



Australian Government
Immigration Assessment Authority

Decision and Reasons

Referred application

SUDAN

IAA reference: IAA19/06617

Date and time of decision: 6 June 2019 12:23:00

B Mericourt, Reviewer

Decision

The IAA remits the decision for reconsideration with the direction that:

- the referred applicant is a refugee within the meaning of s.5H(1) of the *Migration Act 1958*.

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 an referred applicant, or their relative or other dependant.

Background to the review

Visa application

1. The referred applicant (the applicant) claims to be a Sudanese national. On 9 May 2017 he lodged an application for a Safe Haven Enterprise Visa (SHEV). In a decision dated 9 May 2019 the delegate of the Minister of Immigration and Border Protection (the delegate) refused to grant the visa.
2. The delegate was satisfied the applicant is a Sudanese national from [Ethnic Group 1] who was born in West Darfur. She found that he did not have a well-founded fear of persecution and there was no real chance or real risk he would suffer serious or significant harm if he returned to Sudan now or in the reasonably foreseeable future.

Information before the IAA

3. I have had regard to the material given by the Secretary under s.473CB of the *Migration Act 1958* (the Act).
4. I have obtained new country information published by the UK Home Office on Non-Arab Darfuris in Sudan¹. Given the volatile situation in Sudan and the fact that the most recent Department of Foreign Affairs and Trade (DFAT) report is now over three years old, I consider there are exceptional circumstances to justify consideration of updated information on the situation for persons with a profile similar to the applicant's in Sudan. The UK Home Office report has been specifically prepared for the purpose of assisting with determination of protection for persons who are non-Arab Darfuris.
5. On 3 June 2019 the IAA received a submission from the applicant's representative. To the extent that this engaged in argument with the delegate's decision based on information which was before the delegate, I have had regard to it. The submission includes an additional statement from the applicant; several photographs purporting to be of the applicant's relatives and friends who have been killed in Sudan; two 'displacement certificates' and translations from the [various individuals] for the applicant and his father; and a letter from [name deleted], [an official of Organisation 1, State 1], dated 25 May 2019 recommending the applicant be granted protection.
6. The applicant has not provided an explanation about why he could not provide the displacement certificates and photographs to the delegate before the decision was made. Similarly, although the letter from [Organisation 1] post-dates the delegate's decision it does not provide any information that post-dates the decision and the applicant has not provided an explanation about why the letter could not have been sought before the decision was made. The letter contains no information that, had it been previously known, may have affected consideration of the applicant's claims and I consider there are no exceptional circumstances to justify consideration of the information in the letter. As discussed below, I accept the applicant had been living in [Camp 1] prior to moving Khartoum and that he was not recognised when he returned to visit his family. I therefore consider there are no exceptional circumstances to justify consideration of the displacement certificates or the letter.

¹ UK Home Office, "Country Policy and Information Note – Sudan: Non-Arab Darfuri", v.3.0, 28 September 2018, OG9EF767949

7. The photographs contain new claims that the applicant's [various relatives] and friend were killed in Sudan. There is no way of knowing if the people in the pictures are his relatives as claimed. No details of their deaths have been provided, including when and how they died and under what circumstances they were killed. I consider the applicant was provided multiple opportunities to make these claims in his written statement of claims at the time he made his application and at his protection interview. Furthermore, the delegate advised the applicant he should provide any information at his interview as he may not have any further opportunities to do so and he could provide any further information after the interview before she made her decision. Under these circumstances I consider there are no exceptional circumstances to justify consideration of this information.
8. In his 'Additional Statement' dated 31 May 2019, the applicant provided the following new information: (a) at the time of his departure he was interrogated and threatened with punishment including 'murder' if they (the authorities) "discovered they were applying for asylum in violation of the instructions of the Sudanese government to the contrary"; and (b) the situation in Sudan has become 'more fearful' since the fall of Omar al-Bashir as the military are now in control. The military are the same people who persecuted, attacked and killed the people of Darfur. Rumours are circulating that al-Bashir is under the protection of the military junta. "Sudan is now on the threshold of a devastating civil war because the military junta is insisting on ruling the country".
9. With regard to (a), the applicant was asked directly by the delegate what happened when he departed Sudan. He said he had trouble because "they say I had a one-way visa. They detained us in a small room for about an hour. They said you are a [detail deleted] servant and if you leave we know you won't come back". They also "confiscated" the money he had on his person. Although he stated he took this as a threat to harm him on his return, he did not say this was for reasons related to a possible application for asylum. Nor did he provide this information in his written statement of claims or after the interview before the delegate made her decision. I note he was represented at his interview. I consider the new information in his additional statement about what happened at the airport could have been provided prior to the delegate making her decision and I have serious doubts about whether it is credible personal information. Under these circumstances I consider there are no exceptional circumstances to justify consideration of this information.
10. With regard to (b) recent events in Sudan relating to the overthrow of Omar Al-Bashir in April 2019 have not been referred to in the 2016 Department of Foreign Affairs and Trade (DFAT) country report on Sudan or by the more recent 2018 UK Home Office report that I have obtained (see paragraph 4). Although the overthrow of al-Bashir occurred on 11 April 2019, just prior to the delegate's decision, I accept the applicant had referred to the current violence in Sudan as a reason for his reluctance to return. Furthermore the situation has developed since the delegate's decision. Given the volatility of events in Sudan I consider there are exceptional circumstances to justify consideration of this information. Furthermore, I have obtained further new information about the current situation in Sudan that is relevant to persons with the same profile as the applicant.²

