

**071571629 [2007] RRTA 263 (15 October 2007)**

**DECISION RECORD**

**RRT CASE NUMBER:** 071571629

**DIAC REFERENCE(S):** [file number] & [file number]

**COUNTRY OF REFERENCE:** Sudan

**TRIBUNAL MEMBER:** Giles Short

**DATE DECISION SIGNED:** 15 October 2007

**PLACE OF DECISION:** Sydney

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

**STATEMENT OF DECISION AND REASONS**

**APPLICATION FOR REVIEW**

This is a review of a decision made by a delegate of the Minister for Immigration and Citizenship on [date] refusing an application by the applicant for a Protection (Class XA) visa. The applicant was notified of the decision under cover of a letter dated [date] and the application for review was lodged with the Tribunal on [date]. I am satisfied that the Tribunal has jurisdiction to review the decision.

The applicant is a citizen of Sudan. He arrived in Australia in [month, year] and he applied for a Protection (Class XA) visa on [date].

**RELEVANT LAW**

In accordance with section 65 of the *Migration Act 1958* (the Act), the Minister may only grant a visa if the Minister is satisfied that the criteria prescribed for that visa by the Act and the Migration Regulations 1994 (the Regulations) have been satisfied. The criteria for the grant of a Protection (Class XA) visa are set out in section 36 of the Act and Parts 785 and 866 of Schedule 2 to the Regulations. Subsection 36(2) of the Act provides that:

‘(2) A criterion for a protection visa is that the applicant for the visa is:

(a) a non-citizen in Australia to whom the Minister is satisfied Australia has protection obligations under the Refugees Convention as amended by the Refugees

- Protocol; or
- (b) a non-citizen in Australia who is the spouse or a dependant of a non-citizen who:
- (i) is mentioned in paragraph (a); and
  - (ii) holds a protection visa.'

Subsection 5(1) of the Act defines the 'Refugees Convention' for the purposes of the Act as 'the Convention relating to the Status of Refugees done at Geneva on 28 July 1951' and the 'Refugees Protocol' as 'the Protocol relating to the Status of Refugees done at New York on 31 January 1967'. Australia is a party to the Convention and the Protocol and therefore generally speaking has protection obligations to persons defined as refugees for the purposes of those international instruments.

Article 1A(2) of the Convention as amended by the Protocol relevantly defines a 'refugee' as a person who:

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

The time at which this definition must be satisfied is the date of the decision on the application: *Minister for Immigration and Ethnic Affairs v Singh* (1997) 72 FCR 288.

The definition contains four key elements. First, the applicant must be outside his or her country of nationality. Secondly, the applicant must fear 'persecution'. Subsection 91R(1) of the Act states that, in order to come within the definition in Article 1A(2), the persecution which a person fears must involve 'serious harm' to the person and 'systematic and discriminatory conduct'. Subsection 91R(2) states that 'serious harm' includes a reference to any of the following:

- (a) a threat to the person's life or liberty;
- (b) significant physical harassment of the person;
- (c) significant physical ill-treatment of the person;
- (d) significant economic hardship that threatens the person's capacity to subsist;
- (e) denial of access to basic services, where the denial threatens the person's capacity to subsist;
- (f) denial of capacity to earn a livelihood of any kind, where the denial threatens the person's capacity to subsist.

In requiring that 'persecution' must involve 'systematic and discriminatory conduct' subsection 91R(1) reflects observations made by the Australian courts to the effect that the notion of persecution involves selective harassment of a person as an individual or as a member of a group subjected to such harassment (*Chan Yee Kin v Minister for Immigration and Ethnic Affairs* [1989] HCA 62; (1989) 169 CLR 379 per Mason CJ at 388, McHugh J at 429). Justice McHugh went on to observe in *Chan*, at 430, that it was not a necessary element of the concept of 'persecution' that an individual be the victim of a series of acts:

‘A single act of oppression may suffice. As long as the person is threatened with harm and that harm can be seen as part of a course of systematic conduct directed for a Convention reason against that person as an individual or as a member of a class, he or she is “being persecuted” for the purposes of the Convention.’

‘Systematic conduct’ is used in this context not in the sense of methodical or organised conduct but rather in the sense of conduct that is not random but deliberate, premeditated or intentional, such that it can be described as selective harassment which discriminates against the person concerned for a Convention reason: see *Minister for Immigration and Multicultural Affairs v Haji Ibrahim* [2000] HCA 55; (2000) 204 CLR 1 at [89] - [100] per McHugh J (dissenting on other grounds). The Australian courts have also observed that, in order to constitute ‘persecution’ for the purposes of the Convention, the threat of harm to a person:

‘need not be the product of any policy of the government of the person’s country of nationality. It may be enough, depending on the circumstances, that the government has failed or is unable to protect the person in question from persecution’ (per McHugh J in *Chan* at 430; see also *Applicant A v Minister for Immigration and Ethnic Affairs* [1997] HCA 4; (1997) 190 CLR 225 per Brennan CJ at 233, McHugh J at 258)

Thirdly, the applicant must fear persecution ‘for reasons of race, religion, nationality, membership of a particular social group or political opinion’. Subsection 91R(1) of the Act provides that Article 1A(2) does not apply in relation to persecution for one or more of the reasons mentioned in that Article unless ‘that reason is the essential and significant reason, or those reasons are the essential and significant reasons, for the persecution’. It should be remembered, however, that, as the Australian courts have observed, persons may be persecuted for attributes they are perceived to have or opinions or beliefs they are perceived to hold, irrespective of whether they actually possess those attributes or hold those opinions or beliefs: see *Chan* per Mason CJ at 390, Gaudron J at 416, McHugh J at 433; *Minister for Immigration and Ethnic Affairs v Guo* [1997] HCA 22; (1997) 191 CLR 559 at 570-571 per Brennan CJ, Dawson, Toohey, Gaudron, McHugh and Gummow JJ.

Fourthly, the applicant must have a ‘well-founded’ fear of persecution for one of the Convention reasons. Dawson J said in *Chan* at 396 that this element contains both a subjective and an objective requirement:

‘There must be a state of mind - fear of being persecuted - and a basis - well-founded - for that fear. Whilst there must be fear of being persecuted, it must not all be in the mind; there must be a sufficient foundation for that fear.’

