



Australian Government

Immigration Assessment Authority

Decision and Reasons

Referred application

SUDAN

IAA reference: IAA19/06261

Date and time of decision: 4 March 2019 14:47:00

K Allen, Reviewer

Decision

The IAA affirms the decision not to grant the referred applicant a protection visa.

Any references appearing in square brackets indicate that information has been omitted from this decision pursuant to section 473EC(2) of the Migration Act 1958 and replaced with generic information which does not allow the identification of a referred applicant, or their relative or other dependant.

Background to the review

Visa application

1. The referred applicant (the applicant) claims to be of Arab ethnicity from [Village 1], Al Manaqil in the state of Al Jazirah (Gezeira) in the Sudan. On 22 December 2016 he lodged an application for a Safe Haven Enterprise Visa (SHEV).
2. On 16 January 2019 a delegate of the Minister for Immigration made a decision to refuse the grant of the visa on the basis that the applicant is not owed protection.

Information before the IAA

3. I have had regard to the referred material given by the Secretary under s.473CB of the *Migration Act 1958* (the Act).
4. On 11 February 2019 the applicant's representative sent a submission explaining why the applicant disagrees with the delegate's decision. To the extent that it contains argument about information already before the delegate I have had regard to that in making this decision.
5. The submission includes new information that was not before the delegate. The applicant's representative has speculated that his client could be suffering a psychological trauma that he may not know he has. He described what trauma is and provided a hyperlink to an article on trauma from psychology.org.au. He claims that the trauma of the applicant losing his properties was what triggered him to leave the Sudan. I note that the applicant's representative suggested in his post interview submission of 19 November 2018 that the applicant had some level of Post-Traumatic Stress Disorder (PTSD) which may have explained why he could not fully recall key events. I consider that this additional new information could have been provided to the delegate before the decision was made. I also have concerns about the credibility of the new information. The applicant has not provided any information that he has received a diagnosis of any psychological condition; he has not claimed to have seen a medical or other professional or received any treatment. At his SHEV interview held on 9 November 2018 the applicant stated that he was well and had no health issues, either mental or physical, and took no medication. In all these circumstances I am not satisfied as to either of the limbs of s.473DD(b) and I have not considered this new information. I am also not satisfied that there are exceptional circumstances to justify considering this new information as it is little more than a bald assertion.
6. The submission includes the new information that the applicant has recently been communicating with his wife after his interview and she has told him that security agents have been coming to their house and following up with phone calls asking her about the whereabouts of her husband. He notes that this highlights the high risk he faces of being wanted by the authorities upon his return to Sudan. The applicant was interviewed on 9 November 2018 and the delegate made the decision on 16 January 2019. The applicant has not stated when after the interview his wife told him this new information. He has not suggested that it was only after the delegate made the decision. In the circumstances, I am not satisfied that this information could not have been provided to the delegate before the decision was made. Further, I note that it is almost six years since the applicant departed the Sudan and he has not indicated that security agents or anyone else sought him out before this. He has provided no particulars as to when his wife told him this or when the agents

came to his house or called or how many times or why they are only seeking him now. I am not satisfied that this is credible personal information and I am not satisfied as to either of the limbs of s.473DD(b) and I have not considered this new information.

7. The applicant attached a letter with his submission from [a community centre] dated 23 September 2018. This is new information. The letter states that the applicant is Darfuri and comments on his character. Attached to that are various documents in relation to courses that the applicant has undertaken in Australia between 2014 and 2018. I do not consider that claims about the applicant's character or education are of themselves relevant to the applicant's claims for protection. In relation to the statement that the applicant is Darfuri, I do not accept this information as being credible. The applicant consistently claimed throughout his application at the primary stage that he is not Darfuri and he has never claimed to be so. The letter containing this information pre-dates the delegate's decision by some months. I am not satisfied there are any exceptional circumstances to justify considering this information or that either limb of s.473DD(b) is met.

Applicant's claims for protection

8. The applicant's claims can be summarised as follows:
 - He was born in [year] in [Village 1] in Al Jazirah state in the Sudan. His parents, [number] siblings, wife and [number] children live in his home village.
 - From 2002 until his departure from the Sudan in 2013 he lived with his family in Soba Aradi (also known as Soba Al Aradi), an area for displaced persons, in Khartoum. He owned businesses there selling [various items].
 - Because he was well off in relation to the average citizen, the government forces targeted him on suspicion of being a supporter of the rebel Justice and Equality Movement (JEM).
 - Around [specific months] 2005 the National Intelligence and Security Service (NISS) arrested him and took him to [specific] prison where he was detained for investigation for about [number] days on suspicion of siding with JEM. He faced severe torture and beatings. After the completion of the interrogations he was released without charge.
 - In 2006 he was taken by the NISS for [duration] under suspicion of assisting, aiding and collaborating with JEM after a conflict that erupted in Soba Aradi when some policemen were killed. He was mistreated but denied all accusations and insults that were directed at him and he was released without charge.
 - In 2008 the JEM came to Omdurman and were engaged in conflict with the Sudanese authorities. Even though he did not have anything to do with the conflict, he was arrested along with many other people and taken away to an unknown prison. He was detained for [number] months and accused by the NISS of being part of JEM. After [number] days of ill-treatment he was shot in his [body part]. He was taken by the NISS to a [hospital] and then released for no reason and with no charge.
 - In 2012 trouble and conflict escalated and intensified in Soba Aradi. The government forces came and started to demolish buildings. They damaged the buildings where his shops operated and he had [houses] that he had purchased from South Sudanese people which were reclaimed. He was targeted because he was under suspicion of supporting rebels by providing them with information and money.

