994 - October 1999.

Latest congress: March 2001

Distinctive color: Green

Supporting the view that the Movement of Socialist Democrats was legal and recognised in 2004, *BBC News*, in an article titled 'Tunisian votes', dated 23 October 2004 <[http://news.bbc.co.uk/2/low/middle\\_east/3754410.stm](http://news.bbc.co.uk/2/low/middle_east/3754410.stm)> reported:

Who is standing for parliament?

Over 300 candidates are contesting seats in the 182-member Chamber of Deputies. Officials say over 25% are women. Seven parties are fielding candidates.

Mr Ben Ali's Democratic Constitutional Rally (RCD) was founded by former President Habib Bourguiba in 1934. It has ruled the country since independence in 1956 and holds 148 seats.

It is widely expected to retain its majority.

The Movement of Socialist Democrats (MDS) is the second largest party in parliament, with 13 seats.

Although an opposition party, it has endorsed Mr Ben Ali's re-election bid saying this will "complete the process of democratic pluralism".

The Popular Unity Party (PUP) has seven seats in parliament. Its leader, Mohamed Bouchiha, is standing for president.

The Unionist Democratic Union (UDU) also holds seven seats in parliament. Its leader till recently was Abderrahman Tlili, one of two challengers defeated by Mr Ben Ali in 1999.

A June 2009 report entitled 'Tunisia: The Life of Others', written by Kristina Kausch for the Madrid-based *Fundación para las Relaciones Internacionales y el Diálogo Exterior (FRIDE)*, <[www.fride.org/descarga/FRIDE\\_WP85\\_INGLES\\_FINAL.pdf](http://www.fride.org/descarga/FRIDE_WP85_INGLES_FINAL.pdf)> states that the registration of a new political party in Tunisia is rare and the decision for approval is possibly made by President Zine el Abidine Ben Ali. According to Kausch, there is an unspoken understanding between legal parties and the President; "you are being legalised so we can talk about pluralism, but the condition is that you stay on the margin and play by our rules." This article also confirms the legality of the Movement of Socialist Democrats.

The registration of a new political party is rare, and is usually the result of many years of informal negotiations. There are many de facto political parties that have long asked to be legalised but without success. Some observers in Tunisia say the regime only legalises elitist parties and parties with a niche programme. Islamist and leftist parties are the ones which the current politicians would be least inclined to legalise. International pressure, they say, helps parties to get legal recognition, as in the case of the Forum Party, which was legalised following pressure from the French government. The last party to have gained legal status was the Green Party (in 2006). Legal opposition parties are the leftist Attajdid, the Democratic Progressive Party (PDP), the Forum Party, the Social Liberal Party

(PSL), the Unionist Democratic Union (UDU), the Party of Popular Unity (PUP), the Movement of Socialist Democrats (MDS) and the Green Party.

Opposition party representatives are sure that it is Ben Ali himself who decides on the legalisation of political parties. Members of both legalised and non-legalised parties agree that the regime's aim of keeping the opposition legal is to project its democratic image, but the government's message to them upon registration is clear: 'you are being legalised so we can talk about pluralism, but the condition is that you stay on the margin and play by our rules'.

66. [Information regarding Country 1's Protection Obligations deleted: s.431(2)]

### **FINDINGS AND REASONS**

67. In order to be a refugee under the Convention, it is necessary for the applicant to be outside of his country of nationality and for him to hold a well-founded fear of persecution for at least one of the five grounds listed in the Convention. The applicant claims to be a citizen of Tunisia and of no other country. He traveled to Australia on a valid passport of Tunisia and has made claims against no other country. Therefore, for the purposes of the Convention, the Tribunal has assessed the applicant's claims against Tunisia as his country of nationality.
68. The Tribunal accepts that the second named applicant is a citizen of Morocco but, as she has made no claims for protection in her own right, her citizenship is not a live issue before the Tribunal except, in the event, that the Tribunal would be required to consider the applicant's third country protection. In any case, the Tribunal accepts the information provided (RRT f25) and verified independently by the Tribunal, that the applicant would not be entitled to avail himself of the protection of Morocco based on his marriage to a Moroccan citizen.
69. The applicant claims to fear persecution on account of his occupation as a shop/business owner and/or his political opinion. Specifically the applicant claims he was arrested, detained and tortured for refusing to continue paying donations or bribes to government officials and/or for being politically active as a member of the Tunisian Democratic Socialist Party also known as the Tunisian Movement of Social Democrats and/or the Hezb Dimocrate Echteraki and because there is a Criminal Court Order issued for him sentencing him to prison. The Tribunal finds that the Convention grounds of political opinion and particular social group are the essential and significant reasons for the harm claimed to be feared as outlined in subdivision AL of the *Migration Act* 1958.
70. The applicant's evidence is that he had no interest in politics until he was constantly harassed for money in the form of "donations" from police and agents of the Government, that he joined an opposition political party, that he was arrested and tortured and that he fled Tunisia in December 2004. In the applicant's first statutory declaration [in] March 2009, he claims to have been arrested after he stopped making payments to the government and that, after his arrest, he joined an opposition party.

