



**Australian Government**  

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**Immigration Assessment Authority**

**Decision and Reasons**

**Referred application**

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SUDAN

IAA reference: IAA19/06736

Date and time of decision: 11 July 2019 16:30:00

K Allen, Reviewer

**Decision**

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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 a referred applicant, or their relative or other dependant.*

## Background to the review

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### Visa application

1. The referred applicant (the applicant) claims to be a Sudanese national from [Tribe 1]<sup>1</sup> who is from East Darfur. On 18 May 2017 he lodged an application for a Safe Haven Enterprise Visa ('SHEV').
2. On 4 June 2019 a delegate of the Minister for Immigration made a decision to refuse the grant of the visa on the basis that the applicant was not owed protection.

### 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 also obtained new country information from news sources about recent political events in the Sudan and the situation for non-Arab Darfuri's returning to Sudan<sup>2</sup>. There have been a number of significant changes to conditions for Darfuris in Sudan in the past two years. It appears the applicant attempted to raise information about the latest incidents regarding the actions of government authorities and anti-government demonstrations during his SHEV interview but that he was cut off before being able to do so. Information about the overthrow of the former President Omar Al-Bashir in April 2019 and subsequent protests and killings has not been referred to in the 2016 DFAT country report on Sudan which was before the delegate and no information from 2018 or 2019 has been referred to by the delegate. In all these circumstances, I am satisfied that there are exceptional circumstances to justify considering this new information.
5. The applicant has made claims relating to his political activity as a student between 2008 and 2012. The country information in the referred material does not address the treatment of students at that time. The applicant's claimed profile as a student protester who came to the attention of the National Intelligence and Security Service (NISS) is a central aspect of his claim. In order to properly assess the applicant's claims I have obtained reports on student activity in Khartoum in 2011 and 2012<sup>3</sup>. Given the absence of information in the referred material relating to this material aspect of the applicant's claims, I am satisfied that there are exceptional circumstances to justify considering the new information.
6. On 28 June 2019 the applicant's representative provided a submission and new information to the IAA in the form of a statement from the applicant about the delegate's decision; a letter of support from [Agency 1]; and photographs of the applicant participating in protests against the actions of the Sudanese government in Australia. On 2 July 2019 the applicant's representative

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<sup>1</sup> [Deleted]

<sup>2</sup> United Nations (UN) News Service, 'UN suspending handover of camps in Darfur, peacekeeping chief tells Security Council', 14 June 2019, 20190628163834; United States (US) Department of State, "Country Reports on Human Rights Practices for 2017 - Sudan", 20 April 2018, OGD95BE927360; BBC News, "Sudan crisis: Military calls for snap election amid protests", 4 June 2019, 20190701111405; Agence France Presse (AFP) - France, 'Sudan protesters announce day of 'civil disobedience' in mid-July', 2 July 2019, 20190702155930; United Kingdom (UK) Home Office, "Country Policy and Information Note – Sudan: Non-Arab Darfuri", v.3.0, 28 September 2018, OG9EF767949.

<sup>3</sup> Sudan Tribune, 'Death of Darfur rebel leader sparks student brawl in Sudan's capital', 29 December 2011; Canada: Immigration and Refugee Board of Canada, 'Sudan: Student protests in 2012, particularly at the University of Sudan and Gezira University; treatment of protesters by security forces; role of the Darfur Students Organization and the Darfur Graduate Students Association', 7 June 2013

sent a submission on behalf of the applicant and also new country information in support of the applicant's claims. To the extent that the applicant and the representative have provided submissions that are not new information but rather argument about the delegate's decision, I have had regard to those submissions in making this decision.