- He left the Sudan using a valid passport in his own name via Khartoum International Airport (KIA) on [date] March 2013.
- He fears returning to the Sudan as a returned failed asylum seeker from a western country and from an African tribe. He fears being imputed with an anti-government political opinion as a supporter of JEM.

Factual findings

Identity

9. The applicant has consistently stated that he was born [Village 1] in the Al Jazirah state of the Sudan. He claimed that his parents, siblings, wife and children remained living in his home village until recently when his wife and children moved to Khartoum under the care of his elder brother for their children's education. He was able to provide a detailed account of the location of his village and his parents' occupation in farming in the village. He has consistently claimed that from 2002 until his departure from the Sudan in 2013 he lived with his family in Soba Aradi, an area for displaced people in Khartoum. He owned businesses there selling [various items] and lived there to oversee his businesses. He claimed in his SHEV interview that after his buildings in Soba Aradi were confiscated in 2011 his wife and children moved back to the village. In his SHEV interview he stated that they were living in the village until 2018. He said that he and his family had lived in no other places in the Sudan apart from [Village 1], Soba Aradi and Khartoum.
10. In support of his claimed identity the applicant provided his Certificate of Civil Registration and translation issued in 2012 which noted his place of birth as State of Al-Jazirah, Al-Manaqil, [Area 2], [Village 1] and noted his citizenship by birth. He claims he held a valid passport which was obtained some time before his departure and which he renewed in Khartoum in 2013 before he left the country. I accept that the applicant is from [Village 1] in the Al Jazirah state where he lived until 2002 before moving to Soba Aradi where he opened various businesses in an IDP camp south of Khartoum. I accept that his immediate family now reside in Khartoum. I accept that he is a national of the Sudan and that the Sudan is the receiving country for the purpose of this decision.

Tribal membership

11. In his SHEV application the applicant's representative indicated that the applicant fears harm as someone from an African tribe. The delegate asked the representative to clarify the applicant's tribal membership beyond just stating African or Arab. On 22 January 2018 the applicant's representative advised that the applicant is a member of [Tribe 1]. The applicant was asked about this at interview and clarified that he is from [Tribe 2]. When asked whether it was an Arab or African tribe he responded that it is an Arab tribe and noted that the majority of tribes in the Sudan are Arab. He indicated that there were not many Arabs in the camp as most people there were from Darfur. I accept his statement at interview that he is from an Arab tribe rather than an African tribe as stated in the SHEV application. I note that the applicant has not particularised any claim to fear harm on the basis of his membership of an Arab tribe.

Detention by the NISS

12. The applicant claims that he has a political profile as a result of being detained on three occasions by the NISS in 2005, 2006 and 2008 on suspicion of association with JEM.
13. DFAT reports¹ that the NISS is responsible for internal security and intelligence in the Sudan and is independent from any other Ministry. The 2010 National Security Act provides the NISS with broad powers, particularly in relation to arrest and detention – the NISS can detain someone for up to four and a half months without any judicial authority. While detailed information regarding the operations of the NISS is difficult to obtain, former detainees who had been held by the NISS reported experiencing torture, including prolonged isolation, beatings and deprivation of food, water and toilets. Overall, DFAT assesses that the NISS targets and detains individuals associated with the armed opposition, unarmed opposition, NGOs (particularly those who work on sensitive issues such as human rights), journalists, and individuals associated with particular religious organisations.
14. DFAT reports² that the JEM is a Darfur based rebel group linked to the Fur, Massalit and Zaghawa tribes of Darfur and has been involved in successive armed conflicts in Darfur, mainly against the Government (and associated militias, often referred to as the Janjaweed, who were armed by the Government).
15. When the applicant arrived in Australia in 2013 he was interviewed and advised that the information he provided would not be disclosed to the Sudanese authorities. He subsequently denied ever having any political involvement and he denied ever being arrested or detained by the security forces. He described his reason for coming to Australia as economic. He stated that “back in Sudan there is a lot of trouble and the economic situation is bad there, standard of living is low so I hope I can come here, work here and problem for back home and help them”. He indicated that his main concern was that the government had destroyed the building where he lived and his place of business in Soba Aradi and his family had to live with his extended family with seven people in one room.
16. In his SHEV interview he claimed that he did not divulge his entire circumstances on arrival as he was scared that the Australian government would disclose his information to the Sudanese government. He claimed he came under suspicion in the Sudan as a supporter of anti-government organisations such as JEM because he was well off. His representative noted that he has not been to Darfur and was not involved in any political activities or associated with any anti-government organisation, but nevertheless he claims he was imputed with an adverse political opinion and stigmatised by government authorities and agencies. In his SHEV interview the applicant confirmed that he has no affiliation with Darfur or Darfuri movements and he is from Al Jezirah. The delegate put to the applicant that she was not convinced that he would have been targeted by the NISS on three occasions if he was not politically active, had never been to Darfur and was from an Arab tribe. The applicant responded that he was targeted because of his good status.
17. The applicant claimed that his first detention occurred in 2005. As noted above, this event was not mentioned in the applicant’s initial arrival interview. In his SHEV application he claimed that [in] 2005, because of the conflicts between the North and South, government security guards came to his shop, seized and arrested him. He was taken to [specific] prison where he was detained in the investigation/interrogations area for about [number] days as