71. In determining whether an applicant is entitled to protection in Australia, the Tribunal must first make findings on the claims the applicant has made. This may involve an assessment of the applicant's credibility. In assessing credibility, it is important that the Tribunal be sensitive to the difficulties often faced by asylum seekers. The benefit of the doubt should be given to asylum seekers who are generally credible but unable to substantiate all of their claims. However the mere fact that a person claims fear of persecution for a particular reason does not establish either the genuineness of the asserted fear or that it is "well founded" or that it is for the reason claimed. It remains for the applicant to satisfy the Tribunal that all of the statutory elements are made out. Although the concept of onus of proof is not appropriate to administrative inquiries and decision making, the relevant facts of the individual case will have to be supplied by the applicant herself, in as much detail as is necessary to enable the examiner to establish the relevant facts. A decision maker is not required to make the applicant's case for her. Nor is the Tribunal required to accept uncritically any and all the allegations made by an applicant. (*MIEA v Guo & Anor* (1997) 191 CLR 559 at 596, *Nagalingam v MILGEA* (1992) 38 FCR 191, *Prasad v MIEA* (1985) 6 FCR 155 at 169-70.)
72. After carefully considering the claims before it and the possible Convention grounds of political opinion, imputed political opinion and particular social group which, while not specifically advanced, arises on the evidence before it, the Tribunal does not accept the applicant's claims to fear persecution on these grounds for the following reasons.
73. The Tribunal will firstly consider the applicant's claim to have been harassed, arrested and tortured for refusing to continue paying "donations" which the "Tajama Destouri Democracy" and /or local government and/or the mayor and/or the police demanded of him. While not specifically claimed, the Convention ground of particular social group arises from these claims. Such a group might be constructed as 'shop and/or business owners in Tunisia'.
74. In *Ram v MIEA & Anon* (1995) 57 FCR 565 at 568, Burchett J stated that for persecution to be "for reasons of" a Convention ground, it:

involves the infliction of harm, but it implies something more: an element of an attitude on the part of those who persecute which leads to the infliction of harm, or an element of motivation (however twisted) for the infliction of harm. People are persecuted for something perceived about them or attributed to them by their persecutors...

In addition, Burchett J stated that motivation is:

implicit in the very idea of persecution, is expressed in the phrase "for reasons of" and fastens upon the victim's membership of a particular social group. He is persecuted because he belongs to that group.

He further noted at [569] that:

A social group may be identified, in a particular case, by the perceptions of its persecutors rather than by the reality. The words "persecuted for reasons of" look to *their* motives and attitudes, and a victim may be persecuted for reasons of race or social group, to which *they* think he belongs, even if in truth they are mistaken. [italics in original]

Thus the Convention ground must be more than merely peripherally linked to the persecution; it must be the essential and significant motivation for the persecution feared (as stated in s.91R(1)(a) of the Act). In the case of a particular social group the persecutor must persecute *because of* the victim's actual or perceived membership of a cognisable group in society.

75. A particular social group is a collection of persons who share a certain characteristic or element which unites them and distinguishes them from society at large. Not only must such persons exhibit some common element but the element must unite them, making those who share it a cognisable group within their society. The group must be identifiable as a social unit. Moreover, the characteristic or element which unites the group cannot be a common fear of persecution: the group must not be defined by the persecution.
76. The Tribunal notes the following Australian case law on membership of a particular social group. In the case of *Applicant A v MIEA* (1997) 190 CLR 225, the High Court stated:

The adjoining of "social" to "group" suggests that the collection of persons must be of a social character, that is to say, the collection must be cognisable as a group in society such that its members share something which unites them and sets them apart from society at large. The word "particular" in the definition merely indicates that there must be an identifiable social group such that a group can be pointed to as a particular social group. A particular social group, therefore, is a collection of persons who share a certain characteristic or element which unites them and enables them to be set apart from society at large. That is to say, not only must such persons exhibit some common element; the element must unite them, making those who share it a cognisable group within their society. (per Dawson J at 241)