7. I have not had regard to the letter of support from [Agency 1]. The letter is dated 12 June 2019 and states that the applicant would be arrested on return to Sudan as he has no passport and because he came to Australia to seek protection. It also makes a positive assessment of his character. Even though the letter postdates the delegate's decision, there is nothing about this letter that could be described as new or exceptional. It contains speculation as to what would happen to the applicant on his return to Sudan which does no more than corroborate the applicant's claims which I have accepted and it makes a character assessment which I do not consider to be relevant to the applicant's claims for protection. Overall, I am not satisfied that there are exceptional circumstances to justify considering the new information.
8. I have not considered new information contained in the applicant's statement about a 2018 incident of arson in the [named] refugee camp or the names of tribal members associated with the Justice and Equality Movement (JEM). There is little detail about this information; there is inadequate explanation about how this information relates to the applicant's circumstances; the information is unsupported; and the information appears to predate the decision of the delegate. Overall, I am not satisfied that there are exceptional circumstances to justify considering the new information.
9. I have had regard to the photographs of the applicant participating in protests in Australia at various locations including at [two specified locations] in Canberra and commentary on those photographs. I am satisfied that this is credible personal information. Further I note that it would not have been apparent during that interview that the delegate would not accept this claim. As the delegate did not accept the applicant's claims in this regard and these photographs support the applicant's claimed activity which is relevant to his profile and his risk of harm on return to Sudan, I am satisfied that there are exceptional circumstances to justify considering the new information and that s.473DD(b)(ii) is met.
10. I have also had regard to news reports from 2019<sup>4</sup> and commentary on that information provided by the applicant's representative about recent events which have taken place in Khartoum. Given the very recent nature of these events, the reporting of those events and the closeness of those events to the date of the delegate's decision, I am satisfied that this information was not and could not have been provided to the delegate. In addition to this it points to a significant change in the country information such that I am satisfied that there are exceptional circumstances to justify considering the new information in accordance with s.473DD of the Act.

### **Applicant's claims for protection**

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11. The applicant's claims can be summarised as follows:

- The applicant was born in [year] in [a town] in the area of Ed Daein<sup>5</sup>, the capital of East Darfur. He is a member of [Tribe 1].

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<sup>4</sup> The Guardian, "Sudan paramilitaries threw dead protesters into Nile, doctors say", 6 June 2019; The Guardian, "Sudan paramilitaries raped and assaulted protesters and medics", 5 June 2019; ABC news, "More than a dozen people killed, hundreds wounded as Sudan troops besiege protest camp, doctors say", 3 June 2019

<sup>5</sup> Also appears to be written El Daein, Ad Du'ayn, Ad Da'en or Ed Da'ein when translated from the Arabic

- In 2004 the Sudanese Army and pro-regime Janjaweed Arab tribal militia raided their village, murdered his father, destroyed their crops and released their cattle and sheep.
- He, his father's [number] wives and his [number] siblings fled to the [named] United Nations Internally Displaced Persons (IDP) [camp] and his family remain living there. He completed his school education in the camp and then returned there after finishing university.
- In 2006 he moved to Omdurman in the capital of Khartoum where he studied [subject] at [a named] University. At university he faced harassment and discrimination and was failed in some subjects because of his Darfuri ethnicity resulting in him not completing his degree until 2012.
- Because of the treatment of Darfuris he joined student demonstrations and groups demanding rights for Darfuris and a halt to the acts of arrest, detention, repression and hostilities that target them. The security forces and the militias used to intercept those groups.
- In 2008 he was detained by the National Intelligence and Security Services (NISS) and interrogated about this activity. When it was apparent that he was not associated with the opposition political group, the Justice and Equality Movement (JEM), he was released after one week.
- In 2011 he was arrested from inside the university campus and detained and tortured for [number] weeks and then released with a warning. He decided to leave Sudan and seek asylum.
- After completing his degree in 2012 he returned to the IDP camp to see his family and to get some money to help him to leave Sudan.
- One month before his departure he returned to Khartoum to make arrangements for his departure and to obtain a passport.
- [In] April 2013 he went to Khartoum International Airport (KIA) where he was instructed to meet the person who was facilitating his travel. That person was not at the window and he was then held at the airport for four hours and interrogated about his plans. The authorities at KIA were worried about the Movements in Darfur getting money from outside the country. He was forced to sign a document stating that he would not act against the government and he was allowed to depart for [another country] and he made his way to Australia.
- He will be harmed in Sudan as a Sudanese of African descent who is a member of [Tribe 1]. All young male non-Arab tribespeople like [Tribe 1] are suspected of being involved with the JEM, active in the Darfur region, and sympathetic to rebels of the Sudan Peoples' Liberation Army who are still fighting the regime for autonomy.
- Now in addition, he is a fugitive so he is held to be inimical to the ruling regime. He knows he will be arrested on his return and face more torture or more serious persecution. The cumulative effect of his status creates a heightened profile for him which realistically and appreciably increases the risk of severe persecutory treatment against him at the hands of the security agencies of the regime and the militias of its supporting Arab tribes if he is returned.
- Because of the continuing violence in Sudan no reasonable person can discount the possibility that he will be targeted.

12. At his SHEV interview the applicant made the following additional claims:

- In [2012], while he was giving a speech at university, he was detained by the NISS for [number] days. They tried to force him to admit he was against the regime. They hit and abused him. He was released and thrown into the street.
- He brother was arrested by the NISS in January 2019 after he participated in the demonstrations which were held across Sudan. His family do not know where he is.
- Since arriving in Australia he has participated in demonstrations against the actions of the Sudanese government with members of the Sudanese community.