² The Guardian, "Sudan paramilitaries threw dead protesters into Nile, doctors say", 6 June 2019, <https://www.theguardian.com/world/2019/jun/05/sudan-death-toll-rises-to-60-after-khartoum-pro-democracy-sit-in> Accessed 6 June 2019; The Guardian, "Sudan paramilitaries raped and assaulted protesters and medics", 5 June 2019, <https://www.theguardian.com/world/2019/jun/04/sudans-military-council-calls-for-snap-elections-in-wake-of-deadly-protests> Accessed 6 June 2019; ABC news, "More than a dozen people killed, hundreds wounded as Sudan troops besiege protest camp, doctors say", 3 June 2019, <https://www.abc.net.au/news/2019-06-03/sudan-troops-besiege-protest-camp-killing-civilians-doctors-say/11174746> Accessed 6 June 2019; Department of Foreign Affairs and Trade (DFAT),

11. On 4 June 2019 the IAA received further information from the applicant being three Refugee identity cards indicating the applicant and his parents were registered as displaced persons at [Camp 1] [in] March 2004 and that the area from which they were displaced was [Village 1]. As discussed above, I accept the applicant and his family were displaced to this camp, although the date on these cards is a year earlier than he claimed. He has not provided any explanation about why he could not provide them to the delegate before she made her decision. Under these circumstances I consider there are no exceptional circumstances to justify consideration of this information.

Applicant's claims for protection

12. The applicant's claims can be summarised as follows:
- The applicant fears harm for reasons of his ethnicity as a Sudanese of African descent who is a member of ³ [Ethnic Group 1];
 - Due to his membership of the Darfuri [Ethnic Group 1] he is imputed with a political opinion that is in opposition to the government and therefore vulnerable to detention and torture or execution;
 - He fears harm for reasons of being a member of a particular social group, that is failed asylum seekers who return to Sudan; and
 - He fears he will be harmed as a consequence of the generalised violence in Sudan, particularly in Darfur.

Factual findings

13. The applicant's claims as to his identity and nationality have been consistent since his arrival in Australia. He conducted interviews in Arabic and has submitted his original Sudanese National Identity card, Civil Registration card and his Sudanese driver's licence together with English translations. I accept the applicant's nationality and identity are as claimed and find Sudan to be the receiving country for the purpose of the application. There is no evidence before me to suggest that the applicant has a right to enter and reside in any country other than Sudan and I am satisfied he does not: s.36(3).
14. I am satisfied the applicant's passport was taken from him by [Country 1] people smuggler.

Refugee assessment

15. 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.

Smartraveller, "Sudan", 16 April 2019, <https://smartraveller.gov.au/Countries/africa/north/Pages/sudan.aspx> Accessed 6 June 2019

³[source deleted].

Well-founded fear of persecution

16. 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.
17. Real chance is a substantial chance as distinct from a remote or far-fetched possibility.⁴
18. The applicant was born in [Village 1], [City 1]⁵, West Darfur province, Sudan. His parents, step-mother and most of his siblings continue to live in West Darfur. One brother now lives in Khartoum. His father was [employed] and also had [goods]. The applicant stated that in 2005 the family [business] was attacked by members of the Janjaweed who set fire to their home and [business] and seized all their [goods] and property. Consequently the family fled to [Camp 1] in [City 1]. The applicant stayed there until [year] when he enrolled in a university in Khartoum or [year] when he completed his [school] education in Khartoum. He resided in Omdurman, Greater Khartoum until he departed Sudan in May 2013. The applicant has never worked and his family paid for his studies and costs while he was living in Khartoum.