¹ Department of Foreign Affairs and Trade (DFAT), "DFAT Country Information Report - Sudan", 27 April 2016, CIS38A8012704, 5.7-5.9

² Ibid, 2.33

he was suspected to be siding with JEM because they could see he was well off and people who are in this situation are always suspected of being paid off by the anti-government organisations to help them and provide them with government information. He claimed that during the detention they questioned him as to whether he had anything to do with or had joined JEM in Darfur because this organisation was responsible for the trouble in the South. He claimed he denied those false allegations and answered 'no'. After the completion of his interrogations he claimed he was released without charge.

18. In his SHEV interview he expanded on this claim and stated that his arrest in 2005 was associated with the killing of South Sudanese leader John Garang. He stated that there were riots in in Soba Aradi and the NISS arrested people. He claimed he came under suspicion as an activist. He claimed he was taken from his [shop] and blindfolded and that he did not know where they took him. He made no mention of being detained in [specific] prison which is a significant omission. He provided little detail of what occurred during this claimed detention apart from general claims about being tortured. At the SHEV interview the delegate put to the applicant that the fact that he could not remember any of the dates that he was arrested created a credibility concern. In response the applicant's representative submitted after the interview that the applicant was unable to remember the dates of his arrests was due to some level of PTSD. This is unsupported and the applicant himself has denied having any mental health conditions.
19. In his post interview submission the applicant's representative estimated the dates of the applicant's arrests. He stated that in 2005 his first arrest was related to the death of John Garang who died in a helicopter crash on 30 July 2005. His arrest was about [number] days after the event which would be [specific dates] 2005. According to the BBC³ in August 2005 John Garang was killed in a plane crash and his death sparked deadly clashes in the capital between southern Sudanese and northern Arabs. The applicant has not claimed to have been involved in these clashes and he claimed he was detained at his place of work. It is not apparent how the applicant would have come to the attention of the authorities in connection with these events. He had no apparent affiliation with rebel movements and was not from Darfur or South Sudan.
20. I also have concerns about the fact that the applicant was unable to state in his application or interview when the arrest occurred even though he claimed he was taken from his business for a period of [number] days, a not insignificant event. In his SHEV application he stated that he was taken to [specific] prison. In his SHEV interview he claimed he did not know where he was taken. I consider that if the applicant had been detained in [specific] prison by the NISS he would have been able to recall that at interview and that he would have been able to describe the detention and his experiences in more than very general terms. Overall I do not accept that the applicant was detained in 2005 in connection with the events surrounding the death of John Garang and, given his profile I do not accept that he would have been suspected of any involvement in rebel activity.
21. The applicant claimed that in 2006 he was taken by the NISS a second time. As noted above, the applicant made no mention of this event in his initial arrival interview. In his SHEV interview he stated that his arrest was associated with the killing of a policeman in Soba Aradi. The police raided the area arresting suspects, he claimed they took him for an interview and he was subject to severe torture constantly for [number] days. He stated that they pulled his hair and nails and poured cold water on him to disclose which movement he belonged to. The applicant did not describe what happened to him in any compelling way and

³ "South Sudan Profile – Timeline", BBC, 5 December 2016

provided little detail in spite of not appearing to be in any discomfort describing such a traumatic event. At the SHEV interview the applicant was unable to state even approximately when in 2006 this occurred. The applicant provided a post interview submission containing an estimated date. It was submitted that conflict broke out on 18 May 2006 between police forces and displaced civilian residence and seven civilians died and six members of the regular forces including a captain were killed in the fighting. Government armed forces began to round up those who were under their radar and wealthy so they went to his restaurant and arrested him about [number] days after the event around about [date] 2006.