## Factual findings

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### Identity

13. The applicant claims to be a member of [Tribe 1] from East Darfur in Sudan. He claims his family were impacted by the Sudanese Army and the Janjaweed militia, their village attacked and his father killed. He claims that his mother, his father's other [wives] and his [number] siblings have lived in an IDP camp in East Darfur since 2004.
14. The applicant's claims as to his background and nationality have been consistent since his arrival in Australia. He conducted interviews in Arabic and has submitted his Civil Registration Card and translation which supports his date and place of birth. He has advised, and I accept, that his passport was taken from him by [a] people smuggler. He explained that [Tribe 1] have dark skin and originated from Chad and at his SHEV interview he displayed knowledge of their tribal practices. I accept the applicant's claims as to his identity and nationality and I find Sudan to be the receiving country for the purpose of the application.
15. DFAT reports<sup>6</sup> that Sudan is home to hundreds of ethnic and sub-ethnic groups, speaking a multitude of languages. The largest ethnic group within Darfur are the Fur people. Other non-Arab, "African", groups include the Zaghawa nomads, the Meidob, Massaleit, Dajo, Berti, Kanein, Mima, Bargo, Barno, Gimir, Tama, Mararit, Fellata, Jebel, Sambat and Tunjur<sup>7</sup>. Arabic is the dominant and official language of Sudan and sources suggest that Arabs account for 70 per cent of the population.
16. 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. DFAT reports<sup>8</sup> 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 and the 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. I accept that it is possible some members of [Tribe 1] may have been involved in conflict with government forces or the Janjaweed and that, like other local non-Arab Darfuri tribes in Eastern Darfur, they have been targeted for raids and their villages and crops burned during periods of armed conflict. In light of the country information and the applicant's own evidence, I accept the applicant's claim that his village was subject to a raid in 2004 and that the applicant and his family were displaced to an IDP camp as a result of their father being killed and their home and livelihood being destroyed.

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<sup>6</sup> Department of Foreign Affairs and Trade (DFAT), "DFAT Country Information Report – Sudan", 27 April 2016, CIS38A8012704, 2.1, 2.9

<sup>7</sup> UK Home Office, "Country Policy and Information Note – Sudan: Non-Arab Darfuri", v.3.0, 28 September 2018, OG9EF767949, 4.3.2

<sup>8</sup> DFAT, "DFAT Country Information Report – Sudan", 27 April 2016, CIS38A8012704, 3.7

## Detention and mistreatment by NISS while at university

17. The applicant claims that after two years in the IDP camp, his family supported him to travel to Omdurman in Khartoum in 2006 to study [subject] at the [named university]. At university he faced harassment and discrimination and was failed in some subjects because of his ethnicity resulting in him not completing his degree until 2012.
18. He claims that because of the Sudanese government's treatment of Darfuris and his own experiences, he joined student demonstrations and groups demanding rights for Darfuris and demanding a halt to the acts of arrest, detention, repression and hostilities that target them. He claims the security forces and the militias used to intercept those groups.
19. Initially he claimed that he was detained by the NISS on two occasions in 2008 and 2011. He claimed that in 2008 he was detained and interrogated and released after one week when it became apparent that he was of no interest to the authorities. Country information reports<sup>9</sup> that, in May 2008, the JEM undertook a raid against the Sudanese government in the cities of Omdurman and Khartoum. Sources noted that at that time widespread security operations in Khartoum took place, which were often based on the skin colour and the ethnicity of a person. There were reports of widespread arrests (numbering in the 1000s) of non-Arab Darfuris in Khartoum. I accept that as a young Darfuri student in Omdurman at that time, the applicant was detained by the NISS on suspicion of anti-government activity but was later released when he was found to not have been a part of the JEM raid.
20. The applicant claimed he was arrested by the NISS again in 2011 from inside the university campus due to his political activity, and in particular his involvement in Dafuri student groups. He claimed he was detained and tortured for [number] weeks and then released with a warning not to continue such activities. It was reported<sup>10</sup> that there were waves of anti-government student protests at universities in Sudan in 2011 after the death of Khalil Ibrahim, the leader of JEM. The death of Khalil Ibrahim and the wave of anti-government protests in some universities evidently alarmed the authorities in Khartoum State whose governor announced the formation of a new security-monitoring unit comprised of 33 groups tasked specifically with countering "riot activities" in the capital. I accept as plausible that the applicant participated in anti-government political activity in 2011 and that he was detained, tortured and interrogated as a result.
21. At his SHEV interview the applicant stated that he had been detained a third time in 2012 while at university under similar circumstances. According to Human Rights Watch<sup>11</sup>, protests occurred nearly daily from June until August 2012 and that government forces responded to violently disperse these protests. Some sources estimated that around 2,000 people were detained between mid-June and mid-July in response to the protests. It was reported that as of 11 July 2012, at least 100 people remained in detention in Khartoum alone and that some people were detained for more than four weeks without charge or denied access to a lawyer. Sources indicate that not all of those arrested were protesters and "hundreds" of known activists were arrested, even if they did not participate in the protests. In spite of the country information cited above, I consider that the late disclosure of this involvement in the 2012 demonstrations at the SHEV interview raises questions as to the credibility of the applicant's claim to have been