The use of [the term "membership"] in conjunction with "particular social group" connotes persons who are defined as a distinct social group by reason of some characteristic, attribute, activity, belief, interest or goal that unites them. If the group is perceived by people in the relevant country as a particular social group, it will usually but not always be the case that they are members of such a group. Without some form of internal linking or unity of characteristics, attributes, activities, beliefs, interests or goals, however, it is unlikely that a collection of individuals will or can be perceived as being a particular social group. Those indiscriminately killed or robbed by guerillas, for example, are not a particular social group. (per McHugh J at 264-265)

The concept of persecution can have no place in defining the term "a particular social group". ... Allowing persecutory conduct of itself to define a particular social group would, in substance, permit the "particular social group" ground to take on the character of a safety-net. It would impermissibly weaken, if it did not destroy, the cumulative requirements of "fear of persecution", "for reasons of" and "membership of a particular social group" in the definition of "refugee" (per McHugh J at 263)

In reviewing statements made in that case, Gleeson CJ, Gummow and Kirby JJ [36] in the joint judgment in *Applicant S v MIMA Applicant* (2004) 217 CLR 387 summarised the determination of whether a group falls within the Article 1A(2) definition of "particular social group" in this way:

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.

77. In considering whether the applicant belongs to the particular social group ‘shop and/or business owners in Tunisia’ the Tribunal has considered if such a group of people would be identified as ‘cognisable as a group in society such that its members share something that unites them and sets them apart from society at large.’ The Tribunal accepts that ‘shop and/or business owners in Tunisia’, are cognisable as a group in society and that its members share something that unites them and sets them apart from society at large, namely that they run independent businesses, that they trade in goods or services and that they generally rely on the income they generate. The Tribunal therefore accepts that the applicant is a member of the particular social group ‘shop and/or business owners in Tunisia’. It is also prepared to accept that the applicant was asked or even harassed and pressured to provide donations to ‘The National Solidarity Fund’, the “26 fund” or “a corporation bank” as donations to this fund appear, relying on the evidence the applicant himself provided (RRT f26-27), to be widespread with almost five million donations reported in 2007 from a population of 10 million people <[www.theodora.com/wfbcurrent/tunisia/tunisia\\_people.html](http://www.theodora.com/wfbcurrent/tunisia/tunisia_people.html)>
78. The Convention definition requires that the persecution feared be *for reasons of membership* or perceived membership of the group: *Applicant A & Anor v MIEA* (1997) CLR 225 [240]. Further, under s.91R(1)(a) of the Act, where the harm feared is attributable to a number of motivations, it will be insufficient that membership of a particular social group constitutes a minor or non-central motivation. Rather, membership of a particular social group (or membership of such a group together with other Convention reasons) must constitute at least the essential and significant reason or reasons for the persecution.
79. The Tribunal does not accept that such requests or even pressure or harassment for donations were made for the essential and significant reason of the applicant’s membership of the particular social group ‘shop and/or business owners in Tunisia’. In making this finding the Tribunal relies on the information the applicant himself provided to the Tribunal (RRT f26) that such donations were made by “Tunisian individuals and enterprises”, “Tunisians living inside the country and abroad” and “sisterly and friendly countries”. Further, the Tribunal does not accept that such requests, pressure or harassment for donations was made for any other Convention ground but rather were requested of individuals and enterprises in Tunisia.
80. The Tribunal does not accept that the applicant was arrested and tortured for ceasing the payment of these donations as he claimed in his statutory declaration of [date deleted: s.431(2)] March 2009 as it does not accept that the applicant was ever arrested or tortured based on his inconsistent and contradictory evidence on this issue as detailed below. Nor does the Tribunal accept that the applicant was threatened that his business would be closed down as he claimed in his statutory declaration [in] October 2009. The applicant’s own evidence was that he was still operating his business until the time he left Tunisia in

December 2004 yet he claims to have ceased the payment of donations in late 2003 or early 2004.