22. The applicant provided an article from a website called Sudanese Online which reported that on 18 May 2008 clashes erupted between the displaced people living in the Soba area and police and up to 17 people were killed. The clashes were in response to the deportation of displaced people from Soba and the government's United Nations backed plan to re-plan, remove homes and force returns of IDPs. In response to the announcement of the plan the attackers entered the local police station and attacked police. The applicant did not appear to be able to provide any detail about this event at interview and it was not apparent how he would have been involved in this being neither an IDP nor a person involved in the clash at the police station. I do not accept that the applicant was taken by the NISS in 2006.
23. The applicant claimed that he was detained by NISS on a third occasion in 2008 when the JEM came to Omdurman. As with the other claimed events, he made no mention of this incident in his initial arrival interview. In his SHEV interview he claimed that conflict began between the JEM and the Sudanese government authorities and even though he did not have anything to do with the conflict he was arrested along with many other people suspected of being with Darfur movement. He claimed he was taken from his [shop] in Soba Aradi and taken away to an unknown prison for about [number] months or [number] days. He claimed he was accused by the NISS of being part of JEM and after [number] days of ill-treatment he was shot in his [body part]. He claimed he was then taken to a [hospital] and later released for no reason and with no charge.
24. In a post interview submission he stated that on 10 May 2008 Martyr Dr Khalil Ibrahim Mohammed tried to enter Khartoum from Omdurman and was stopped by the Sudanese government forces two days later. He claimed he was rounded up and arrested along with many other people who were suspects under the government's radar around about [date] 2008. They all had sacks put on their heads; they were taken away to an unknown destination and put in prison where everyone arrested faced the same ill treatment of brutal, ruthless and cruel interrogation. In support of this claim he provided an opinion piece from Sudanese Online about the invasion of Khartoum by JEM in May 2008. He also provided a report from Amnesty International about the JEM attack on Khartoum on 10 May 2008⁴. Amnesty reported that trucks loaded with armed men entered Omdurman. They were defeated in a matter of hours by Sudanese forces, police and NISS. In the days that followed more than 1000 people, mostly civilians from Darfur, were arrested by NISS. They were tried in courts set up in Khartoum in the wake of the attack and 1005 death sentences were pronounced between 2008 and 2010. The applicant does not claim to have or to have had any link to Darfur or the JEM and it is not apparent why the applicant would have been taken from his [shop] in Soba Aradi when the JEM supporters were defeated and arrested in Omdurman. I do not accept that the applicant was ever arrested and detained in 2008.
25. At his SHEV interview the applicant was unable to explain why he was arrested three times except to say that it was because he was considered to be supporting the opposition because

⁴ Amnesty International, "Agents of Fear: the National Security Service in Sudan", July 2010

of his 'good status' – presumably as a person who could finance rebel activity. He was unable to explain why a person of Arab ethnicity who has never been to Darfur and has no links with Darfur would be subjected to such treatment. He confirmed that he is not politically active and has not been involved in any anti-government activities. Furthermore, he was unable to provide any plausible explanations as to why he was released on the three occasions. I also consider it implausible that if he was wanted by the authorities and subjected to repeated torture that he continued to reside in the same residence where he could be easily found. His continued residence in Khartoum and continued business activities in Khartoum after each claimed arrest indicates that he was not fearful of the authorities.

26. I also note that since his last claimed detention in 2008 the applicant did not claim to have been sought by the authorities and he did not depart his country. Rather he left the country in 2013 for a completely unrelated reason. The applicant stated that he decided to leave the country when his properties were confiscated by the authorities due to illegal ownership. He could no longer earn a living in the way he had done and he had to rehome his family. I am satisfied that his reason for departing the country in 2013 was not because of his past detentions or that he was fearful of the authorities as claimed.
27. In addition to this, I note that the applicant's passport was issued to him before his departure in 2013 and his Civil Registration Certificate was renewed in April 2012 indicating that the applicant was not fearful of approaching the authorities. The applicant used his passport in his own name to depart the Sudan legally in 2013 again without any issues. I am not satisfied that the applicant was of any adverse interest to the authorities at the time of his departure.

Confiscation of land in 2012

28. The applicant has consistently stated that he came to Australia as a result of trouble in 2012 in the Soba Aradi camp when the government forces came and started to demolish buildings. He claimed that the authorities damaged the buildings where his shops operated and he had [number] houses that he had purchased from South Sudanese people which were taken. He claimed that these properties were not legally transferred to his name when he bought them in 2004 due to the conflicts and the political situation at the time. He claimed he was targeted because he was under suspicion of supporting rebels by providing them with information and money. In his SHEV interview when asked why this happened to his property, he responded, that he honestly did not know.
29. The applicant's description of what happened in Soba Aradi including the destruction of his business is consistent with information that the Sudanese government planned to dismantle IDP camps in Khartoum as part of replanning and repatriation⁵. There is no information to indicate that the applicant was personally targeted for any other reason. He claimed he ceased working in his businesses in 2012 after the shops were damaged. In his SHEV interview he stated that a lot of people in Soba Aradi were affected by this.
30. He claimed that [the] houses he purchased were reclaimed by the government in 2011. They told him these houses were for the Southern Sudanese people and now they were back he could not have access to these houses. He claimed that as he had no work and no home in Soba Aradi his family had to return to his [village]. At his SHEV interview the applicant was asked if anything else had happened between his last claimed detention in 2008 and the dismantling of Soba Aradi in 2011/2012. He said no, he lost everything and there was no way for him to keep living in Soba Aradi.