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<sup>9</sup> UK Home Office, "Country Policy and Information Note – Sudan: Non-Arab Darfuri", v.3.0, 28 September 2018, OG9EF767949, 2.4.13

<sup>10</sup> Sudan Tribune, 'Death of Darfur rebel leader sparks student brawl in Sudan's capital', 29 December 2011

<sup>11</sup> Quoted in, Canada: Immigration and Refugee Board of Canada, 'Sudan: Student protests in 2012, particularly at the University of Sudan and Gezira University; treatment of protesters by security forces; role of the Darfur Students Organization and the Darfur Graduate Students Association', 7 June 2013

involved. Further it is not apparent why the applicant would have risked a further detention after he was warned about his actions in 2011. Given the applicant's very specific references to other earlier incidents of detention throughout the application process, it does seem quite telling that the most recent one was not referred to until later in the SHEV interview. Overall I do not accept that this third detention occurred.

22. According to Human Rights Watch, the majority of NISS detainees were held in its detention centres, which it claims are "well known for the use of ill-treatment and torture". Most detained protesters were subject to torture. Sources indicated that detainees included students. It was reported that more than thirteen detainees interviewed after their release indicated that they were subjected to "beatings, verbal insults, food, water and sleep-deprivation, and other ill-treatment while in detention in Khartoum and its suburbs". Many of the detainees said "they had been tortured with sticks, water hoses and fists, and made to stand under the scorching sun all day". Overall, I accept that the applicant came to the attention of the NISS on more than one occasion when he was at university (specifically in 2008 and 2011) as a result of his pro-Darfuri, anti-government political opinion and due to his ethnicity and profile. I also accept that there would very likely be a record of such involvement.
23. I have considered the applicant's claims that after he completed his studies in 2012 he had to travel back to Ed Daein carefully to avoid detection before joining his family. I have also considered his claim that a month before his departure from Sudan he returned to Khartoum in 2013 where he obtained his passport and made his travel arrangements. In spite of his claimed actions and keeping a low profile, I do not accept that the applicant remained of interest to the NISS after he finished university in 2012. He gave no indication that he was not able to complete his education or that he was sought out in Ed Daein and, in spite of being subject to questioning at the airport, he was able to leave the country on his own passport in his own name.

#### **Returning asylum seeker**

24. The applicant no longer has possession of his passport and I accept it is very likely he would be returning on a temporary travel document. I consider that it is likely that if he is returned to Sudan, the authorities at KIA may be aware that the applicant is returning from Australia after seeking asylum due to circumstances of his return on temporary travel documents.

#### **Sur place claim**

25. The applicant claims that since arriving in Australia he has participated in demonstrations against the actions of the Sudanese government with members of the Sudanese community. He has provided photographs of him with a group of Sudanese protesters labelled as being at [two specified locations] in Canberra. Another photo shows him holding protest placards and is labelled [with a third location]. It appears to depict him by himself on a suburban street. Given his previous political activity and the photographic evidence, I accept that the applicant has attended at least one demonstration against the Sudanese government since he has been in Australia. In the context of the applicant's consistently stated beliefs about the rights of Darfuris, his family history of mistreatment and displacement and his political activities at university, I consider that the applicant participated in this sur place activity because of his strong feelings about the actions of the Sudanese government and otherwise than for the purpose of strengthening his claim to be a refugee. The applicant's account of and knowledge about the protests gave no indication that he was an organiser of those demonstrations or that he had a central role or that there is a record of his involvement or that his involvement would necessarily be known to the Sudanese authorities.

## Refugee assessment

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

### Well-founded fear of persecution

27. 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.