Fear of harm for reasons of the applicant's ethnicity ([Ethnic Group 1]) and imputed or actual political opinion

19. The applicant claims to be a member of [Ethnic Group 1] from Western Darfur. It is a non-Arab tribe. He said [Ethnic Group 1] are a small tribe which originated in [a location]. There are no sub-tribes. [Ethnic Group 1] have their own customs and language which he speaks with his family and other tribe members. He showed the delegate scarring on his [body] which were the result of [Ethnic Group 1] ceremony when he was very young. Although he did not know their meaning he said it was a means of recognising he was from [Ethnic Group 1]. He said this tribe is perceived by the Sudanese government and the Jangaweed (an armed militia supported by the government) as being in opposition to the government. At his protection interview he initially stated that his tribe is not involved with rebel groups. However, later in the interview he claimed several members of his tribe are members of the rebel group, Justice and Equality Movement (JEM) but did not know any details about this. He himself has never been a member of a rebel group or opposition political party or been involved in anti-regime activities personally.
20. Based on the applicant's evidence I am satisfied he is a member of the non-Arab Darfuri [Ethnic Group 1]. I accept that the applicant's darker skin colour would identify him as of

⁴ *Chan v MIEA*, (1989) 169 CLR 379 at 389.

⁵ [source deleted].

African tribal descent. Whilst there is no information before me to suggest that members of [Ethnic Group 1] are visibly distinct from other African tribes originating in Darfur I accept that he would be identified as from that tribe by other members of his tribe and other local tribes in West Darfur by the markings on his [body].

21. DFAT reports that Sudan is home to hundreds of ethnic and sub-ethnic groups, speaking a multitude of languages. Arabic is the dominant and official language and sources suggest that Arabs account for 70% of the population.⁶ Ethnically motivated inter-tribal discrimination and violence has been historically common in Sudan largely due to disputes over land, access to resources, migration and tribal rivalries.⁷ DFAT reports that armed conflict between the government or government associated militias often referred to as the Janjaweed, and rebel groups such as the Sudanese Liberation Movement (SLM) and Justice and Equality Movement (JEM) have occurred since 1987. The rebel groups are linked to the Fur, Massalit and Zaghawa ethnic groups. JEM is headed by members of the Zaghawa tribe.⁸ There is no independent information before me that members of [Ethnic Group 1] are either at the forefront (as the applicant suggests) of JEM, SLM or any other rebel organisation in Sudan. I accept that it is possible some members of [Ethnic Group 1] may have been involved in conflict with government forces or the Janjaweed and that, like other local non-Arab Darfuri tribes in Western Darfur they have been targeted for raids and their villages [goods] burned during periods of armed conflict, particularly from 2003 to 2007⁹ at the time the applicant claims his family was displaced to the IDP camp as a result of their home and [goods] being burned by the Janjaweed.
22. DFAT refers to Minority Rights Group International which identifies the non-Arab groups of Fur, Zaghawa and Massalit from Darfur and Nuba from South Kordofan as facing the greatest risk of being deliberately persecuted or discriminated against on the basis of their ethnicity.¹⁰ [A] report refers to [Ethnic Group 1] as [a] tribe in Darfur and states that since the conflict in 2003/04 in Darfur between armed militia (government aligned) groups and local tribes, large-scale displacement has occurred of those who lost their homes and [items] or who fled violence. There are 60 IDP camps in Darfur.¹¹
23. Based on the above country information I accept the applicant's family moved to [Camp 1] in 2004 and continue to reside there.
24. The available country evidence does not indicate that all Darfuris face discrimination, harassment and human rights abuses that amount to serious harm or persecution. The UK Home Office concluded that while there is discrimination in accessing public services, the evidence does not establish that it, in general, by its nature and repetition amounts to persecution or serious harm.¹²
25. The UK Upper Tribunal found that each case involving non-Arab Darfuri applicants needs to be considered on its facts, taking into account a person's individual circumstances, profile and activities. "The problem that the evidence presents is that whilst the categories of those potentially at risk are legion, it is apparent that not all those falling into a particular category are at risk. It is not enough, therefore, to be a journalist or a student because

⁶ [source deleted]

⁷ Ibid p.11

⁸ Ibid

⁹ [source deleted]

¹⁰ Ibid

¹¹ [source deleted]

¹² Ibid

not all members of these groups are at risk. So, too, with ethnic or tribal classification. Not all non-Arabs are at risk; nor all black Africans are at risk notwithstanding the unchallenged evidence that they are members of the various tribes associated with this group. Not all those from the troubled regions of Darfur, Southern Kordofan or the Blue Nile are at risk. Nor are all those who have been arrested and detained".¹³