A fear will be ‘well-founded’ if there is a ‘real chance’ that the person will be persecuted for one of the Convention reasons if he or she returns to his or her country of nationality: *Chan* per Mason CJ at 389, Dawson J at 398, Toohey J at 407, McHugh J at 429. A fear will be ‘well-founded’ in this sense even though the possibility of the persecution occurring is well below 50 per cent but:

‘no fear can be well-founded for the purpose of the Convention unless the evidence indicates a real ground for believing that the applicant for refugee status is at risk of persecution. A fear of persecution is not well-founded if it is merely assumed or if it is

mere speculation.’ (see *Guo*, referred to above, at 572 per Brennan CJ, Dawson, Toohey, Gaudron, McHugh and Gummow JJ)

## **CLAIMS AND EVIDENCE**

In accordance with section 418 of the Act, the Tribunal was given the Department’s files [file number] and [file number] relating to the applicant. The applicant appeared before the Tribunal to give oral evidence by video conference on [date]. The Tribunal was assisted by an interpreter in the Arabic language. The applicant was represented by [person A] of [organisation A], a registered migration agent. [Person A] attended the hearing with the applicant.

The applicant’s original application

The applicant is aged in his [age]. According to the details in his original application he completed [number] years of education in Sudan. He said that he had last left Sudan in [year]. He said that from [year] to [month, year] he had lived in [country A] where he had worked as a [profession] in a [business]. He said that from [month, year] until [month, year] he had been in the service of [person B] in [country B] as a [profession].

The applicant said that he belonged to the [ethnic group A] ethnic group. He said that he had left Sudan because he had feared for his safety. He said that a government official had threatened him with death. He said that he had left [country B] because if he went back there he would be arrested and killed for not working for the intelligence service. He said that if he went back to Sudan he would be arrested, detained and tortured and that he might be killed. He said that he would be mistreated by government officials in Sudan and by the intelligence service in [country B]. He said that this would happen because of his [ethnic group A] ethnic background and his refusal to assist the intelligence service. He said that the authorities in Sudan and [country B] would not protect him because they were behind the discriminatory policies against the [ethnic group A] people. He said that they had forced the [ethnic group] people to leave their lands and to live a life of poverty and that [ethnic group A] were discriminated against.

In a statement accompanying his original application the applicant said that when he had been about [number] years old his family had been forced to leave [city A] because of the [construction project] which was being constructed. He said that after this his family had lived in a small house in [city B]. He said that his father had faced discrimination because he was [ethnic group A]. He said that people could tell [ethnic group A] because of their dark skin colour and features. He said that his family had lived in poverty in [city B] and he himself had not been able to finish his education because he had had to work to help feed his family. The applicant said that in [year], after he had got married, he had gone to work in [country A]. He said that he had not been able to earn enough money in Sudan to look after his wife and parents and he had not been able to accept the discrimination he had faced as a [ethnic group A]. He said that he had worked for long hours in [businesses] in Sudan but that he had been paid less than a non-[ethnic group A] person. He said that he had not had the same rights as [ethnic group C] and he had not been able to speak his language or to talk about his culture, customs and civilisation. He said that he had therefore felt stateless.

The applicant complained about the conditions of his work in [country A] as well. He said that there too he had been treated badly because he had been considered a [ethnic group D] and poor. He said that unfortunately the [ethnic group C] looked down on poor, [ethnic group D] and non-[ethnic group C]. He said that his wife and children had remained in [country B] and had lived a life of despair and misery. The applicant said (contrary to the details in his application itself) that in early [year] he had returned to Sudan because he had not been able to renew his work visa in [country A]. He said that he had not found work because of his [ethnic group A] race and he had decided to leave Sudan again. He said that he had had an argument about the rights of the [ethnic group A] people with an official in the government who belonged to the ruling party. He said that this man had threatened him with arrest if he did not retract what he had said but that he had refused. He said that this man had told him that he would be arrested 'in a day or two' so he had decided to go to [country B].

The applicant said that in [country B] he had worked for [person B] and that he had again had to work long hours for little money just to support his family. He said that the [country B] [ethnic group C] looked down on the [ethnic group A] people, even if they were [country B] citizens. The applicant said that on [date] he had been stopped near his home by two people who had introduced themselves as being from the [organisation name], the intelligence services. He said that they had taken him to their office where he had been kicked and insulted. He said that they had threatened that he would be sent to prison for being against the government and for calling for an independent [ethnic group A] country. He said that the next day they had asked him about the people he had been working with against the government. He said that they had noticed that two or three times a week he had met a few men in a café to talk about the problems of the [ethnic group A] people and 'their struggle for freedom and establishing our country'.

The applicant said that the people from the intelligence services had kept torturing him for one week. He said that 'their officer' had told him he would be released if he agreed to work for them as an informer. The applicant said that when he had refused the officer had ordered his men to beat him and torture him. He said that they had threatened to bring his wife to see them humiliating and torturing him. The applicant said that he had had no choice but to accept their offer. He said that they had nevertheless kept him in a very dark small room for another week. The applicant said that he had not told his family the truth but had decided to leave [country B] and to try to find refuge in a Western country. He said that he had been granted visas to travel to both the [country C] and Australia and had decided to come to Australia. He said that he could not go back to Sudan because he had lost his home when he had been [number] years old and he had been beaten up by the security service personnel about [number] years previously and had been threatened that he would be killed. He said that he feared that if he returned to [country B] he would be arrested by the intelligence services because he had not worked for them and that he would be tortured and might die. He submitted material downloaded from the Internet regarding the [ethnic group A] people.

The applicant's previous application for an Offshore Humanitarian Visa

The applicant had previously applied in [country B] for an Offshore Humanitarian Visa. In that application he said that he had never married. He said that he had

completed [number] years of primary school and [number] years of intermediate school. He said that from [year] until [year] he had been employed as a [occupation] in Sudan and that from [month, year] until [month, year] he had been self-employed in [country B] as a '[occupation]'.