81. The Tribunal will now consider the applicant's claimed persecution on account of his political opinion.
82. The Tribunal does not accept that the applicant was a member of the Democratic Socialist Party also known as Hezb Dimocrate Ectirake, that he distributed any political pamphlets or brochures, that he did not have a membership card because the Party was secret and illegal or that he undertook any political activity on behalf of an opposition party or had any political involvement at all in Tunisia.
83. The Tribunal, despite extensive searching, can find no reference to the Democratic Socialist Party, however is prepared to accept that this is the same party as the Movement of Socialist Democrats (as the applicant claims in his statutory declaration [in] October 2009 [at paragraph 7] although he states in his statutory declaration [in] January 2010 that he does not know if this is the same party). This conclusion is also supported by the material the applicant provided to the Tribunal (RRT f28) in support of his claims about the Movement of Socialist Democrats. For the purposes of clarity, and despite the applicant's inconsistent evidence as to the name of the party, the Tribunal will hereafter refer to the political party of which the applicant claimed to be member as the Movement of Socialist Democrats (MSD)
84. The Tribunal does not accept that the applicant was a member of the MSD or that the MSD is either secret or "not allowed" and that this is the reason the applicant was not given a membership card. In information the applicant himself provided to the Tribunal as part of his submission received [in] November 2009 (RRT f28) the Movement of Socialist Democrats (MSD) is described as the major opposition party in 1991 with 13 seats in the Tunisian parliament and that, at the legislative elections of 24 October 2004, it won 4.6% of the popular vote and 14 of 189 seats. Further, as detailed above, this party is listed on the 'Political Parties in Tunisia' website and was officially recognised in November 1983.
85. Supporting the finding that the applicant was not a member of the MSD was his inconsistent evidence as to his membership and activity and a lack of basic knowledge about the Party. In his statutory declaration [in] October 2009 the applicant claimed that "at the end of 2003, I started to become involved in the Hezb Dimocrate Ectirakia (the Democratic Socialist Party which also became known as the Movement of Socialist Democrats)" while at the hearing, just one week later, he claimed he joined the party at the start of 2002; a difference of at least 18 months. In his statutory declaration [in] October he claimed that "[f]rom the end of 2003 until I left in late 2004, I participated in secret political activity with the Democratic Socialist Party" while at the hearing he said that he started giving out pamphlets and booklets at "the start of 2002 in March or April" and in his first statement [in] March 2009 he said that he "met [name], [Person 3 and Person 4] early in 2004 [and] was asked along with [Person 3] to

deliver pamphlets against the Tunisian regime”. Also supporting this finding is the fact that the applicant could not satisfy the Tribunal that he had even a basic knowledge of the MSD. The Tribunal asked the applicant to describe the key features of the Party, at the time he claimed to be a member, such as who was its leader, what its party colour was, the name of its newspaper etc. The applicant said the party’s leader was [Person 2] [information deleted: s.431(2)] “although he is not running it anymore”, when country information indicates it is, and was in 2004, Ismail Boulahahya (a fact the Tribunal has confirmed via several sources) and that its colours were red and black when the party’s distinctive colour is green. The applicant said that MSD did not publish a newspaper when, according to the country information above it published a newspaper titled ‘Al Mostaqbal’. The applicant also said at the hearing there are only two opposition parties in Tunisia: the Nahda Islamic party and the Socialist Democratic Movement when, according to results published pertaining to the 2004 elections, there were eight registered political parties in Tunisia in 2004 of which 7 stood candidates in the 2004 elections <[http://www.tunisiaonline.com/elections2004/parties\\_politiques/index.html](http://www.tunisiaonline.com/elections2004/parties_politiques/index.html)> Further, country information confirms the conduct of legislative elections in October 2004 at the very time the applicant claims to have involved, yet he made no mention of any political involvement or activity in relation to the 2004 election.

86. The Tribunal has considered whether the applicant, while not being a formal member of a political party, might nonetheless have assisted friends to distribute political leaflets and therefore had a political opinion imputed to him by the authorities which might have led to his arrest. However the Tribunal finds the applicant did not have a political opinion imputed to him. It finds this because his evidence of political involvement was confused and contradictory and he was not able to demonstrate even a limited degree of knowledge relating to opposition politics in Tunisia.
87. It follows that the Tribunal does not accept that the applicant was arrested and tortured due to his political membership and/or activity for an opposition party. Nor does the Tribunal accept that the applicant was arrested for stopping payments of donations or bribes to government officials. Supporting this finding are the several significant inconsistencies about the applicant’s claimed arrest and torture in his statutory declarations [in] March 2009 and [in] October 2009 and his evidence at the hearing. In his first statement the applicant said he was called to the police station of [Location 1] and arrested and tortured for 3 days and nights, whereas in his second statement and at the hearing he said that he was arrested from a bar was held for 4 nights. In his first statement the applicant said he was arrested because he stopped paying “donations” to the government as he “couldn’t handle it any more” and that it was after his release and shutting his business for a month that he met [Person 1] and “decided to join [Person 1]’s party”. However, in his second declaration, he claimed he joined the MSD at the end of 2003 and ceased paying donations to the government at the beginning of 2004 and was arrested and tortured after he first refused to pay the demanded donations and that he was accused of being a member of the Democratic Socialist Party
88. When these inconsistencies were put to the applicant on two occasions at the hearing he said that his first adviser, [Adviser A], rushed the taking of his statement and that he felt more



comfortable with his second adviser who wrote everything down. The Tribunal has considered this explanation however Tribunal finds that the inconsistencies are of such a significant and material nature that they are not adequately explained by a change of adviser or the relevant diligence of his advisers.