⁵ Amnesty International, "Agents of Fear: the National Security Service in Sudan", July 2010

31. Based on the applicant's own account, I am satisfied that he did not hold any valid legal documentation that he owned property in Soba Aradi and was not regarded the legal owner of these properties and had no right to their ownership and continued occupation. In this case the reclamation of property held without title and destruction of property as part of urban planning was not the consequence of any discriminatory treatment.

Failed returned asylum seeker who left Sudan lawfully

32. The applicant stated that he departed Sudan lawfully on a Sudanese passport in his own name via KIA and arrived in Australia in June 2013. As such, I accept the applicant departed Sudan legally and arrived in Australia unlawfully; therefore, the applicant could be considered to be a failed asylum seeker who left Sudan lawfully if returned.

Refugee assessment

33. Section 5H(1) of the Act provides that a person is a refugee if, in a case where the person has a nationality, he or she is outside the country of his or her nationality and, owing to a well-founded fear of persecution, is unable or unwilling to avail himself or herself of the protection of that country; or in a case where the person does not have a nationality—is outside the country of his or her former habitual residence and owing to a well-founded fear of persecution, is unable or unwilling to return to it.

Well-founded fear of persecution

34. Under s.5J of the Act 'well-founded fear of persecution' involves a number of components which include that:
- the person fears persecution and there is a real chance that the person would be persecuted
 - the real chance of persecution relates to all areas of the receiving country
 - the persecution involves serious harm and systematic and discriminatory conduct
 - the essential and significant reason (or reasons) for the persecution is race, religion, nationality, membership of a particular social group or political opinion
 - the person does not have a well-founded fear of persecution if effective protection measures are available to the person, and
 - the person does not have a well-founded fear of persecution if they could take reasonable steps to modify their behaviour, other than certain types of modification.
35. The applicant claimed that he was detained by the Sudanese authorities as he was suspected of supporting rebel groups such as JEM. I have not accepted this to be the case. I have found that he was never of any adverse interest to the authorities during his life in Sudan for any of the claimed reasons nor did he fear harm from the authorities. Consequently, I do not accept that there is a real chance he will be targeted for these reasons, including by NISS upon his return to Sudan. The applicant claimed that his properties were taken by the government as he did not have legal ownership of them. I accept that this was the case but am not satisfied that he was personally targeted; rather I have found that the actions were as a result of a wider Khartoum planning decision and reclamation of property that had not legally been transferred. I do not accept that this is an indication that he faces a real chance of any harm

from the Sudanese authorities on his return to the Sudan. I am not satisfied there is a real chance of any harm, including serious harm arising from these claims.

36. The applicant also claimed that he fears harm as a returned failed asylum seeker from a western country. I accept that the applicant departed the Sudan in 2013 to seek asylum, and has since resided in Australia. I do not accept that the applicant has any profile with the authorities in the Sudan beyond seeking asylum and spending a number of years in Australia. I consider, based on his own claims at interview, that he is of Arab ethnicity and that he does not have a profile as a rebel supporter or as a Darfuri.
37. The British Embassy in Khartoum⁶ reports that for any individual identified as a 'failed asylum seeker' it is standard procedure to have their documents removed and they may be detained for investigation by the immigration authorities for a period of up to 24 hours upon arrival at KIA. Should the investigation reveal any previous criminal activity or other nefarious reason for their original departure, the returnee is blacklisted from leaving Sudan again. If the crime is outstanding, they will be arrested. If a crime is not outstanding or the investigation does not reveal anything the returnee would be released by immigration. Things that would draw the attention of the authorities would include, but not be limited to: the use of an emergency travel document; having no valid exit visa in passport; or, being escorted into the country. I accept that the manner of the applicant's return may bring him to the notice of the authorities at KIA where he may be investigated for up to 24 hours to determine whether he is wanted for any outstanding crimes. I am not satisfied that the applicant is wanted for any crimes and the country information does not indicate that returnees are held in detention or subject to any other harm as a result of this investigation process.
38. It is reported that the NISS has a significant presence at KIA and reviews the documentation of all individuals exiting or entering the Sudan⁷. Any intervention by the NISS would necessarily await the outcome of the immigration procedures. A failed asylum seeker, including an individual that had been subject to investigation by the immigration authorities on return, would not be at risk of further investigation by NISS on that basis alone. However, the UK Home Office assesses that returnees can be subjected to further questioning by security should they be determined to be a potential person of interest. While it is difficult to offer a definitive statement on who would fall into such a category, activities likely to be of interest would include: being of previous interest to the authorities (in which case they may appear on a travel watch list); having a record of contact with Sudanese opposition groups outside of Sudan; or, having attracted the attention of the authorities during time overseas including through engagement with opposition groups within the diaspora⁸. The applicant has not claimed to have been politically active in the Sudan or Australia and has not indicated any intention to become politically active in the future. I do not consider that the applicant has a profile that would make him a potential person of interest to the NISS or that he will face a real chance of further investigation by NISS after the immigration investigation.
39. DFAT is not aware of any evidence that suggests an asylum seeker returning to Sudan would be distinguishable to the broader community or susceptible to any form of discrimination or violence, unless they presented a threat to the Government. In reality, this is likely to affect vocal opponents of the Government. DFAT understands that the main issue facing returnees is the perceived lack of financial support provided for effective reintegration into Sudanese society, particularly in Khartoum⁹. However, several sources noted that access to