28. I accept that the applicant is a non-Arab Darfuri of African descent, a member of [Tribe 1] and that he and his family are from Darfur. I accept that his family have been impacted by violence in Darfur and are long term residents of an IDP [camp] in East Darfur. I accept that his family banded together to support him to attend university in Khartoum from 2006-2012 and that after completing his studies he returned to Darfur. I consider that on return to Sudan the applicant would likely return to his home in Darfur. He has not indicated otherwise. I accept that as a student in Khartoum he was involved in student discussion groups and demonstrations in support of Darfuri rights and against the actions of the al-Bashir government. I accept that he has been detained and interrogated about his political activity on two occasions by the NISS in Khartoum and subject to mistreatment during those periods of detention. I am satisfied he has never been a member of an opposition group, rebel group or political party. 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 accept that the authorities in the Sudan may have a record of his previous detentions which will identify him as a student involved at some minor level in opposition activities. I also accept that he has attended at least one demonstration opposing the Sudanese government since his arrival in Australia.

29. The applicant claims to fear harm on his return to Sudan for reasons of his ethnicity as a Sudanese of African descent who is a member of [Tribe 1]. He claims that the al-Bashir government is accused of genocide against the Darfuri people and noted in his SHEV interview that the International Criminal Court has issued a warrant for the arrest of President Omar al-Bashir on war crimes and genocide charges. Further he claims that all young male non-Arab tribespeople like [Tribe 1] are suspected of being involved with the opposition political group,



the JEM, active in the Darfur region and sympathetic to rebels of the Sudan Peoples' Liberation Army-North, who are still fighting the regime for autonomy. He claims that he is known to the NISS and that his fears are compounded because of his seeking of asylum in Australia and his political activity in Australia. He has submitted that the cumulative effect of his status creates a heightened profile for him, which realistically and appreciably increases the risk of severe persecutory treatment against him at the hands of the security agencies of the regime and the militias who are supportive of Arab tribes if he is returned. The applicant has also pointed to the fact that there is continuing violence in Sudan targeting protesters and civilians and there is no way it can be ruled out that he could be targeted and killed.

30. The conflict in Darfur began in 2003 between the Sudanese government, their militiamen allies, and rebel groups. The United Nations estimated that around 300,000 people were killed in Darfur, and around 2.7 million forced from their homes. Former president Omar al-Bashir was indicted for war crimes including genocide, nine years ago<sup>12</sup>. Country information indicates that the situation in Darfur remains unsafe. In 2018 the US Department of State<sup>13</sup> reported that weak rule of law persisted in Darfur. The most significant human rights issues included extrajudicial killings; torture, beatings, rape, and other cruel or inhuman treatment or punishment of detainees and prisoners; arbitrary detention by security forces; harsh and life-threatening prison conditions. Security forces, paramilitary forces, and rebel groups continued to commit killings, rape, and torture of civilians. Local militias maintained substantial influence due to widespread impunity. Intercommunal violence, including renewed clashes between tribes spawned from land tenure and resource scarcity, resulted in high death tolls, particularly in East, South, and North Darfur. The US Department of State also reported that the government has a poor record in preventing societal violence or providing assistance or protection to IDPs. Numerous residents in Darfur routinely complained of a lack of governing presence or authority that could prevent or deter violent crime.
31. In addition to crime, there are numerous reports<sup>14</sup> of abuse committed by government security forces, rebels, and armed groups against IDPs in Darfur, including rapes and beatings. International observers noted criminal gangs aligned with rebel groups operated openly in several IDP camps. It has been reported that the precarious situation in Darfur has been exacerbated by events in 2019 in Khartoum. It has been reported<sup>15</sup> that protests erupted in Khartoum in late 2018 which lead to former president al-Bashir dissolving his government in February 2019. Protests continued through until April 2019 when the President was ousted from office. Demonstrators have been occupying the square in front of the military headquarters in Khartoum since 6 April 2019, five days before al-Bashir was overthrown<sup>16</sup>. On 3 June 2019 Sudanese security forces moved against the demonstrators, besieging the site and setting fire to tents<sup>17</sup>. There are varying reports of the death and injury tolls. According to the Sudan Doctors' Committee, nine people were killed and more than 200 wounded, many by gunfire<sup>18</sup>. It was reported that the death toll later rose to at least 13 in the worst violence experienced since the overthrow of the President.

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<sup>12</sup> UN News Service, 'UN suspending handover of camps in Darfur, peacekeeping chief tells Security Council', 14 June 2019, 20190628163834

<sup>13</sup> US Department of State, "Country Reports on Human Rights Practices for 2017 - Sudan", 20 April 2018, OGD95BE927360

<sup>14</sup> Ibid.