In a statement accompanying that application he said that he belonged to the [ethnic group B] tribe and that he had been harassed, arrested, detained, tortured and insulted by the security organs of the current regime in Sudan for criticising the policies of the regime and for his ethnic group (the [ethnic group B] tribe). The applicant said that he had attended school up until the intermediate stage in [city C] and that after he had left school he had worked in the [industry] area and had learned '[occupation]'. He said that he had worked as a [occupation] between [city D] and [city C] and that he had 'lived peacefully in spite of the security harassment'. He said that in [year] he had joined the [organisation B] in [city C] and that on [date] he had attended a meeting of the executive committee of the [organisation B] at which the President of the [organisation B] and a person in military uniform had talked about the rebels in Darfur and had called on the [workers] to support the government by [occupational duties] to the 'operation zone'. The applicant said that at this meeting he had criticised the regime's policies and had told the meeting that he was against the war in Darfur.

The applicant said that at midnight the security organs had raided his house and had arrested him. He said that he had been taken to their office where he had been questioned about his opposition to the regime's policies. He said that a security officer had accused him of inciting citizens against the policies of the regime, of being a member of an opposition party and of being an agent and 'fifth columnist'. The applicant said that he had been severely tortured and threatened with death before he had been released on [date] on condition that he did not leave [city C], that he did not disclose what had happened to him in detention, that he reported weekly to the security offices, that he cooperated with the security organs, that he did not go to gatherings and that he would go to the 'operation zone' whenever asked. He said that he had been told that he would be executed if he did not comply with these conditions.

The applicant said that he had hidden in the house of a friend for a week and that he had then hidden in the house of a relative in [city B] before he had left Sudan, reaching [country B] on [date]. He said that he was illegally resident in [country B] and that the [country B] authorities could arrest him and deport him to Sudan. The applicant said that if he returned to Sudan the security organs of the current regime would arrest him and torture him severely then execute him because he had not complied with the conditions on which he had been released, because he had escaped from the security elements of the current regime and because of his ethnic group, the [ethnic group B] tribe.

The applicant's representative's submission to the Tribunal

In a submission received by the Tribunal on [date] the applicant's representative referred to a decision of the Tribunal (differently constituted) in relation to a [ethnic group A] applicant from [country B] and to information cited in that decision regarding the situation of the [ethnic group A] community in [country B]. He also referred to information downloaded from the Internet in which it was claimed that Sudanese [ethnic group A] were facing 'ethnic and cultural cleansing' under the

Islamist government, that the Sudanese Government was actively working to construct [construction projects] which would force [ethnic group A] to abandon their ancestral homes (although it noted that construction of the [construction project] had been suspended) and that it had excluded [ethnic group A] from its development plans.

The applicant's representative submitted that the Sudanese Government was in serious political trouble internationally in relation to Darfur and that it could not be suggested, therefore, that the Sudanese Government would offer effective protection to [ethnic group A]. He submitted that the discriminatory treatment of [ethnic group A] in obtaining work in Sudan was clear from the decision of the Tribunal to which he had referred but as noted above that decision related to [ethnic group A] in [country B]. He said that the Sudanese Government had removed the possibility of [ethnic group A] being taught in their own language. He submitted that [ethnic group A] were visibly [ethnic group D], not [ethnic group C], and he submitted that this made them a 'particular social group' for the purposes of the Convention. He produced an article downloaded from the Internet relating to [ethnic group C] racism with regard to [ethnic group D].

The applicant's evidence at the hearing before me

At the hearing before me the applicant said that he had had the assistance of an interpreter when he had prepared his original application to the Department of Immigration for a protection visa and that all the answers in that application were correct and complete. He said that the statement accompanying that application had been read back to him in Arabic and that it accurately reflected his claims for refugee status. He said that he had last left Sudan on [date].

The applicant said that when he had been about [number] years old his family had been displaced from [city A] as a result of the construction of the [construction project] in [country B]. He initially said that his family had gone to [city D] in the [area] of Sudan. I noted that in the statement accompanying his current application he had said that his family had lived in a small house in [city B]. The applicant agreed. He said that any Sudanese could live there. I asked him if he had lived there and he said that he had, and that this had been where he had completed his schooling. He said that he had only completed primary school. I noted that in his application he had said that he had completed intermediate school. The applicant said that he had not completed the intermediate level.

I put to the applicant that in his application for an offshore humanitarian visa which he had lodged in [country B] in [date] he had said that he had attended school up to the intermediate stage in [city C]. The applicant said that he did not know English. He said that someone had completed this application for him and this person had taken money from Sudanese who applied in [country B]. He said that he did not know exactly what this person had written. He said that he had given this person the same story he had told in his current application. He said that he had not studied in [city C]. He said, however, that [city C] was the same as [city D]. He confirmed that he claimed he had attended school in [city B].

I noted that when I had asked the applicant where his family had gone after they had been displaced from [city A] he had said that they had gone to the [area] of Sudan. The applicant said that all the people who had been displaced had gone to the [area] of Sudan. I noted that this would suggest that he had studied in [city C]. The applicant said that some people had wanted to stay in the same place even after the [construction project]. I noted that I was not talking about some people but about what his family had done. The applicant said that his family was scattered everywhere and they did not have a home now. I noted that I was still not clear whether he claimed that they had gone to [city C] in the [area] of Sudan or to [city B]. The applicant said that all the people had been settled in [city C] but when I asked him if this had been where his family had gone he repeated that they had gone to [city B].

I put to the applicant that he had told me earlier that his family had gone to [city D] and that he had said that this was the same as [city C]. The applicant denied that he had said this. He said that he had been [number] years old and they had moved all the people to [city D]. He repeated that all the people who had been displaced had been settled in [city C]. He said, however, that he had never spent any time in [city D]. He denied that he had said that he had gone there. He said that some people had been sent there but he himself had never been there. I tried once again to clarify the applicant's evidence with him. He said that all the people had been sent to the [area] of Sudan but he repeated that he and his family had gone to [city B]. He said that his father had decided not to go to [city C]: he had wanted to return to [city A].

I noted again that in his [year] application the applicant had said that he had gone to [city C] and that it had been there that he had completed his intermediate schooling. The applicant repeated that he did not know English and that he did not know what was written in this application. I noted that the person who had written this had clearly not made it all up: it must have been based on what he had been told by the applicant. The applicant repeated that he had told this person the same story he had told in his current application. I noted that the two stories were not the same. The applicant said that he had been surprised when he had received the decision on his current application because it suggested that he had said in his [year] application that he had been sent to Darfur whereas he had never been to Darfur.