26. Country information indicates that in general non-Arab tribal groups do experience discrimination, harassment and are socio-economically marginalised. They face obstacles because of their origins in accessing public services, employment and ID documentation.¹⁴ The UK Home Office – Danish Immigration Service Fact Finding Mission (UK-DIS FFM) report of September 2016 is based on a range of sources and states that several sources indicated that persons from Darfur would likely find it difficult to secure skilled employment or enter into certain qualified professions or sectors especially within the public sector. It also pointed out that adverse economic conditions and the general shortage of jobs in Sudan is an additional factor. Those with a lack of formal education mostly worked in the informal sector. Those from the Darfuri African tribes were more likely to experience employment discrimination.¹⁵
27. Based on the above country information I accept that as a visibly non-Arab person, the applicant has suffered harassment and discrimination. I therefore had regard to the incidents the applicant described of being detained and harmed to assess whether the discrimination and harassment the applicant suffered before he departed Sudan, and may suffer now or in the reasonably foreseeable future amount to serious harm, having regard to the extensive definitions of serious harm in s.5J(5) of the Act.
28. Based on the applicant's evidence that he attended school and was accepted for entry at university and this was funded by his parents who continue to [have an occupation] outside [Camp 1], I am satisfied the applicant was not denied access to basic services or suffered such significant economic hardship that threatened his capacity to subsist or that he was denied a capacity to earn a livelihood of any kind that threatened his capacity to subsist. I next gave consideration to whether the applicant will be significantly physically harassed or significantly physically mistreated for reasons of his ethnicity or imputed political opinion.
29. At his arrival interview in June 2013 the applicant claimed he had been detained by Sudanese authorities "two or three times". The first two times were in West Darfur and the third time he was at university in Khartoum. He was detained two days, three days and one week respectively and beaten during his third detention in Khartoum. On the first two occasions he was only questioned. He was detained on suspicion of being a member of the opposition and released each time. On the third occasion after he moved from [City 1] (to Khartoum) he was suspected of being part of the opposition because he was not from that area (Khartoum). He was detained and beaten and released after a week. He said he was not arrested or detained on any other occasions although when he was part of a peaceful protest in Khartoum in 2012 the police used tear gas against the protesters.

¹³ UK Home Office, "Country Policy and Information Note – Sudan: Non-Arab Darfuri", v.3.0, 28 September 2018, OGD7C848D82

¹⁴ Department of Foreign Affairs and Trade (DFAT), "DFAT Country Information Report – Sudan", 27 April 2016, CIS38A8012704; 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

¹⁵ 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

30. In his written statement of claims lodged in May 2017, the applicant described two occasions during which he was detained by authorities – one in summer 2010 in [City 1] when he was detained for two days and the second in February 2013 in Khartoum when he was detained by the National Intelligence Security Service (NISS) for seven days.
31. On the occasion in 2010 the applicant said that when he visited his family at [Camp 1] in [City 1] he was intercepted by militias who were harassing displaced refugees. The camp officials did not recognise him and the camp did not have his details. He was detained in [City 1] security for two days and tortured and harassed. He was released when the officials accepted his explanation that he was visiting his parents who lived in the camp. He thought that if they had thought he was a member of a rebel group he would have been killed. On his release he returned to Khartoum as he was frightened he would be intercepted again and harmed on the roads coming into [City 1]. He never visited his family or visited [City 1] again.
32. In February 2013 he was detained in the [a] detention centre for 7 days. He was “severely beaten and suffered [an] injury. He was released with threats of killing him if they intercepted him again”. He said they considered him and all members of [Ethnic Group 1] to be rioters hostile to the regime. He was able to arrange his affairs and obtain a passport after his release and depart almost [number] months later.
33. At his protection interview in March 2019 the applicant claimed he was detained on three occasions. He said in early 2009 he was detained at the border checkpoint when he was going from [Camp 1] to his home village of [Village 1]. They suspected him of being a member of JEM. When they established he had come from the camp he was released. On the second occasion he was detained in late 2010 (after he had moved to Khartoum) when he went to visit his family in [Camp 1]. The delegate questioned the applicant about why he was not recognised as a member of his family if his name was on the list provided by his father to camp authorities when he lived there between 2005 and 2009. The applicant said there was no actual registration of family members and no-one was issued with documents. He has [number] siblings (his father had [number] wives) and the camp authorities just wrote down on a piece of paper how many family members there were for the purpose of issuing food rations. When someone entered the camp they would be detained and interrogated and when they established who the person was they would release them. Once again the authorities initially suspected he was a member of an opposition/rebel group. They released him when he said (and presumably they confirmed) he was studying at university in Khartoum.
34. After this incident the applicant left [City 1] and did not return. He has not seen his parents since this incident. He decided then that he wanted to leave Sudan but did not know how to do so. In about [2012] he was able to obtain a genuine passport through someone he met in the Arab market. He continued to make enquiries of people about how to leave.
35. In [2013] the applicant claimed he was arrested and detained by members of the security service (NISS) at his university whilst he was observing a discussion group led by members of the opposition groups. Such discussion groups occurred reasonably regularly and often resulted in confrontations between pro-government and anti-government students. Often students would be threatened and intimidated by members of the security forces to prevent them from participating in anti-government groups. On this occasion he was arrested with others at the discussion group and detained at [a] detention centre. He was beaten and kicked. After a week he was released when he promised not to attend any further discussion groups. He said that he did not go back to university and hid while he asked people how he could leave Sudan. When asked what he meant by “hid” he said he did not go to university.