<sup>15</sup> BBC News, "Sudan crisis: Military calls for snap election amid protests", 4 June 2019, 20190701111405

<sup>16</sup> Ibid.

<sup>17</sup> ABC news, "More than a dozen people killed, hundreds wounded as Sudan troops besiege protest camp, doctors say", 3 June 2019

<sup>18</sup> Ibid.

32. The joint African Union-UN Mission in Darfur (UNAMID) reported<sup>19</sup> that the activities that have taken place in Khartoum have had an impact across the country including in Darfur and as a consequence it has suspended the handover of IDP camps to the Sudanese military due to the worsening violence and insecurity across the country. After the 3 June 2019 massacre in Khartoum, the Security Council, UN Peacekeeping chief, Jean Pierre Lacroix, said that the bloody military crackdown in the capital Khartoum had highlighted the central role of the Darfur-linked Rapid Support Forces (RSF), which is reportedly made up largely of former Janjaweed militia, which has been accused of serious human rights abuses in Darfur. Mr. Lacroix said that the ruling Transitional Military Council (TMC), which led the violent break-up of pro-democracy protests in the capital earlier this month, had decreed on 13 May, that UNAMID "hand over all 'camps' to the RSF, which is in contravention to the UN rules and procedures." The UN Assistant Secretary-General for Human Rights, Andrew Gilmour, told members that though violence between militias had decreased, the human rights situation overall had got worse, "with increased reports of killings, abduction, sexual violence and other violations." In the previous two months, 163 civilians had been arrested and detained in relation to protests in Darfur, and the Human Rights Section of UNAMID "has received accounts of intensified harassment of civilians and looting of houses and livestock by Rapid Support Forces", noted Mr. Gilmour.
33. Having considered the range country information about the deteriorating conditions in Darfur both in the towns and IDP camps, including the widespread impunity with which government backed militias operate, the continued reporting of extrajudicial killings, torture, beatings, rape, and other cruel or inhuman treatment or punishment of detainees and prisoners. I do not consider that it would be safe for the applicant to return to Darfur for essential reason of his non-Arab African tribal ethnicity.
34. Furthermore I am satisfied that the real chance of persecution extends to all areas of Sudan. Subject to my earlier comments that the applicant is from Darfur and he has not indicated the area to which he would return, I have also considered whether the chance of persecution now extends to what have been considered safer areas such as Khartoum. The applicant has lived in Khartoum for approximately six years prior to his departure for Australia. In its most recent report of 2016, DFAT assessed<sup>20</sup> that the current situation outside of conflict-affected areas, including Khartoum, is relatively stable in spite of general lawlessness and possible violence throughout Sudan attributable to the proliferation of weapons and the deteriorating humanitarian situation.
35. DFAT<sup>21</sup> reported that it understands that the main issue facing returnees is the lack of financial support provided for effective reintegration into Khartoum. Several sources indicated that persons from Darfur experienced some degree of discrimination which was reflected in their limited access to certain types of jobs/sectors in the labour market in Khartoum. For instance, such persons would likely find it difficult to secure skilled employment, or enter into certain qualified professions or sectors especially within the public sector. Several sources also pointed at the adverse economic conditions and the general shortage of jobs in Sudan as an additional factor, which made it difficult for Darfuris to access employment in the formal sector. DFAT assessed<sup>22</sup> that individuals from Darfur could safely relocate to Khartoum, depending on their individual circumstances (such as whether or not the individual was associated with the armed opposition rebel groups) and there are examples of individuals from Darfur being targeted in

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<sup>19</sup> UN News Service, 'UN suspending handover of camps in Darfur, peacekeeping chief tells Security Council', 14 June 2019, 20190628163834

<sup>20</sup> DFAT, "DFAT Country Information Report - Sudan", 27 April 2016, CIS38A8012704, 2.32

<sup>21</sup> Ibid, 5.39

<sup>22</sup> Ibid, 5.33

Khartoum<sup>23</sup>. I am satisfied that the applicant has previously lived in Khartoum and is familiar with that part of Sudan. As noted above, conditions in Khartoum have changed fairly dramatically since the publication of the DFAT report in 2016. A number of news reports<sup>24</sup> indicate that protests were held in Khartoum in early in 2019 demanding former president al-Bashir stand down. On 11 April 2019 al-Bashir was 'removed' by the military and a three month state of emergency was declared by Sudanese authorities. As noted above, the 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 NISS and commanded by General Mohamed Hamdan Dagalo who was himself a Darfuri. He is also Deputy Head of the TMC now in power in Sudan. It is reported that the RSF is largely made up of militia accused of systematic human rights abuses during the war in Darfur<sup>25</sup>.