⁶ UK Home Office, "Country Policy and Information Note – Sudan: Rejected asylum seekers", 1 August 2017, OG6E7028845

⁷ DFAT, "DFAT Country Information Report - Sudan", 27 April 2016, CIS38A8012704, 5.35

⁸ UK Home Office, "Country Policy and Information Note – Sudan: Rejected asylum seekers", 1 August 2017, OG6E7028845

⁹ Ibid.

accommodation was not restricted¹⁰. I am satisfied that the applicant has family in [Village 1] and in Khartoum where he resided, studied and worked in the past. While I accept that the applicant has lost his businesses and that economic conditions are more difficult in Khartoum than in Australia, I consider that the applicant has skills as a result of running a number of businesses in Soba Aradi and that he has no health or other condition that would prevent him from finding work in Khartoum. I consider that the applicant may be detained for up to 24 hours while being investigated by immigration authorities but there is no evidence that people are harmed during this short detention, further this process is one that applies to all returnees and does not amount to systematic and discriminatory conduct. Overall, I do not consider that the applicant will face a real chance of any serious harm as a result of being a returned asylum seeker nor do I consider that he would face any harm in terms of reintegrating to life in Khartoum.

40. The applicant does not have a well- founded fear of persecution.

Refugee: conclusion

41. The applicant does not meet the requirements of the definition of refugee in s.5H(1). The applicant does not meet s.36(2)(a).

Complementary protection assessment

42. A criterion for a protection visa is that the applicant is a non-citizen in Australia (other than a person who is a refugee) in respect of whom the Minister (or Reviewer) is satisfied Australia has protection obligations because there are substantial grounds for believing that, as a necessary and foreseeable consequence of the person being removed from Australia to a receiving country, there is a real risk that the person will suffer significant harm.

Real risk of significant harm

43. Under s.36(2A), a person will suffer 'significant harm' if:

- the person will be arbitrarily deprived of his or her life
- the death penalty will be carried out on the person
- the person will be subjected to torture
- the person will be subjected to cruel or inhuman treatment or punishment, or
- the person will be subjected to degrading treatment or punishment.

44. I have found that the applicant does not face a real chance of harm for any reason claimed including on the basis of his tribe, ethnicity, political opinion – actual or imputed, good status or on the basis of his experiences in the Sudan such as having had his property taken. Real chance and real risk involve the same standard¹¹. On the factual findings, I am similarly not satisfied that the applicant faces a real risk of suffering any harm, including significant harm, should he be returned to the Sudan.

¹⁰ UK Home Office, "Sudan: Situation of Persons from Darfur, Southern Kordofan and Blue Nile in Khartoum: Joint report of the Danish Immigration Service and UK Home Office fact finding missions to Khartoum, Kampala and Nairobi Conducted February – March 2016", 31 August 2016, OGD7C848D82

¹¹ *MIAC v SZQRB* (2013) 210 FCR 505

45. I have accepted that the applicant will likely be identified on arrival at KIA as being a returned asylum seeker who spent time in the West and that he may be detained for investigation by Immigration authorities for up to 24 hours to determine if he has a criminal record or any other outstanding matters. I am not satisfied there is a real risk that the applicant will face significant harm during the investigation process or while being held at the airport. I find that the questioning, investigation and detention at the airport by immigration authorities for up to 24 hours individually or cumulatively does not amount to the death penalty, arbitrary deprivation of life torture or that there is an intention to inflict pain or suffering, severe pain or suffering, or to cause extreme humiliation. I am not satisfied this amounts to significant harm as described in s.36(2A) of the Act.
46. I am not satisfied that as a necessary and foreseeable consequence of his return to the Sudan that he would be at real risk of significant harm.

Complementary protection: conclusion

47. There are not substantial grounds for believing that, as a necessary and foreseeable consequence of being returned from Australia to a receiving country, there is a real risk that the applicant will suffer significant harm. The applicant does not meet s.36(2)(aa).

Decision

The IAA affirms the decision not to grant the referred applicant a protection visa.

Applicable law

Migration Act 1958

5 (1) Interpretation

In this Act, unless the contrary intention appears:

...

bogus document, in relation to a person, means a document that the Minister reasonably suspects is a document that:

- (a) purports to have been, but was not, issued in respect of the person; or
- (b) is counterfeit or has been altered by a person who does not have authority to do so; or
- (c) was obtained because of a false or misleading statement, whether or not made knowingly

...

cruel or inhuman treatment or punishment means an act or omission by which:

- (a) severe pain or suffering, whether physical or mental, is intentionally inflicted on a person; or
- (b) pain or suffering, whether physical or mental, is intentionally inflicted on a person so long as, in all the circumstances, the act or omission could reasonably be regarded as cruel or inhuman in nature; but does not include an act or omission:
 - (c) that is not inconsistent with Article 7 of the Covenant; or
 - (d) arising only from, inherent in or incidental to, lawful sanctions that are not inconsistent with the Articles of the Covenant.