The applicant said that after he had finished school he had worked with his father. He said that he had been working in [businesses] in [city B] before he had gone to [country A] in [year]. He said that prior to [year] he had been living in Sudan. I noted that in his current application he had said that he had got married in [city B] in [month, year]. The applicant said that he had mentioned the date, [date], but that he had got married in Sudan, not in [country B]. The applicant confirmed that he had lived in [country A] for almost [year] years. He said that during this time his wife had lived in [city B]. I noted that in his current application he had said that his wife had lived in [country B]. The applicant said that she had gone to [country B] when his father had been ill. He said that his father had lived in Sudan but they preferred [country B] doctors. I noted that in his [year A] application the applicant had said that he had worked as a [occupation] between [city D] and [city C] in Sudan. The applicant said that he did not know anything about what the person who had completed this application had written and that this was not true.



The applicant confirmed that he claimed that he had returned to Sudan in early [year] and that he had last left Sudan on [date]. I asked him what he feared would happen to him if he returned to Sudan now. The applicant said that he had been in danger because a member of the ruling party had threatened to kill him as they had killed two others, [person C], a [ethnic group A], and a person called [name], a [ethnic group C]. He said that the member of the ruling party had threatened to kill him because he had asked for the rights of the [ethnic group A] who were scattered and mistreated. I asked the applicant in what context he had done this and he said that he had done so together with a group of [ethnic group A] who had been discussing the [ethnic group A] case. He said that they had met in a public place, in a coffee shop, and had talked in general. He said that they had wanted to establish a [ethnic group A] Federation. He said that when the member of the ruling party had heard about this the member of the ruling party had asked him to stop this activity.

I asked the applicant whether he had been involved in any activity asking for the rights of the [ethnic group A] during the [number] years he had been in [country A]. He said that he had not. All he had done was to work hard. He said that there had been a big group of [ethnic group A] in [country A]. I asked the applicant how he had become involved in a group calling for a [ethnic group A] Federation in the brief time when he had returned to Sudan. The applicant said that during the [number] years he had been in [country A] he had returned to Sudan for a month or so each year. He said that he had had limited contact with [ethnic group A] activists during these visits. I indicated to the applicant that it was not clear to me why the member of the ruling party had threatened him specifically. The applicant said that this had happened and this was why he had had to leave the country.

I noted that in his original application the applicant had said that he had been working for [country A, person], in whose service he had been in [country B], from [month, year]. The applicant repeated that he had gone to [country B] in [month, year]. I noted that his application suggested that when he had given up working in [country A] it had been to take up the position in [country B]. The applicant said that he had gone home to Sudan, and that he had gone from Sudan to [country B]. I indicated to the applicant that I was not questioning this, but he had said that he had visited Sudan regularly while he had been working in [country A]. The applicant repeated that he had been given a month off each year to go back to Sudan.

I indicated to the applicant that I had difficulty accepting his story that he had been threatened by a member of the ruling party. The applicant said that this had been what had happened, otherwise he would not have left Sudan. I noted that he had been working in [country A] for [number] years and he had then taken up service with a [person B]. The applicant repeated that after he had returned to Sudan he had gone to [country B]. I noted that in his [year A] application the applicant had told a different story. The applicant said that he had paid 200 [country B, monetary unit] to the person who had completed his [year A] application. He said that he had been very surprised when he had read in the decision on his current application that his [year A] application had said that he had been a [occupation] and had gone to Darfur.

I noted that the story the applicant had told in his [year A] application with regard to why he could not go back to Sudan bore similarities to the story he had given in his current application with regard to why he could not go back to [country B]. The

applicant said that he had told the person who had prepared his [year A] application the same story he had told in his current application. I noted that this could not be correct because this part of the story only related to events which he had said had taken place in [year]. I put to him that in his [year A] application he had said that he had been threatened by security organs in Sudan in [year] and in his current application he had said that he had been threatened by security organs in [country B] in [year]. In both applications he had said that he had been released because he had agreed to cooperate with the security organs. The applicant reiterated that he did not know what was written in his [year A] application and he said that the story he had told in his current application was the true one about his family history, since he had been young until now.

I indicated to the applicant that I accepted that he and his family had been displaced from [city A]. I noted that a lot of people had been affected and that this had not been the fault of the Government of Sudan. The applicant said that it had been the fault of the Sudanese and [country B] Governments under [person D] regime. He said that the two governments had been united in applying the ideology of [ethnic group C] nationalism and this had led to the [construction project]. I noted that it had been [country B] which had built the [construction project]. The applicant said that they had been affected and had been displaced. I noted that [city A] had been [affected] because of the [construction project] being built in [country B]. The applicant said that the [construction project] had [affected] the graves of his ancestors and his grandparents and parents had been very sad about what had happened. He said that he could not forget the sight of his father being forced to leave.

I indicated to the applicant that I accepted that all this had happened but I put to him that I had difficulty accepting that he had had problems with the Sudanese Government after that. The applicant said that Sudan and [country B] did not recognise [ethnic group A] rights. I put to the applicant that the Canadian Immigration and Refugee Board had obtained some information from an academic in the USA in March 2001 regarding the treatment of [ethnic group A] by the Sudanese authorities. I noted that the academic was director of the Centre for Muslim-Christian Studies at Georgetown University and he had said that the [ethnic group A] in Sudan were not generally being discriminated against on the basis of ethnicity. [information deleted in accordance with s.431 as it may identify the applicant]. The applicant said that this was the reality of their lives.

I put to the applicant that it appeared that critics of the Government from the [ethnic group A] community like [person E] were able to publish their views and to speak to the media. [information deleted in accordance with s.431 as it may identify the applicant]. The applicant said that if they expressed their views they would be arrested the next day. I noted again that it did not appear that this was the case. The applicant said that people who actually lived there would not agree. I asked the applicant why he had not applied for refugee status in [country D] when he had gone there in [month, year] if he had been having these problems in Sudan. The applicant said that his daughter in [country B] had fallen ill and he had had to go back there after [number] days.

I foreshadowed to the applicant that I would be writing to him about the issues in the review. The applicant's representative said that the applicant had told him that they

had threatened to rape his wife. The applicant clarified that this had happened after he had been detained in [country B] on [date]. He began to recount the story of what he claimed had happened to him in [country B]. I indicated to him that I accepted that he did not have a right to return to [country B] which had been why the focus of the hearing had been on what he claimed would happen to him if he returned to Sudan. I noted that in his current application, so far as Sudan was concerned, he had said that he had been threatened by a member of the ruling party. The applicant said with regard to his [year A] application that there had been a big group of Sudanese trying to come here and that there had actually been a protest in front of the Australian Embassy in [country B].