36. Since the military have taken control of the government in Sudan, 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 are reported to have broken down<sup>26</sup>. There have been a number of crackdowns on protesters and members of the opposition resulting in significant numbers of deaths and injuries, including of civilians. Heavily armed RSF units have been sweeping through Khartoum and neighbouring Omdurman. The Guardian reported<sup>27</sup> video clips circulating on social media which show the RSF and other armed forces shooting and beating unarmed people on the streets. Sudan's ruling military council confirmed clashes erupted between troops and protesters. Witnesses said baton-wielding troops — including riot police and members of the RSF — were closing roads in central Khartoum, apparently to try to block people from reaching the protest site. Nile bridges that connect various parts of the Sudanese capital were also blocked. In Khartoum's twin city of Omdurman, across the Nile, thousands of people took to the streets, blocking roads with stones and burning tyres, according to witnesses and posts on social media<sup>28</sup>.
37. The Guardian reported<sup>29</sup> that doctors and activists have said paramilitaries in Khartoum threw dozens of bodies into the Nile to try to hide the number of casualties inflicted during the attack. At least 100 people are thought to have been killed in the crackdown across Sudan. Heavily armed units of the RSF continued to sweep through Khartoum and the neighbouring city of Omdurman. The Guardian reported that residents and activists retrieved nine bodies from the Nile after these events.
38. It is difficult to assess the on-going security situation in Khartoum given the lack of access for international bodies to report on the developing situation. However, current news reports indicate that the insecurity is likely to continue at least for the foreseeable future. The leader of the TMC has announced that an election will be held in nine months' time under "regional and international supervision". Rosalind Marsden,<sup>30</sup> an associate fellow at the Chatham House think-tank and an expert on Sudan, was reported as saying that the military council intended to use the forthcoming election as a means of legitimising their interests because they would link up with old regime elements and so the elections will open the way for the old regime to come back

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<sup>23</sup> DFAT, "DFAT Country Information Report - Sudan", 27 April 2016, CIS38A8012704, 3.8

<sup>24</sup> The Guardian, "Sudan paramilitaries threw dead protesters into Nile, doctors say", 6 June 2019; ABC news, "More than a dozen people killed, hundreds wounded as Sudan troops besiege protest camp, doctors say", 3 June 2019

<sup>25</sup> The Guardian, "Sudan paramilitaries threw dead protesters into Nile, doctors say", 6 June 2019

<sup>26</sup> ABC news, "More than a dozen people killed, hundreds wounded as Sudan troops besiege protest camp, doctors say", 3 June 2019

<sup>27</sup> The Guardian, "Sudan paramilitaries raped and assaulted protesters and medics", 5 June 2019

<sup>28</sup> Ibid.

<sup>29</sup> The Guardian, "Sudan paramilitaries threw dead protesters into Nile, doctors say", 6 June 2019

<sup>30</sup> BBC news, "Sudan crisis: Military calls for snap election amid protests", 4 June 2019, 20190701111405; The Guardian, "Sudan paramilitaries raped and assaulted protesters and medics", 5 June 2019

into power. The BBC has reported that the country is now braced for further violence. Masden noted that the revolution has gained real momentum over the last five months but it is very difficult to predict if the professionals, youth and women who have been a driving force will be prepared to carry on.