...

degrading treatment or punishment means an act or omission that causes, and is intended to cause, extreme humiliation which is unreasonable, but does not include an act or omission:

- (a) that is not inconsistent with Article 7 of the Covenant; or
- (b) that causes, and is intended to cause, extreme humiliation arising only from, inherent in or incidental to, lawful sanctions that are not inconsistent with the Articles of the Covenant.

...

receiving country, in relation to a non-citizen, means:

- (a) a country of which the non-citizen is a national, to be determined solely by reference to the law of the relevant country; or
- (b) if the non-citizen has no country of nationality—a country of his or her former habitual residence, regardless of whether it would be possible to return the non-citizen to the country.

...

torture means an act or omission by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person:

- (a) for the purpose of obtaining from the person or from a third person information or a confession; or
- (b) for the purpose of punishing the person for an act which that person or a third person has committed or is suspected of having committed; or
- (c) for the purpose of intimidating or coercing the person or a third person; or
- (d) for a purpose related to a purpose mentioned in paragraph (a), (b) or (c); or
- (e) for any reason based on discrimination that is inconsistent with the Articles of the Covenant; but does not include an act or omission arising only from, inherent in or incidental to, lawful sanctions that are not inconsistent with the Articles of the Covenant.

...

5H Meaning of refugee

(1) For the purposes of the application of this Act and the regulations to a particular person in Australia, the person is a refugee if the person:

- (a) in a case where the person has a nationality—is outside the country of his or her nationality and, owing to a well-founded fear of persecution, is unable or unwilling to avail himself or herself of the protection of that country; or
- (b) in a case where the person does not have a nationality—is outside the country of his or her former habitual residence and owing to a well-founded fear of persecution, is unable or unwilling to return to it.

Note: For the meaning of ***well-founded fear of persecution***, see section 5J.

...

5J Meaning of well-founded fear of persecution

- (1) For the purposes of the application of this Act and the regulations to a particular person, the person has a well-founded fear of persecution if:
 - (a) the person fears being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion; and
 - (b) there is a real chance that, if the person returned to the receiving country, the person would be persecuted for one or more of the reasons mentioned in paragraph (a); and
 - (c) the real chance of persecution relates to all areas of a receiving country.

Note: For membership of a particular social group, see sections 5K and 5L.
- (2) A person does not have a well-founded fear of persecution if effective protection measures are available to the person in a receiving country.

Note: For effective protection measures, see section 5LA.
- (3) A person does not have a well-founded fear of persecution if the person could take reasonable steps to modify his or her behaviour so as to avoid a real chance of persecution in a receiving country, other than a modification that would:
 - (a) conflict with a characteristic that is fundamental to the person's identity or conscience; or
 - (b) conceal an innate or immutable characteristic of the person; or
 - (c) without limiting paragraph (a) or (b), require the person to do any of the following:
 - (i) alter his or her religious beliefs, including by renouncing a religious conversion, or conceal his or her true religious beliefs, or cease to be involved in the practice of his or her faith;
 - (ii) conceal his or her true race, ethnicity, nationality or country of origin;
 - (iii) alter his or her political beliefs or conceal his or her true political beliefs;
 - (iv) conceal a physical, psychological or intellectual disability;
 - (v) enter into or remain in a marriage to which that person is opposed, or accept the forced marriage of a child;
 - (vi) alter his or her sexual orientation or gender identity or conceal his or her true sexual orientation, gender identity or intersex status.
- (4) If a person fears persecution for one or more of the reasons mentioned in paragraph (1)(a):
 - (a) that reason must be the essential and significant reason, or those reasons must be the essential and significant reasons, for the persecution; and
 - (b) the persecution must involve serious harm to the person; and
 - (c) the persecution must involve systematic and discriminatory conduct.
- (5) Without limiting what is serious harm for the purposes of paragraph (4)(b), the following are instances of **serious harm** for the purposes of that paragraph:
 - (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.
- (6) In determining whether the person has a **well-founded fear of persecution** for one or more of the reasons mentioned in paragraph (1)(a), any conduct engaged in by the person in Australia is to be disregarded unless the person satisfies the Minister that the person engaged in the conduct otherwise than for the purpose of strengthening the person's claim to be a refugee.

5K Membership of a particular social group consisting of family

For the purposes of the application of this Act and the regulations to a particular person (the **first person**), in determining whether the first person has a well-founded fear of persecution for the reason of membership of a particular social group that consists of the first person's family:

- (a) disregard any fear of persecution, or any persecution, that any other member or former member (whether alive or dead) of the family has ever experienced, where the reason for the fear or persecution is not a reason mentioned in paragraph 5J(1)(a); and
- (b) disregard any fear of persecution, or any persecution, that:
 - (i) the first person has ever experienced; or

- (ii) any other member or former member (whether alive or dead) of the family has ever experienced;

where it is reasonable to conclude that the fear or persecution would not exist if it were assumed that the fear or persecution mentioned in paragraph (a) had never existed.