The applicant's representative submitted that I should consider cumulative grounds and particular social group. I noted that the applicant's claims based on his being [ethnic group A] could be regarded as being based on the Convention grounds of race, membership of a particular social group or even nationality. However the issue was not the Convention ground but whether there was a real chance of the applicant being persecuted if he returned to Sudan. I invited the applicant's representative to produce further evidence regarding the situation of [ethnic group A] in Sudan if he wished. The applicant said that his life was in danger and that he was worried about his family because they had no one there. He said that he had received a lot of help and assistance in Australia.

#### Post-hearing correspondence

On [date] the Tribunal wrote to the applicant inviting him to comment on or respond to information that the Tribunal considered would, subject to any comments he might make, be the reason, or a part of the reason, for affirming the decision under review. The Tribunal noted that in order to act in a way that was fair and just (see subsection 422B(3) of the Act), the information included information to which section 424A of the Act did not apply in accordance with subsection 424A(3) of the Act. The applicant's representative responded on the applicant's behalf by letter dated [date] and he also submitted what he described as 'new and significant information about the treatment of [ethnic group A] in Sudan' under cover of a letter of the same date. Reference is made to the information mentioned in the Tribunal's letter, the response of the applicant's representative and the additional material he submitted as relevant below.

### **FINDINGS AND REASONS**

I accept that, as Beaumont J observed in *Randhawa v Minister for Immigration, Local Government and Ethnic Affairs* (1994) 52 FCR 437 at 451, 'in the proof of refugeehood, a liberal attitude on the part of the decision-maker is called for'. However this should not lead to 'an uncritical acceptance of any and all allegations made by suppliants'. As the Full Court of the Federal Court (von Doussa, Moore and Sackville JJ) observed in *Chand v Minister for Immigration and Ethnic Affairs* (unreported, 7 November 1997):

'Where there is conflicting evidence from different sources, questions of credit of witnesses may have to be resolved. The RRT is also entitled to attribute greater weight to one piece of evidence as against another, and to act on its opinion that one

version of the facts is more probable than another’ (citing *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* [1996] HCA 6; (1996) 185 CLR 259 at 281-282)

As the Full Court noted in that case, this statement of principle is subject to the qualification explained by the High Court in *Minister for Immigration and Ethnic Affairs v Guo* [1997] HCA 22; (1997) 191 CLR 559 at 576 per Brennan CJ, Dawson, Toohey, Gaudron, McHugh and Gummow JJ where they observed that:

‘in determining whether there is a real chance that an event will occur, or will occur for a particular reason, the degree of probability that similar events have or have not occurred for particular reasons in the past is relevant in determining the chance that the event or the reason will occur in the future.’

If, however, the Tribunal has ‘no real doubt’ that the claimed events did not occur, it will not be necessary for it to consider the possibility that its findings might be wrong: *Minister for Immigration and Multicultural Affairs v Rajalingam* [1999] FCA 719; (1999) 93 FCR 220 per Sackville J (with whom North J agreed) at 241. Furthermore, as the Full Court of the Federal Court (O’Connor, Branson and Marshall JJ) observed in *Kopalapillai v Minister for Immigration and Multicultural Affairs* (1998) 86 FCR 547 at 558-9, there is no rule that a decision-maker concerned to evaluate the testimony of a person who claims to be a refugee in Australia may not reject an applicant’s testimony on credibility grounds unless there are no possible explanations for any delay in the making of claims or for any evidentiary inconsistencies. Nor is there a rule that a decision-maker must hold a ‘positive state of disbelief’ before making an adverse credibility assessment in a refugee case.

In the present case, first, as the Tribunal noted in its letter dated [date], in the statement accompanying the applicant’s protection visa application he said that when he had been about [number] years old his family had been forced to leave [city A] because of the [construction project] which was being constructed. He said that after this his family had lived in a small house in [city B]. As the Tribunal noted, at the hearing on [date] the applicant initially said that when his family had been displaced from [city A] as a result of the construction of the [construction project] in [country B] his family had gone to [city D] in the [area] of Sudan. However he subsequently confirmed that he claimed that his family had lived in a small house in [city B]. He said that all the people who had been displaced had gone to the [area] of Sudan, and he said that [city D] was the same as [city C] in the [area] of Sudan. However, although he said that all the people who had been displaced had been settled in [city D] or [city C], he said that his family had gone to [city B].

As the Tribunal noted, in the applicant’s application for an offshore humanitarian visa which he lodged in [country B] in [month, year] the applicant said that he had attended school up to the intermediate stage in [city C]. At the hearing on [date] he said that he did not know what the person who had completed this application for him had written. However, as the Tribunal noted, it is apparent that the person who completed the application did not simply make all this up: the [year A] application, like the applicant’s current application for a protection visa, starts from the fact that he was born in [city A] and that he is from the [ethnic group A] ethnic group or ‘[ethnic group name]’ as it was expressed in the [year A] application. The Tribunal stated that the inconsistency between what the applicant had said in the [year A] application,

what he had said in his current application and what he had said at the hearing on [date] with regard to where his family had gone after his family had been displaced from [city A] was relevant to the review because it cast doubt on his credibility.

In his response dated [date] the applicant's representative said that it was not useful to compare the [year A] and [year B] applications because the applicant had said that he did not know what the person who had completed the [year A] application for him had written. He noted, for example, that the [year A] application had said that the applicant was single whereas he was in fact married with children. The applicant's representative said that the applicant had been very careful in his [year B] application to make sure that what was written in it was the truth. He said, however, that the applicant had attended [primary school A] primary school which was in [city B] and that his education had finished at that point. As referred to below, in his [year B] application (his application for a protection visa), by contrast, the applicant said that he had attended primary school in [city A] from [year] to [year] and secondary school in [city B] from [year] to [year]. He made no mention of having attended [primary school A] primary school in [city B].

I remain of the view that, as I noted in the course of the hearing before me and as noted in the Tribunal's letter dated [date], it is apparent that the person who completed the [year A] application did not simply make up the answers in that application. I remain of the view that the inconsistency between what the applicant said in his [year A] application, what he said in his current application and what he said at the hearing on [date] with regard to where his family went after his family had been displaced from [city A] is relevant to the review because it casts doubt on his credibility.

