



Australian Government
Immigration Assessment Authority

Decision and Reasons

Referred application

SUDAN
IAA reference: IAA21/08949

Date and time of decision: 16 April 2021 18:02:00
S MacKenzie, 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 a citizen of Sudan. He arrived in Australia in July 2013 as an unauthorised maritime arrival. On 15 September 2017 he lodged a valid application for a Class XE Subclass 790 Safe Haven Enterprise visa (SHEV). He claimed to fear harm from the government authorities in Sudan on account of his membership of the Nouba tribe.
2. A delegate of the Minister for Immigration (the delegate) refused to grant the visa on 15 March 2021, on the basis that the applicant did not face a real chance of serious harm or a real risk of significant harm upon return to Sudan.

Information before the IAA

3. I have had regard to the review material given by the Secretary under s.473CB of the *Migration Act 1958* (the Act).
4. The Department wrote to the applicant on 18 October 2019, via his appointed representative, requesting that he attend a scheduled interview on 1 November 2019. The purpose of the interview was to discuss his SHEV application and his claim to be a person in respect of whom Australia has protection obligations (protection interview). On 28 October 2019, the representative informed the Department that the applicant had not responded to calls, messages, and letters sent to him informing him of the scheduled interview.
5. On 6 October 2020, [Agency 1] emailed the Department a Form 929 (Change of contact and/or passport details) on the applicant's behalf. It stated that the applicant was homeless and that it was best to contact him via the email address provided.
6. The Department again wrote to the representative on 18 February 2021, requesting that the applicant attend the protection interview on 4 March 2021. The delegate sent a follow up email to the representative on 23 February 2021 noting that the applicant had failed to attend the previously scheduled protection interview, that he appeared to have a history of homelessness, and that he had provided an updated email address in October 2020. The delegate advised the representative that if the Department was unable to contact the applicant that it would likely make an assessment on the papers, including consideration of any submission provided. In his email response later that day, the representative advised that he had tried to contact the applicant without success.
7. On 24 February 2021, the delegate emailed the applicant using the address provided on the Form 929. The delegate advised him that his representative had been unable to contact him regarding the protection interview scheduled for 4 March 2021. He also advised him that if he did not attend the interview that his application would likely be decided without an interview or further contact. It appears no response to that email was received.
8. On 1 March 2021, a Team Leader from the Department's Complex Status Resolution Team twice attempted to contact the applicant by telephone without success. He also unsuccessfully attempted to contact a friend of the applicant. The Team Leader also emailed the applicant asking him to contact him, [or one of two support agencies]. It appears no response was received.

9. According to the delegate's decision and an email dated 15 March 2021 from an Assistant Director from the Department's Humanitarian Program Operations Branch, there have also been several other attempts to contact the applicant by telephone to no avail.
10. As noted above, the delegate refused the application on 15 March 2021. The case was referred to the IAA on 19 March 2021.
11. In the acknowledgement letter sent to the applicant by email on 19 March 2021, the IAA provided an information sheet (with Arabic translation) and a copy of the IAA Practice Direction which outlined the timeframes for providing information to the IAA. As outlined in the correspondence, submissions and new information should be provided within 21 days of the case being referred to the IAA by the Department. The correspondence was sent to the applicant's email address provided to the Department in October 2020. On 22 March 2021, the IAA attempted to contact the applicant on the mobile number provided in his SHEV application. The IAA left a voice message for him to return the call, but no response was received. On 15 April 2021, the IAA again attempted to call the applicant on the same number. A further message was left but there has been no return call. The IAA also attempted to call the applicant on a different mobile number recorded in the Department's file, but it was engaged. The applicant's case has been with the IAA for four weeks and he has not responded to the IAA's email or telephone correspondence. When I consider this, along with the Department's and his appointed representative's recent attempts to contact him to no avail, I consider it is reasonable to proceed to make a decision.
12. I have obtained new information in the form of a recent UK Home Office report specifically about the situation for Nuba people in Sudan.¹ The delegate did not refer to any country information in their decision. I am satisfied that there are exceptional circumstances to justify considering this new information as it is relevant to the issue for determination.

Applicant's claims for protection

13. The applicant's claims can be summarised as follows:
 - He originates from the Sudanese province of South Kordofan and is a member of the 'Nouba tribe';
 - He fears harm from the Sudanese government authorities due to his tribal identity.

Refugee assessment

14. 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.