39. There demonstrators appear to be organised under various pro-democracy groups including The Sudanese Professionals Association and Alliance for Freedom and Change. Demonstrators under these banners have reported to news services<sup>31</sup> their view that the former regime of al-Bashir is so deeply entrenched that a transition of at least three years is needed to dismantle his political network and allow fair elections. As a consequence that spearheaded nationwide protests, calling for a campaign of sweeping civil disobedience and a general strike to topple the TMC. They have announced a call for a one-day nationwide "civil disobedience" campaign on 14 July 2019 in a move to increase pressure on the ruling generals to hand power to a civilian administration. The Alliance for Freedom and Change has announced that this action will be preceded by mass protests on 13 July 2019. It is unclear what the ramifications of rolling protests will be in Khartoum.
40. The applicant has submitted that, given the current security situation and his political profile, he will be singled out by the NISS for investigation on arrival at KIA should he be returned to Sudan. The British Embassy in Khartoum<sup>32</sup> reports that for any individual identified as a 'failed asylum seeker' it is standard procedure to have their documents removed and they may be detained for investigation by the immigration authorities for a period of up to 24 hours upon arrival at KIA. The Sudanese authorities are likely to identify a person as a failed asylum seeker on return, especially if they are travelling on an emergency travel document or are accompanied by escort staff on their return. During investigation by Immigration it is likely that they would be questioned about their activities since leaving Sudan, including any political affiliations or contacts they may have. A number of sources stated that they had no information to indicate that failed asylum seekers/returnees from Darfur would generally experience difficulties on return to KIA, or they did not consider that claiming asylum overseas would put such a person at risk per se. However, there are some categories of people who might attract the attention of the NISS.
41. The British Embassy in Khartoum<sup>33</sup> reports that any intervention in the arrival process by the NISS would necessarily await the outcome of the immigration procedures. Returnees can be subjected to further questioning by security should they be determined to be a potential person of interest. The report goes on to note that while it is difficult to offer a definitive statement on who would fall into such a category, activities likely to be of interest would include: being of previous interest to the authorities; having a record of contact with Sudanese opposition groups outside of Sudan; or, having attracted the attention of the authorities during time overseas including through engagement with opposition groups within the diaspora<sup>34</sup>. I note that the applicant has previously come to the attention of NISS. The Danish Immigration Service and the UK Home Office<sup>35</sup> in their joint report on a fact-finding-mission to Khartoum, Kampala and Nairobi conducted in February and March 2016 make a distinction between an ordinary Darfuri returning from abroad and a Darfuri with a political profile. The NISS acts with impunity. Persons

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<sup>31</sup> BBC News, "Sudan crisis: Military calls for snap election amid protests", 4 June 2019, 20190701111405

<sup>32</sup> UK Home Office, "Country Information and Guidance: Sudan: Failed asylum seekers", 9 August 2016, OGD7C848D61, 5.1.9

<sup>33</sup> Ibid.

<sup>34</sup> Ibid.

<sup>35</sup> 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

from Darfur with a political profile are at risk of being targeted by the NISS and its affiliated militias in Khartoum, particularly student activists and persons with an affiliation to rebel groups.

42. Given the applicant's profile as a non-Arab Darfuri who was previous known to NISS as a student protester, and who has spent a significant time out of the country, in the context of the current security crisis, I am satisfied that there is a real chance that he could come to the attention of NISS on arrival in Khartoum, particularly given the recent targeting of political protesters in Khartoum. There are reports<sup>36</sup> that the Sudanese authorities, especially NISS, arbitrarily detain political opponents and those believed to sympathize with the opposition. The US Department of State<sup>37</sup> has reported that government authorities do not investigate human rights violations by the NISS, the military, or any other branch of the security services. Security forces detain political opponents incommunicado and without charge. NISS held some political detainees in isolation cells in regular prisons, and many were held without access to family or medical treatment and reportedly suffered physical abuse. Human rights activists asserted NISS ran "ghost houses" where it detained opposition and human rights figures without acknowledging they were being held.
43. I am satisfied that if the applicant is questioned or detained by the NISS at KIA there is a real chance that he will be subjected to serious harm including significant physical ill-treatment in the course of any the investigation triggered by his arrival. I am satisfied that the harm would be inflicted on the applicant for the essential and significant reasons of an actual and imputed political opinion as being opposed the government in combination with his origin in Darfur and African non-Arab tribal membership. As the feared harm is from the State, I am satisfied that the real chance of persecution relates to all areas of the Sudan.
44. I also find that effective protection measures are not available to the applicant as the harm would be inflicted by the Sudanese authorities who control the entirety of the country and as these attributes arise from the applicant's tribal origin and political views and actions, I do not consider that he could take reasonable steps to avoid persecution. I am satisfied that the conduct of the authorities in inflicting any such mistreatment would be systematic and discriminatory, and that the harm amounts to persecution within the meaning of s.5J of the Act.

#### **Refugee: conclusion**

45. The applicant meets the requirements of the definition of refugee in s.5H(1).

#### **Decision**

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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*.

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<sup>36</sup> US Department of State, "Country Reports on Human Rights Practices for 2017 - Sudan", 20 April 2018, OGD95BE927360; UK Home Office, "Country Information and Guidance - Sudan Treatment on Return", 1 August 2015, OG8F59D8D52

<sup>37</sup> US Department of State, "Country Reports on Human Rights Practices for 2017 - Sudan", 20 April 2018, OGD95BE927360



## Applicable law

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### ***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.