Secondly, as the Tribunal likewise noted in its letter dated [date], in the applicant's current application he said in answer to question 36 on Part C of the application form (relating to his education) that he had attended primary school in [city A] from [year] to [year] and that he had attended secondary school in [city B] from [year] to [year]. He said that he had completed nine years of education in total. As the Tribunal noted, in the statement accompanying the applicant's current application he said that he had not been able to finish his education because he had had to work to help feed his family. As the Tribunal noted, in the [year A] application the applicant said that he had studied in [city C] until the intermediate stage. At the hearing on [date], however, he not only denied that he had ever been in [city D] or [city C], as referred to above, but he also denied that he had completed intermediate school. He said at the hearing that he had only completed primary school. The Tribunal stated that the inconsistency between what the applicant had said in the [year A] application, what he had said in his current application and what he had said at the hearing on [date] with regard to his education was once again relevant to the review because it cast doubt on his credibility.

In his response dated [date] the applicant's representative said, as referred to above, that the applicant had attended [primary school A] primary school which was in [city B] and that his education had finished at that point. As referred to above, this does not accord with what the applicant said in his current application even though his representative said that the applicant had been very careful in his [year B] application to make sure it was the truth. The applicant's representative referred to the fact that at the hearing the applicant had taken an oath on the Koran. He also said that the man

who had helped the applicant in [year A] had been a fellow [ethnic group A] who knew 'our area of [city A]' but the relevance of this is not obvious since the applicant's representative submits that it is not useful to compare the [year A] and [year B] applications. I remain of the view that the inconsistency between what the applicant said in the [year A] application, what he said in his current application and what he said at the hearing on [date] with regard to his education is once again relevant to the review because it casts doubt on his credibility.

Thirdly, as the Tribunal likewise noted in its letter dated [date], in the applicant's current application he said in answer to question 45 on Part C of the application form that he had left Sudan in [year]. He said in answer to question 13 on Part C of the application form that he had married on [date] in [country B]. He said in answer to question 38 on Part C of the application form that he had worked as a [occupation] in a [industry] in [country A] from [year] until [month,year] and that he had worked as a [occupation] for [person B] in [country B] from [month, year] until [month, year]. As the Tribunal noted, in the statement accompanying the applicant's current application he said that while he had been working in [country A] his family had left Sudan and had lived in [country B]. At the hearing on [date], however, he said that he had not left Sudan until [year]. He said that before he had gone to [country A] he had been working in [type of business] in [city B]. He said that he had got married in Sudan, not in [country B], and that while he had been working in [country A] his wife had lived in [city B].

As the Tribunal noted, in the applicant's [year A] application he said that after he had left school (in [city C], as referred to above) he had worked in the [industry] area and had learned [occupation]. He said that he had been issued with a [trade] and that he had then worked as a [occupation] between [city D] and [city C] until [year]. As the Tribunal noted, at the hearing on [date] the applicant said that this was not true. The Tribunal stated that the inconsistencies between what the applicant had said in his [year A] application, what he had said in his current application and what he had said at the hearing on [date] with regard to when he had left Sudan, where he had got married, where his family had lived while he claimed to have been working in [country A], and his employment history (what work he had been doing and where he had been doing it) were all once again relevant to the review because they cast doubt on his credibility.

In his response dated [date] the applicant's representative did not address these issues directly but his comments to the effect that it is not useful to compare the [year A] and [year B] applications, that the applicant was very careful in his [year B] application to make sure that what was written in it was the truth and that at the hearing the applicant had taken an oath on the Koran may all be considered relevant. Once again, however, I remain of the view that it is apparent that the person who completed the [year A] application did not simply make up the answers in that application. Furthermore the issues referred to in the two preceding paragraphs suggest that either the applicant was not in fact very careful in his [year B] application to make sure that what was written in it was the truth or that he was not telling the truth at the hearing before me despite having taken an oath on the Koran. I remain of the view that the inconsistencies between what the applicant said in his [year A] application, what he said in his current application and what he said at the hearing on [date] with regard to when he left Sudan, where he got married, where his family lived while he claims to

have been working in [country A], and his employment history (what work he was doing and where he was doing it) are all once again relevant to the review because they cast doubt on his credibility.

Fourthly, as the Tribunal likewise noted in its letter dated [date], in the statement accompanying the applicant's current application he said that in early [year] he had returned to Sudan because he had not been able to renew his work visa in [country A]. He said that he had not found work because of his [ethnic group A] race and that he had decided to leave Sudan again. He said that he had had an argument about the rights of the [ethnic group A] people with an official in the government who belonged to the ruling party. He said that this man had threatened him with arrest if he did not retract what he had said but that he had refused. He said that this man had told him that he would be arrested 'in a day or two' so he had decided to go to [country B]. He also said, however, that he had been beaten up by the security service personnel in Sudan and had been threatened that he would be killed.

As the Tribunal noted, at the hearing on [date] the applicant confirmed that he claimed that he had returned to Sudan in early [year] and that he had last left Sudan on [date]. He said that he had been in danger in Sudan because a member of the ruling party had threatened to kill him as they had killed two others, [person C], a [ethnic group A], and a person called [name], a [ethnic group C]. He said that the member of the ruling party had threatened to kill him because together with a group of [ethnic group A] who met in a coffee shop he had asked for the rights of the [ethnic group A] who were scattered and mistreated. He said that the group had wanted to establish a [ethnic group A] Federation. He said that when the member of the ruling party had heard about this the member of the ruling party had asked him to stop this activity.

As the Tribunal noted, the applicant said that during the [number] years he had been in [country A] he had returned to Sudan for a month or so each year and that he had had limited contact with [ethnic group A] activists on these visits. The Tribunal stated that this information was relevant to the review because it was difficult to accept that the applicant would have been threatened by a member of the ruling party in the manner he claimed to have been if his involvement in any activity asking for the rights of the [ethnic group A] had been at the very low level he claimed. The Tribunal stated, moreover, that, as the primary decision-maker had noted, the claims made in the statement accompanying the applicant's current application were internally inconsistent in that he claimed at one point that the man from the ruling party had told him that he would be arrested 'in a day or two' while at another point he claimed that he had been beaten up by the security service personnel in Sudan and threatened that he would be killed. The Tribunal stated that this information was relevant to the review because it was difficult to accept that, if the man from the ruling party had wanted to have the applicant arrested, or if the applicant had in fact been beaten up by security service personnel as he claimed, the man from the ruling party would have told him that he would be arrested 'in a day or two', thus enabling him to escape to [country B] as he claimed.