¹ UK Home Office, "Country Policy and Information Note. Sudan – Nuba, Version 1.0", December 2020

Well-founded fear of persecution

15. 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.
16. Since his arrival in Australia, the applicant has consistently claimed to be a national of Sudan. However, as noted in the delegate's decision, he has not provided any documentary evidence of his citizenship, nationality or identity. In an invitation sent to him dated 27 July 2016, prior to the lodgement of his SHEV application, the Department explained the need to satisfy the identity requirements. It was explained that if he had no documentary evidence of his identity, nationality or citizenship, or was unable to provide requested documents, he should provide a detailed explanation for this in his application. There appeared to be no explanation provided. The delegate ultimately accepted the applicant's identity (name and date of birth) was as claimed and that his receiving country was Sudan. For the purposes of this assessment, I also accept the applicant's name and date of birth is as claimed, that he is a national of Sudan, and that Sudan is the receiving country.
17. The applicant's claims for protection are set out in his SHEV application, signed and dated 14 September 2017. In summary, he claimed to originate from South Kordofan and that he faced harm in Sudan from the government authorities due to his membership of the Nouba tribe. He stated that persons from his tribe were being attacked all over Sudan and that the authorities were bombing their villages. He faced being killed or imprisoned and believes he is on a government list. He also claimed that his maternal cousin and brother-in-law were detained, implying this being due to their membership of the Nouba tribe.
18. Soon after his arrival in Australia, the applicant participated in an 'Irregular Maritime Arrival & Induction Interview' conducted by the then Department of Immigration and Citizenship (arrival interview). It was conducted in two parts on 21 July 2013 and 3 August 2013. In the arrival interview, he indicated that he left Sudan due to the Nouba being detained. He mentioned that his maternal cousin and brother-in-law were imprisoned and that if he were to return to Sudan he too would be imprisoned. He also stated that the Nouba have no rights to education. He said that his brother once participated in an anti-government protest and indicated this led to the brother being expelled from university.
19. I have some difficulties with the applicant's evidence as to his background in Sudan. He claimed both in the arrival interview and SHEV application that he was born in '[City name]'² in South

² Also recorded on his SHEV application form as [two spelling variations]

Kordofan and primarily lived in that part of Sudan until 2010. However, he also indicated that he attended university in Khartoum from 2004 until 2010. Further, he claimed that the Nuba in Sudan have no rights to education, which I find difficult to reconcile with his evidence that he attended university for around six years. He also claims to have obtained a bachelor's degree in [subject] in 2010.

20. Information from the UK Home Office indicates that the Nuba peoples are a group of ethnic groups that comprise of various non-Arab ethnic groups who are indigenous to, and inhabit, the Nuba Mountains in South Kordofan. The Nuba also live in the Blue Nile State of Sudan and together these areas are known as the "Two Areas". The Nuba are comprised from around 50 tribes. Many Nuba now live in and around Khartoum due to conflict in their home area.³ The applicant has claimed to have originated from South Kordofan and lived in Khartoum, and I infer his claim to be a member of the 'Nouba tribe' is that he is of the Nuba peoples.
21. The applicant's written claims were brief and given the delegate's inability to explore with him his background and claims at interview, I have difficulty accepting that he originates from South Kordofan, that he is a member of the Nouba tribe or Nuba peoples, or that family members have been detained or imprisoned. I have considered whether to exercise my discretion and invite the applicant to provide new information and/or attend an interview at the IAA. However, in all the circumstances, I have decided not to. As noted above, the Department has repeatedly attempted to contact the applicant, including via his appointed representative, by telephone and email to no avail. He has not responded to the IAA acknowledgement letter sent by email on 19 March 2021, nor voicemail messages left on 22 March and 15 April 2021 requesting he contact the IAA. On the evidence, I am not satisfied the applicant originates from South Kordofan, that he is a member of the 'Nouba tribe' or of the Nuba peoples, that family members have been detained or imprisoned, or that his name is on a government list. I am not satisfied he faces a real chance of harm in Sudan for these reasons now, or in the reasonably foreseeable future.
22. Even if I were to accept the applicant was of the Nuba peoples, I would not be satisfied he would face a real chance of harm by the Sudanese government authorities on that basis now, or in the reasonably foreseeable future. According to the UK Home Office's Country Policy and Information Team in 2020, no specific information could be found of the state targeting the Nuba in Khartoum and surrounding areas and the Two Areas by the Transitional Government since October 2019. The UK Home Office assessed that, in its opinion, the country evidence since December 2019 did not indicate that the Nuba have been targeted because of their ethnicity by the state.⁴ On the evidence, I am not satisfied that the Nuba or Nuba peoples face a real chance of harm in Sudan from the state on the basis of their ethnicity alone.
23. The applicant does not have a well-founded fear of persecution within the meaning of s.5J.

Refugee: conclusion

24. 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).

³ UK Home Office, "Country Policy and Information Note. Sudan – Nuba, Version 1.0", December 2020

⁴ Ibid

Complementary protection assessment

25. 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

26. 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.
27. The expressions 'torture', 'cruel or inhuman treatment or punishment' and 'degrading treatment or punishment' are in turn defined in s.5(1) of the Act.
28. I have found that the applicant does not face a real chance of any harm in Sudan for the reasons claimed. Based on the same information, and for the reasons set out above, I find he does not have a real risk of suffering significant harm in Sudan.
29. After having regard to the applicant's circumstances, I find that he does not face a real risk of suffering significant harm.

Complementary protection: conclusion

30. 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.

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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.

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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.