He still lived in Omdurman until he departed Sudan [number] months later. He found someone who was a people smuggler who organised his visa for [Country 1] and helped him make the travel arrangements.

36. The delegate asked the applicant if he had ever been a member of any anti-government or rebel groups or actually participated in their activities. He said he had only ever been an observer of the discussion groups although he “liked their ideas”. He later went on to say that he was often questioned and intimidated for one or two hours at the university. There was a lot of discrimination against Darfuri students at the university and because they were visible due to their darker skin colour they were targeted for intimidation by members of the security forces. The discussion groups were often about this type of discrimination and oppression by government authorities. The applicant’s explanation for why he was arrested on this particular occasion when he was only an observer was that the authorities wanted to intimidate people and stop them from going to these discussion groups. He did not know why he was kept for a week on this occasion and then released without charge other than saying he was released when said he undertook to not attend such discussion groups again.
37. The applicant stated that he was able to obtain a passport in [2012] in his own name upon the payment of [amount]. He also had a valid exit visa which he frequently referred to as a one-way visa. In his written statement of claims the applicant made no mention of having any difficulty leaving Sudan or having to pay a bribe to obtain his passport. At his protection interview he said that he was taken aside and questioned in a small room for about an hour because they saw he had a one-way visa. I take this to mean the applicant had a one-way plane ticket as the visa may have been a single entry visa but does not make reference to being “one way”. They insulted him, did a body search, took the money he had on his person and accused him of making up fake stories about al-Bashir when he left. They said if he left he will never come back. The applicant took this to mean that if he returned they will kill him. Nevertheless, they allowed him to board the plane.
38. DFAT reports that in order to obtain a Sudanese passport, an individual must present their birth certificate, national identity card and provide a guarantor confirming their identity. In late 2009, Sudan began issuing machine-readable passports which include some sophisticated security features, including a microchip containing the holder’s details.¹⁶
39. DFAT also reports that individuals are required to obtain an ‘Exit Visa’ in order to leave the country. This requirement has been used to restrict the travel of some high-profile individuals, especially those who were of political or security interest.¹⁷ NISS has a significant presence at the airport and reviews documentation of all people leaving and entering Sudan.¹⁸ DFAT assesses that an individual would come to the attention of the authorities if they did not leave Sudan with a valid ‘Exit Visa’ or were of specific interest to the authorities.¹⁹ DFAT also reports there is a high level of corruption in Sudan and given the discrimination by officials against people identified as Darfuri I accept it is possible the applicant was asked to pay additional money to enable him to obtain his passport. However, based on the above information and the fact that the applicant only mentioned being

¹⁶ 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

¹⁷ Department of Foreign Affairs and Trade (DFAT), “DFAT Country Information Report – Sudan”, 27 April 2016, p.6, CIS38A8012704

¹⁸ Ibid

¹⁹ Department of Foreign Affairs and Trade (DFAT), “DFAT Country Information Report – Sudan”, 27 April 2016, p.6, CIS38A8012704

questioned at the airport for the first time at his protection interview, I am satisfied his passport was valid and genuine. Whilst I accept he may have been insulted by the authorities and had his money “confiscated” at the time of his departure, the fact that he had no particular difficulty leaving suggests he was of no interest to Sudanese authorities when he applied for his passport a year before his departure or when he departed three months after his detention in Khartoum.