Furthermore, as the Tribunal also noted, whereas the applicant suggested that his decision to leave Sudan had been prompted by the threat he claimed to have received from the member of the ruling party, as referred to above he said in his original application (in answer to question 38 on Part C of the application form) that he had

worked as a [occupation] for [person B] in [country B] from [march, year] until [month, year]. The Tribunal stated that this information was relevant to the review because it suggested that when the applicant had given up working in [country A] it had been to take up the position in [country B] and that, even if he had returned briefly to Sudan before taking up his position in [country B], his departure from Sudan had not been prompted by the threat he claimed to have received from the member of the ruling party, as he claimed, but simply by his decision to take up service with a [person B] in [country B].

As the Tribunal also noted, in the applicant's [year A] application he told a different story about what had prompted his departure from Sudan in [year] (remembering that in that application he had claimed that he had been living and working in Sudan up until [year]). As the Tribunal noted, he said that in [year] he had joined the [organisation B] in [city C] and that on [date] he had attended a meeting of the executive committee of the [organisation B] at which the [organisation B] and a person in military uniform had talked about the rebels in Darfur and had called on the [workers] to support the government by [operational duties] to the 'operation zone'. He said that at this meeting he had criticised the regime's policies and had told the meeting that he was against the war in Darfur.

As the Tribunal noted, the applicant said that at midnight the security organs had raided his house and had arrested him. He said that he had been taken to their office where he had been questioned about his opposition to the regime's policies. He said that a security officer had accused him of inciting citizens against the policies of the regime, of being a member of an opposition party and of being an agent and 'fifth columnist'. He said that he had been severely tortured and threatened with death before he had been released on [date] on condition that he did not leave [city C], that he did not disclose what had happened to him in detention, that he reported weekly to the security offices, that he cooperated with the security organs, that he did not go to gatherings and that he would go to the 'operation zone' whenever asked. He said that he had been told that he would be executed if he did not comply with these conditions. He said that if he returned to Sudan the security organs of the current regime would arrest him and torture him severely then execute him because he had not complied with the conditions on which he had been released, because he had escaped from the security elements of the current regime and because of his ethnic group, the [ethnic group B] tribe.

As the Tribunal noted at the hearing on [date] and in its letter dated [date], these claims resemble the claims the applicant made in the statement accompanying his current application with regard to the problems which he claimed prompted his departure from [country B]. He said in that statement that on [date] he had been stopped near his home by two people who had introduced themselves as being from the [organisation name], the [country B] intelligence services. He said that they had taken him to their office where he had been kicked and insulted. He said that they had threatened that he would be sent to prison for being against the government and for calling for an independent [ethnic group A] country. He said that 'their officer' had told him that he would be released if he agreed to work for them as an informer. He said that, because they had kept torturing him, he had had no choice but to accept their offer. He said that he feared that if he returned to [country B] he would be arrested by



the intelligence services because he had not worked for them and that he would be tortured and might die.

The Tribunal stated that the inconsistency between what the applicant had said in his [year A] application and what he had said in the statement accompanying his current application with regard to what had prompted him to leave Sudan, and the fact that his claims in that statement regarding what had prompted him to leave [country B] were similar to the claims he had made in the [year A] application with regard to what had prompted him to leave Sudan, were relevant to the review because they cast doubt on whether he was telling the truth with regard to his reasons for leaving Sudan in [year] or [country B] in [year]. The Tribunal stated that the information in this and the seven preceding paragraphs was also relevant to the review because, once again, it cast doubt on the applicant's overall credibility.

In his response dated [date] the applicant's representative did not address all these issues directly although once again his comments to the effect that it is not useful to compare the [year A] and [year B] applications, that the applicant was very careful in his [year B] application to make sure that what was written in it was the truth and that at the hearing the applicant had taken an oath on the Koran may all be considered relevant. The applicant's representative said specifically that the assumption that the applicant had 'returned to Sudan then in [sic] [country B] with [person B]' was not true and that it was the truth that the applicant had left Sudan because of a threat from a member of the ruling party. However it is the applicant's current application - the [year B] application - which suggests that he worked as a [occupation] for [person B] in [country B] from [month, year] until [month, year]. I remain of the view that this suggests that when the applicant gave up working in [country A] it was to take up the position in [country B] and that, even if he returned briefly to Sudan before taking up his position in [country B], his departure from Sudan was not prompted by the threat he claims to have received from the member of the ruling party, as he claims, but simply by his decision to take up service with a [person B] in [country B].

I likewise remain of the view that it is difficult to accept that the applicant would have been threatened by a member of the ruling party in the manner he claims to have been if his involvement in any activity asking for the rights of the [ethnic group A] was at the very low level he claims. I likewise remain of the view that it is difficult to accept that, if the man from the ruling party had wanted to have the applicant arrested, or if the applicant had in fact been beaten up by security service personnel as he claims, the man from the ruling party would have told him that he would be arrested 'in a day or two', thus enabling him to escape to [country B] as he claims. I also remain of the view that the inconsistency between what the applicant said in his [year A] application and what he said in the statement accompanying his current application with regard to what prompted him to leave Sudan, and the fact that his claims in that statement regarding what prompted him to leave [country B] are similar to the claims he made in the [year A] application with regard to what prompted him to leave Sudan, are relevant to the review because they cast doubt on whether he is telling the truth with regard to his reasons for leaving Sudan in [year] or [country B] in [year]. Finally, I remain of the view that the information in this and the nine preceding paragraphs is also relevant to the review because, once again, it casts doubt on the applicant's overall credibility.

Fifthly, as the Tribunal likewise noted at the hearing on [date] and in its letter dated [date], the director of the Centre for Muslim-Christian Studies at Georgetown University told the Canadian Immigration and Refugee Board in March 2001 that generally the [ethnic group A] in Sudan were not being discriminated against on the basis of ethnicity [information deleted in accordance with s.431 as it may identify the applicant]. As the Tribunal likewise noted, it appears that critics of the Government from the [ethnic group A] community like [person E] are able to publish their views and to speak to the media [information deleted in accordance with s.431 as it may identify the applicant ].