89. As the Tribunal does not accept that the applicant was arrested or charged the Tribunal does not accept that the 'certificate concerning a criminal court order' document is genuine. Supporting this finding, the document refers to a charge "in relation to an accusation charge of being affiliated to an unauthorized Party and disturbing brochures and pamphlets". As detailed above the country information does not support a claim that the MSD to which the applicant claimed to belong was illegal or unauthorised and therefore the very foundation of this document is false. Further, the Tribunal was provided with only a poor copy of the document. The Tribunal requested that the original be sent to it for authentication but this has not been forthcoming in the time following the hearing. The Tribunal notes that the applicant said his brother had engaged a lawyer to secure this document and a lawyer's name appears on the document. The Tribunal considers that, had the document been genuine, it was open to the applicant to contact the named lawyer to have the original sent to Australia notwithstanding that he claims to have had a falling out with his brother. He did not do so.
90. Regarding the photos the applicant submitted to the Department in support of the claimed torture the Tribunal does accept that these are photos of the applicant's body however, for the reasons outlined above, the Tribunal does not accept that the scars pictured are a result of any torture the applicant experienced on account of his political or imputed political opinion or membership of a particular social group
91. The Tribunal accepts that the applicant is divorced from his first wife, but, for all the reasons outlined above, does not accept the applicant's claim that his first wife divorced him because she was forced to do so by the government because of the applicant's political involvement and/or activity
92. The Tribunal does accept that the applicant left Tunisia in December 2004 but does not accept that he had to flee the country and the Tunisian authorities for any Convention related reason.
93. The Tribunal does not accept that the applicant had to leave [Country 1] and came to Australia because he could not renew his Tunisian passport in [Country 1]. In his last statutory declaration [in] January 2010, submitted after the hearing, the applicant claimed "[t]he embassy staff told me that because there was unrest in my country, they could not renew my passport and I would have to return to Tunisia to renew my passport". This statement is inconsistent with the evidence he gave at the hearing that he was told by the embassy officials that he was "requested by the Tunisian authorities" and that he thought he would have to go to prison if he returned to Tunisia.

94. Finally, the Tribunal finds that the applicant's failure to seek protection in the [Country 1] seriously undermines his claim to have been fleeing persecution in Tunisia. While the Tribunal recognises that the chances of success are less than those in Australia, the fact that the applicant did not even make enquires of the country where he lived and worked since 2007 supports the Tribunal's finding that the applicant did not suffer persecution in Tunisia.
95. Although the Tribunal put to the applicant inconsistencies in his employment history from his tourist visa application the Tribunal places no weight on these matters as they are insignificant and not material in light of the substantive findings above. Further, the Tribunal accepts the evidence of the second named applicant that she completed this document and may have recorded the applicant's employment history incorrectly.
96. Based on the applicant's inconsistent evidence and lack of basic knowledge of the political party of which he claimed to have been a member, the Tribunal does not accept that the applicant was ever a member of the Movement of Socialist Democrats or any other political party or that he undertook any distribution of political materials as claimed. The Tribunal finds that the applicant is not a credible witness in relation to his claimed political activity.
97. The applicant claims that if he returns to Tunisia now or in the reasonably foreseeable future he fears harm from the Tunisian police and authorities who have arrested and tortured him in the past and that he will be jailed pursuant to a court order. However, the Tribunal has found that the applicant was not a member of any political party and that he has not suffered any harm in the past in Tunisia for reason of his membership of a particular social group or his political or imputed political opinion. Accordingly, the Tribunal finds that if the applicant returned to Tunisia now or in the reasonably foreseeable future there is no real chance that he would suffer serious harm amounting to persecution should he return to his small business operations.
98. The Tribunal therefore finds that if the applicant were to return to Tunisia now or in the reasonably foreseeable future there is no real chance that he would suffer serious harm amounting to persecution within the meaning of s.91R(1) of the Act for reason of his membership of a particular social group, political opinion, imputed political opinion or for any other Convention reason.

## **CONCLUSIONS**

99. The Tribunal is not satisfied that any of the applicants is a person to whom Australia has protection obligations under the Refugees Convention. Therefore the applicants do not satisfy the criterion set out in s.36(2)(a) for a protection visa. It follows that they are also unable to satisfy the criterion set out in s.36(2)(b). As they do not satisfy the criteria for a protection visa, they cannot be granted the visa.

## DECISION

100. The Tribunal affirms the decisions not to grant the applicants Protection (Class XA) visas

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. prrt44