40. I am willing to accept the applicant was detained and questioned in 2009 and 2010 when going to his village from the IDP camp and later when entering the IDP camp. Country information indicates that security was an issue for displaced people in Western Darfur at that time and it would seem logical that a person would be detained until their identity and purpose for being in the area was established. The applicant has been reasonably consistent that he was not harmed on these two occasions although he felt intimidated.
41. I accept that the applicant decided he wished to leave Sudan in 2010 and started making enquiries about how he could do so at that time. However, I consider the reasons for his decision were primarily economic and his discontent about the discrimination he experienced as a Darfuri. He obtained his passport in [2012] [number] months before his departure without difficulty which suggests he had no adverse political profile with authorities at that time.
42. I have some concerns about the applicant’s lack of detail about his claimed arrest and detention for a week in [2013] at the university when he was observing a discussion group but not actually participating himself or participating in any confrontation between different groups of students. According to the UK Home Office various sources have stated that Darfuri university students were targeted by members of the NISS for harassment, intimidation, arbitrary detention and sometimes torture on suspicion of being associated with or members of rebel groups.²⁰ I am therefore prepared to accept he was detained and interrogated about his participation in these groups and that he was physically mistreated during his detention. However, based on information in the same UK Home Office report about treatment of members of opposition groups at that time, I consider that had the authorities believed he was a member of an opposition group it is unlikely he would have been released without charge. In addition, the applicant was able to depart Sudan without being identified as a person of adverse interest to the authorities for reasons of his imputed political opinion or imputed association or membership of opposition groups.
43. DFAT reports that since the mid-1980s there has been armed conflict between government forces and rebel groups linked to the Fur, Massalit and Zaghawa tribes located in Darfur although incidents of formal armed conflict have decreased.²¹ The UK Home Office concluded that Non-Arab Darfuris who are situated in Darfur may be suspected of having connections to rebel groups in Darfur and therefore may be targeted by the Sudanese authorities or militia groups.²² In the applicant’s case I am satisfied that the applicant was not suspected of having connections to rebel groups in Darfur and the times he was detained and interrogated in 2009 and 2010 were part of the normal routines for those entering IDP camps or travelling to

²⁰ UK Home Office, “Country Policy and Information Note – Sudan: Non-Arab Darfuri”, v.3.0, 28 September 2018, OG9EF767949

²¹ Ibid

²² 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

the border areas near Chad²³. Based on his own evidence I am satisfied he did not suffer serious harm on those occasions.

44. Nevertheless, the current security situation in Darfur continues to be precarious since the cease-fire in June 2016. The UK Home Office 2018 report cites various sources including the US Department of State, (USDOS), Amnesty International, African Centre for Justice and Peace Studies, Human Rights Watch, the joint UN and African Union peacekeeping mission (UNAMID) and others who have reported that there have been incidents of unlawful killing of civilians including IDPs, mainly by pro-government militia and reports of widespread looting, rape and arbitrary arrests across Darfur. At the time of the publication of the UK Home Office report in September 2018 no major armed confrontations had taken place between the Government of Sudan and Darfur rebel groups since 1 July 2017 and large scale inter-communal clashes had subsided since mid-2015. However, the UN Security Council assessed the overall security situation in Darfur as precarious due to activities of militia groups, continuing intercommunal violence, the prevalence of weapons, criminality and the absence of rule of law. The Sudanese armed forces, paramilitary units and tribal militias generally have been able to act with impunity.²⁴
45. The UK Home Office report also cited the UN Security Council statement on 1 June 2018 in its Special report of the Chairperson of the African Union Commission and the Secretary-General of the United Nations on the strategic review of the African Union-United Nations Hybrid Operation in Darfur – “The security situation in Darfur has remained relatively stable, following military gains by the Government of the Sudan against the rebel movements since 2016 and a decrease in large-scale intercommunal clashes as of mid-2015, leading to the consolidation of State authority across Darfur, except for small pockets in the Jebel Marra area. Overall, the situation in Darfur has evolved significantly from the height of the conflict in the late 2000s, when the situation was marked by an armed conflict between Government forces and non-State actors. Today, conditions are better described as those of lawlessness and criminality, aggravated by a protracted humanitarian crisis, continued human rights violations and the lack of development. On the political front, the Darfur peace process remains incomplete”.²⁵
46. In the light of this information and the fact the applicant would be most likely to return to an IDP camp, I accept it is not reasonable for him to return to Darfur now or in the reasonably foreseeable future. I am satisfied that the applicant resided in Omdurman, Khartoum for five years prior to his departure. Employment opportunities are greater in Khartoum. I therefore consider that it is most likely he will return to Khartoum rather than Darfur.
47. There is no recent and reliable census data available for the composition of the population in Khartoum. Its population growth has been rapid due to forced displacement, including influxes of refugees and IDPs, seasonal and economic migration and the concentration of employment and services in Khartoum. Darfuris have been migrating to Khartoum since the 1980s and although actual figures are not available various sources have indicated that there is a sizeable Darfuri population in Greater Khartoum of up to a million.²⁶

²³ UK Home Office, “Country Policy and Information Note – Sudan: Non-Arab Darfuri”, v.3.0, 28 September 2018, OG9EF767949

²⁴ Ibid.