The Tribunal stated that the information in the preceding paragraph was relevant to the review because it cast doubt on whether there was a real chance that, if the applicant returned to Sudan now or in the reasonably foreseeable future, he would be discriminated against in relation to employment or otherwise persecuted for reasons of his race, nationality or membership of a particular social group as a [ethnic group A], a member of the [ethnic group B] tribe or a '[ethnic group name]', or that he would be persecuted for reasons of his real or imputed political opinion based on his opposition to the policies of the Sudanese Government with regard to the [ethnic group A] community. The Tribunal stated that if it did not accept the applicant's claims with regard to the persecution he claimed to fear for reasons of his race, nationality, membership of a particular social group or political opinion, it might conclude that the applicant did not have a well-founded fear of being persecuted for a Convention reason if he returned to Sudan and that it was not satisfied that he was a person to whom Australia had protection obligations under the Refugees Convention as amended by the Refugees Protocol. The Tribunal stated, accordingly, that if the Tribunal relied on the information referred to above, it might affirm the decision under review.

In his response dated [date] the applicant's representative said that discrimination against [ethnic group A] existed. He referred to the 'new and significant information about the treatment of [ethnic group A] in Sudan' which he had submitted under cover of a letter of the same date. However the new information he submitted related to the treatment by the Sudanese authorities of activists opposed to the [construction project], specifically the arrest of members of the [committee A] on [date] and [date], an incident on [date] in which the Sudanese security forces shot at civilians holding a peaceful demonstration against the [construction project], the arrest of further people in [city B] on [date] in connection with a protest arising from the incident on [date] and the fact that journalists and lawyers working on and covering the protests against the [construction project] have been arrested and remain in detention. The applicant does not claim to have been involved in opposing the [construction project] and the information does not say anything about the treatment of [ethnic group A] as such as distinct from activists opposed to the [construction project].

The applicant's representative also attached a copy of part of the Human Rights Watch *World Report 2007* (relating to events of 2006) in relation to Sudan - a copy of which he had also produced under cover of his submission received by the Tribunal on [date] - underlining the statement that 'Sudan's human rights record remained abysmal in 2006' and references to arbitrary arrest and detention and restrictions on freedom of expression in Sudan. He also produced a press report of a call issued by the Catholic Archbishop of [city B] for the Sudanese Government to promote human

rights in Sudan. In his response dated [date] the applicant's representative said that the whole world accepted the reality that the Sudanese Government had committed genocide in Darfur. He submitted that others had also been targeted for arrest, torture and imprisonment by the same government 'for precisely the same reasons that [ethnic group A] have faced including in [year]', referring apparently once again to the treatment of the activists against the [construction projects].

The fact that a country has an abysmal human rights record does not of itself establish that every national of the country is a refugee, nor that every applicant for refugee status who is a national of that country is telling the truth, nor even that a particular ethnic group like the [ethnic group A] in Sudan are being discriminated against on the basis of ethnicity in that country. The applicant's representative also referred to paragraphs 199, 202, 203 and 204 of the UNHCR Handbook which he submitted suggested that a person in the applicant's situation should be given the benefit of the doubt. However paragraph 204 states that the benefit of the doubt should only be given when the examiner is satisfied as to the applicant's general credibility. In the present case, for the reasons given above, I am not satisfied as to the applicant's overall credibility. I do not accept that he is a witness of truth.

I accept that the applicant belongs to the [ethnic group A] ethnic group and that he and his family were forced to leave [city A] when he was about [number] years old because of the construction of the [construction project] in [country B]. I am unable to determine on the basis of the evidence before me which of the accounts the applicant has given of his subsequent movements and his education and employment history is correct. I consider that it is sufficient for the purposes of the present review that I find that, having regard to the view I have formed of the applicant's credibility and for the reasons given above, I do not accept the account which the applicant gave either in his [year A] application or in his [year B] application of the reasons for his departure from Sudan in [year]. I do not accept that the applicant was ever involved in asking for the rights of [ethnic group A] in Sudan as he claimed in his current application or in criticising the policies of the present regime in Sudan and specifically the war in Darfur, as he claimed in his [year A] application. I do not accept that the applicant was ever threatened, beaten up, arrested, detained or tortured by a member of the ruling party or security service personnel in Sudan. I do not accept that there is a real chance that the applicant will be involved in political activism for [ethnic group A] rights or in opposition to the policies of the Sudanese Government with regard to the [ethnic group A] community or more generally with regard to the war in Darfur or any other issue if he returns to Sudan now or in the reasonably foreseeable future. I do not accept that there is a real chance that, if the applicant returns to Sudan now or in the reasonably foreseeable future, he will be arrested, detained, tortured, killed or executed for reasons of his real or imputed political opinion or his race, nationality or membership of a particular social group as a [ethnic group A], a member of the [ethnic group B] tribe or a '[ethnic group name]'.

While I accept that the applicant belongs to the [ethnic group A] ethnic group I prefer the independent evidence referred to above - suggesting that the [ethnic group A] in Sudan are not being discriminated against on the basis of ethnicity and that critics of the Government from the [ethnic group A] community are able to publish their views and to speak to the media - to the applicant's own evidence and the evidence submitted by his representative to the extent of any inconsistency. I do not accept that

there is a real chance that, if the applicant returns to Sudan now or in the reasonably foreseeable future, he will be discriminated against in relation to employment or otherwise persecuted for reasons of his race, nationality or membership of a particular social group as a [ethnic group A], a member of the [ethnic group B] tribe or a '[ethnic group name]', or that he will be persecuted for reasons of any political opinion imputed to him for reasons of his ethnicity (such as opposition to the policies of the Sudanese Government with regard to the [ethnic group A] community or asking for the rights of the [ethnic group A] who have been scattered and mistreated).

For the reasons given above, I am not satisfied that the applicant has a well-founded fear of being persecuted for a Convention reason if he returns to Sudan now or in the reasonably foreseeable future. It follows that he is not a person to whom Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol. Consequently the applicant does not satisfy the criterion set out in paragraph 36(2)(a) of the Migration Act for the grant of a protection visa nor is he the spouse or a dependant of a person who holds a protection visa as required by paragraph 36(2)(b).

## **DECISION**

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