Note: Section 5G may be relevant for determining family relationships for the purposes of this section.

5L Membership of a particular social group other than family

For the purposes of the application of this Act and the regulations to a particular person, the person is to be treated as a member of a particular social group (other than the person's family) if:

- (a) a characteristic is shared by each member of the group; and
- (b) the person shares, or is perceived as sharing, the characteristic; and
- (c) any of the following apply:
 - (i) the characteristic is an innate or immutable characteristic;
 - (ii) the characteristic is so fundamental to a member's identity or conscience, the member should not be forced to renounce it;
 - (iii) the characteristic distinguishes the group from society; and
- (d) the characteristic is not a fear of persecution.

5LA Effective protection measures

- (1) For the purposes of the application of this Act and the regulations to a particular person, effective protection measures are available to the person in a receiving country if:
 - (a) protection against persecution could be provided to the person by:
 - (i) the relevant State; or
 - (ii) a party or organisation, including an international organisation, that controls the relevant State or a substantial part of the territory of the relevant State; and
 - (b) the relevant State, party or organisation mentioned in paragraph (a) is willing and able to offer such protection.
- (2) A relevant State, party or organisation mentioned in paragraph (1)(a) is taken to be able to offer protection against persecution to a person if:
 - (a) the person can access the protection; and
 - (b) the protection is durable; and
 - (c) in the case of protection provided by the relevant State—the protection consists of an appropriate criminal law, a reasonably effective police force and an impartial judicial system.

...

36 Protection visas – criteria provided for by this Act

...

- (2) A criterion for a protection visa is that the applicant for the visa is:
 - (a) a non-citizen in Australia in respect of whom the Minister is satisfied Australia has protection obligations because the person is a refugee; or
 - (aa) a non-citizen in Australia (other than a non-citizen mentioned in paragraph (a)) in respect of whom the Minister is satisfied Australia has protection obligations because the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the non-citizen being removed from Australia to a receiving country, there is a real risk that the non-citizen will suffer significant harm; or
 - (b) a non-citizen in Australia who is a member of the same family unit as a non-citizen who:
 - (i) is mentioned in paragraph (a); and
 - (ii) holds a protection visa of the same class as that applied for by the applicant; or
 - (c) a non-citizen in Australia who is a member of the same family unit as a non-citizen who:
 - (i) is mentioned in paragraph (aa); and
 - (ii) holds a protection visa of the same class as that applied for by the applicant.
- (2A) A non-citizen will suffer **significant harm** if:
 - (a) the non-citizen will be arbitrarily deprived of his or her life; or
 - (b) the death penalty will be carried out on the non-citizen; or
 - (c) the non-citizen will be subjected to torture; or
 - (d) the non-citizen will be subjected to cruel or inhuman treatment or punishment; or
 - (e) the non-citizen will be subjected to degrading treatment or punishment.

- (2B) However, there is taken not to be a real risk that a non-citizen will suffer significant harm in a country if the Minister is satisfied that:
- (a) it would be reasonable for the non-citizen to relocate to an area of the country where there would not be a real risk that the non-citizen will suffer significant harm; or
 - (b) the non-citizen could obtain, from an authority of the country, protection such that there would not be a real risk that the non-citizen will suffer significant harm; or
 - (c) the real risk is one faced by the population of the country generally and is not faced by the non-citizen personally.

...

Protection obligations

- (3) Australia is taken not to have protection obligations in respect of a non-citizen who has not taken all possible steps to avail himself or herself of a right to enter and reside in, whether temporarily or permanently and however that right arose or is expressed, any country apart from Australia, including countries of which the non-citizen is a national.
- (4) However, subsection (3) does not apply in relation to a country in respect of which:
- (a) the non-citizen has a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion; or
 - (b) the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the non-citizen availing himself or herself of a right mentioned in subsection (3), there would be a real risk that the non-citizen will suffer significant harm in relation to the country.
- (5) Subsection (3) does not apply in relation to a country if the non-citizen has a well-founded fear that:
- (a) the country will return the non-citizen to another country; and
 - (b) the non-citizen will be persecuted in that other country for reasons of race, religion, nationality, membership of a particular social group or political opinion.
- (5A) Also, subsection (3) does not apply in relation to a country if:
- (a) the non-citizen has a well-founded fear that the country will return the non-citizen to another country; and
 - (b) the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the non-citizen availing himself or herself of a right mentioned in subsection (3), there would be a real risk that the non-citizen will suffer significant harm in relation to the other country.

Determining nationality

- (6) For the purposes of subsection (3), the question of whether a non-citizen is a national of a particular country must be determined solely by reference to the law of that country.
- (7) Subsection (6) does not, by implication, affect the interpretation of any other provision of this Act.