²⁵ UK Home Office, “Country Policy and Information Note – Sudan: Non-Arab Darfuri”, v.3.0, 28 September 2018, OG9EF767949

²⁶ UK Home Office, “Country Policy and Information Note – Sudan: Non-Arab Darfuri”, v.3.0, 28 September 2018, OG9EF767949

48. In its 2016 country report on Sudan, DFAT concluded that individuals from Darfur could safely relocate to Khartoum, depending on their individual circumstances.²⁷ In 2016 DFAT assessed that overall, Darfuris in Khartoum faced a moderate risk of discrimination and violence on the basis of their ethnicity and their actual or perceived support for or association with rebel groups²⁸. Darfuris who have or are perceived to be associated with an armed rebel group or criticise or challenge the government, including student activists, civil society or political activists, were likely to be of adverse interest to the authorities.
49. However, events in Sudan have changed fairly dramatically in the past two months. A number of peaceful protests were held early in the year demanding President Omar al-Bashir stand down. On 11 April 2019 President Bashir was 'removed' by the military and a three month state of emergency was declared by Sudanese authorities.²⁹ The Rapid Support Forces (RSF) are now in control of the government. The RSF were formerly the Janjaweed militias used by the government to fight the rebels in Darfur. They are under the administration of the National Intelligence and Security Services (NISS) and commanded by General Mohamed Hamdan Dagalo who was himself a Darfuri. He is also Deputy head of the Transitional Military Council (TMC) now in power in Sudan. The RSF is largely made up of militia accused of systematic human rights abuses during the war in Darfur.³⁰
50. Since the military have taken control of the government protesters have been insisting the military call democratic elections. Talks between protesters and Sudan's military rulers over who should govern during a transitional period have broken down.³¹ There have been a number of crackdowns on protesters and members of the opposition resulting in significant numbers of deaths and injuries, including of civilians³². Heavily armed RSF units have been sweeping through Khartoum and neighbouring Omdurman. The Guardian reported video clips circulating on social media show the RSF and other armed forces shooting and beating unarmed people on the streets.³³ There is no information before me that suggests non-Arab Darfuris are being targeted by the authorities or the RSF, however, it is clear that there is a significant risk of generalised violence to the civilian population in Greater Khartoum at the moment.
51. The applicant has stated he has no links with armed rebel groups, does not belong to a political party and has not participated in any political activities other than one peaceful street protest at which he was not arrested or detained. As discussed above, whilst I accept that at the times he was detained he may have been suspected of being associated with rebel groups by virtue of his tribal ethnicity. However, I am not satisfied that Sudanese authorities or militia groups identified him as a member of armed rebel groups, political or student

²⁷ Department of Foreign Affairs and Trade (DFAT), "DFAT Country Information Report – Sudan", 27 April 2016, CIS38A8012704

²⁸ Ibid

²⁹ Department of Foreign Affairs and Trade (DFAT) Smartraveller, "Sudan", 16 April 2019, <https://smartraveller.gov.au/Countries/africa/north/Pages/sudan.aspx> Accessed 6 June 2019

³⁰ The Guardian, "Sudan paramilitaries threw dead protesters into Nile, doctors say", 6 June 2019, <https://www.theguardian.com/world/2019/jun/05/sudan-death-toll-rises-to-60-after-khartoum-pro-democracy-sit-in> Accessed 6 June 2019

³¹ ABC news, "More than a dozen people killed, hundreds wounded as Sudan troops besiege protest camp, doctors say", 3 June 2019, <https://www.abc.net.au/news/2019-06-03/sudan-troops-besiege-protest-camp-killing-civilians,-doctors-say/11174746> Accessed 6 June 2019

³² The Guardian, "Sudan paramilitaries threw dead protesters into Nile, doctors say", 6 June 2019, <https://www.theguardian.com/world/2019/jun/05/sudan-death-toll-rises-to-60-after-khartoum-pro-democracy-sit-in> Accessed 6 June 2019

³³ The Guardian, "Sudan paramilitaries raped and assaulted protesters and medics", 5 June 2019, <https://www.theguardian.com/world/2019/jun/04/sudans-military-council-calls-for-snap-elections-in-wake-of-deadly-protests> Accessed 6 June 2019

activist and they released him on each occasion. Nevertheless, I am willing to accept that Sudanese authorities may have a record of his arrest and have identified him as being a student involved in low level opposition activities.

52. Based on the fact he was able to obtain a passport and depart Sudan despite being questioned by authorities at the time of his departure, I am satisfied the applicant does not personally have an adverse political profile with the Sudanese security forces (NISS), armed forces, para-military militia pro-government groups or any other group or person in Sudan. However, I do accept that as a person of visible African descent with very limited personal ties in Greater Khartoum that he is more vulnerable and at risk of generalised violence in Greater Khartoum.
53. The applicant also claims he will be “imputed to be politically hostile” to the government by virtue of his departure from Sudan and applying for protection.
54. In 2016, the Upper Tribunal of the UK Immigration and Asylum Chamber provided general guidance on the position of returned asylum seekers and found that there was no risk of persecution for failed asylum seekers per se.³⁴ This was supported by a number of sources in the Danish and British 2016 fact finding report.³⁵ The same report indicated that returnees who had a political profile may be thoroughly questioned and/or arrested at the airport. Long-term residency outside Sudan in and of itself would not be a risk factor.³⁶ DFAT in its 2016 report assessed that if an individual was of interest to the government, they would likely be questioned by the NISS in detail including potentially being taken to NISS headquarters for further questioning. Several sources indicated that there is no particular problem for Sudanese citizens arriving from Western countries although those coming from Israel and Jordan may be at risk of detention and arrest.³⁷ The UK 2017 Country Policy and Information Note on rejected asylum seekers in Sudan states that travel using emergency or temporary travel documents would not in itself be a risk factor.³⁸
55. The most recent UK Home Office 2018 report states that the authorities are likely to question individuals on arrival as part of an immigration and security control process, and many take a particular interest in those who have been removed forcibly and/or travelling on an emergency travel document. However, there is no clear and cogent evidence that this interest persists beyond arrival or that persons are subject to treatment during questioning amounting to serious harm. Nevertheless, the state continues to be intolerant of dissent and may take an adverse interest in a person who is, or is perceived to be, critical of or a threat to the government because of their particular profile and/or activities.³⁹ There were also some suggestions among the sources used for the UK Home Office report that returnees who are Darfuri may be arrested and/or subjected to more extensive questioning specifically about their political activities both within and outside Sudan.⁴⁰

³⁴ UK Home Office, “Country Policy and Information Note – Sudan: Failed asylum seekers”, 9 August 2016, OGD7C848D61

³⁵ 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

³⁶ Ibid

³⁷ Ibid

³⁸ UK Home Office, “Country Policy and Information Note – Sudan: Rejected asylum seekers”, 1 August 2017, OG6E7028845

³⁹ UK Home Office, “Country Policy and Information Note – Sudan: Non-Arab Darfuri”, v.3.0, 28 September 2018, OG9EF767949

⁴⁰ UK Home Office, “Country Policy and Information Note – Sudan: Non-Arab Darfuri”, v.3.0, 28 September 2018, OG9EF767949

56. Based on the above country information, I consider there is a remote risk the applicant will be subjected to serious harm if he returns either voluntarily or involuntarily, given he is a non-Arab Darfuri, and authorities may have a record of his detention when he was a student in 2013.
57. Overall, based on the above findings, I consider there is a remote risk the applicant will suffer serious harm for reasons of his imputed and/or political opinion and membership of a particular social group, that is, failed asylum seekers returning to Sudan.

Cumulative consideration of the applicant's claims

58. I am satisfied the applicant is a non-Arab Darfuri of African descent, a member of [Ethnic Group 1] and that his home region is Darfur. I accept he has been detained and interrogated on two occasions in Darfur in 2009 and 2010 but that he was not seriously harmed on either occasion. I accept he was arrested and detained in [2013] in Khartoum when he was listening to a discussion group organised by those in the opposition. I accept he was seriously harmed on this occasion but that he was released after he undertook not to attend such discussions again. I am satisfied he has never been a member of an opposition group, rebel group or political party himself and that he was not involved in any political activities in Sudan other than listening to discussions about opposition ideas when he was a student in Khartoum. I am satisfied he did not personally have an adverse political profile with Sudanese authorities at the time of his departure from Sudan in May 2013. However, I am willing to accept it is possible that authorities have a record of his previous detention which will identify him as a student involved at some minor level in opposition activities.
59. I am satisfied the Sudanese authorities will be likely to assume he has applied for protection in Australia given his length of absence and he would return with temporary travel documents whether he returns either voluntarily or involuntarily. As a consequence I accept he is likely to be questioned about the reasons for his departure and lengthy absence. However, there is no evidence before me that under the al-Bashir government failed asylum seekers were at real risk of serious harm unless they are returned from Israel or Jordan.
60. I am satisfied there is a high level of generalised violence in Greater Khartoum, particularly against those identified as students and protesters and a risk of generalised violence in Darfur, particularly for non-Arab Darfuris.
61. Having regard to all the above findings, together with country information about recent events in Sudan, I am satisfied that the risk the applicant will suffer serious harm for reasons of the cumulative effects of this ethnicity (race), imputed political opinion and membership of a particular social group (returning failed asylum seekers) is more than remote and therefore a real risk if he returns to Sudan now or in the reasonably foreseeable future. Furthermore, as the applicant fears harm from the state I accept that the harm he fears relates to all areas of Sudan.

Refugee: conclusion

62. The applicant meets the requirements of the definition of refugee in s.5H(1). The applicant meets s.36(2)(a).

Decision

The IAA remits the decision for reconsideration with the direction that:

- the referred applicant is a refugee within the meaning of s.5H(1) of the *Migration Act 1958*.

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.