



Australian Government

Immigration Assessment Authority

Decision and Reasons

Referred application

SUDAN

IAA reference: IAA17/03427

Date and time of decision: 1 December 2017 14:39:00

Rosie Mathlin, 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 an referred applicant, or their relative or other dependant.

Background to the review

Visa application

1. The referred applicant (the applicant) claims to be from West Kordofan State in Sudan. He arrived in Australia, by boat, undocumented, [in] April 2013. [In] April 2017 he lodged an application for a Safe Haven Enterprise visa (SHEV application) claiming that he feared harm, including torture and imprisonment, from the Sudanese government because it targets his tribe, because he comes from a conflict zone, and because he has not completed his compulsory military service.
2. [In] August 2017 a delegate of the Minister for Immigration and Border Protection (the delegate) refused the grant of the visa. Based on country information and the applicant's somewhat vague evidence, she did not accept that his tribe had been targeted by the government. She did not accept his claims in relation to his military service obligations. She considered whether the applicant would face harm returning as a failed asylum seeker but concluded that he would not.

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. On 20 September 2017 the applicant's newly appointed representative provided further material to the IAA. This consisted of a submission which restated and clarified the applicant's claims, took issue with aspects of the delegate's decision and explained why it was wrong, and referred to country information to which it was said the delegate should have had regard. The IAA was also given a statutory declaration made [in] September 2017 by the applicant.

Representative's submission

5. The submission argues that in assessing the applicant's claims the delegate used country information selectively and over-simplified a complex security situation. The representative argues that if the applicant's consistent claims are considered properly and cumulatively, he will be recognised as a man of military service age who has not done his military service; who is from an area of Sudan which is in conflict with the government, and from a tribe which is targeted by the government; who does not wish to do military service because he has witnessed at firsthand abuses carried out by the military; who will come to the attention of the authorities when he returns to Sudan without a passport; and who will be imputed with an anti-government political opinion because of the combination of these personal factors.
6. The submission refers to country information that was not before the delegate which the representative argues supports these contentions. She argues that the IAA should consider the new country information even though it pre-dates the delegate's decision. She argues that the applicant is barely literate, was assisted to complete his SHEV application by a community volunteer and was not represented at the SHEV interview. She argues that the applicant could not have given the information to the delegate, who should have had regard to it because it was highly relevant, up to date, and publicly available.
7. To the extent that the submission contains legal argument and restates information that was before the delegate, it is not new information and I have considered it.

Applicant's statutory declaration

8. The statutory declaration states

- That the initial interviews (the entry interviews and interviews with the volunteer solicitors who assisted him to prepare his SHEV application) were conducted with interpreters who spoke Arabic dialects that the applicant could not understand well. For this reason and because he was not able to explain the complexity of the situation in the part of Sudan he comes from, the IAA should consider any new information provided to it.
- Government officials came to his house on several occasions looking for the applicant and his brothers in relation to their military service obligations. There were government spies in the community who directed the government officials to the houses of young men of military service age. The applicant's house was regularly approached. However the applicant's tribe is nomadic and he and his family were not in the village for five or six months of the year. Also the government usually came in the afternoon, when the applicant was not usually at home even when he was in the village.
- Sometimes the government would have a "mobile recruitment drive" in which they would grab people of suitable age off the street and demand their ID. When this happened young men would avoid the mobile buses. Also militia groups sometimes forcibly recruited young men.
- There is a lot of military activity in the applicant's area. At the entry interview he referred to an armed group which he said was present in his area, "Al Hamiah". In Sudanese Arabic this actually means military base and he meant that there is a military base in his village.
- The applicant did not want to undertake military service because he himself had been a victim of the military, he did not like what they were doing and did not want to be a part of it.
- He only realised today that he did not mention the issue of compulsory military service at the entry interview which took place by phone when the applicant was in [immigration] detention, with two different interviewers and two different interpreters, neither of whom spoke the applicant's dialect of Arabic. It was a very confusing process but he thought that he had mentioned the military service issue.
- In order to obtain his passport and leave the country he paid a bribe to obtain a military service card which stated that he had a temporary exemption or deferral.
- Contrary to what he appeared to state at the entry interviews, he has never lived or worked in Khartoum. He went there occasionally to do government business or visit relatives. The Khartoum address he gave at the entry interview is that of a distant relative. He did live a nomadic lifestyle which included moving around his tribal areas to do his [jobs].
- The tribe to which he belongs is very large with many sub-clans. There is a lot of conflict between the different groups and the Sudanese government makes trouble between the various clans. One of the worst times for this was the period 2010-2012, just before the applicant left. The applicant belongs to [a particular sub-group] of the Miseriya tribe.

- The applicant married an Australian permanent resident in March 2017, and they are expecting a child. He does not wish to expose his family to the current situation in Sudan.
9. The statutory declaration was not before the delegate and is relevant to the application so it is new information. As the statutory declaration postdates the delegate's decision I am satisfied that the document itself could not have been provided to the delegate before the decision was made. The statutory declaration clarifies and expands on some information that was before the delegate and responds to findings made by the delegate where it appears that there may have been misunderstandings or mistranslations due to interpreting or communication problems. I am satisfied, having listened to the recordings of the interviews, that there may have been interpreting problems. I am satisfied that there are exceptional circumstances which justify considering the applicant's statutory declaration, given that he has had only [a few] years education, comes from a remote nomadic background and was not represented at the SHEV interview. While many applicants share some of these characteristics, I am satisfied that in combination, and in the light of the applicant's particularly unusual language requirement, there are exceptional circumstances which justify considering the new information.

Country information

10. The country information referred to by the representative is
- A report by the Asylum Research Consultancy (ARC), "West and South Kordofan COI Query Response: (1) Inter-communal violence in West Kordofan, (2) Impact on the civilian population: humanitarian situation and internal displacement in West Kordofan (3) Cattle-raiding in West and South Kordofan (4) The ability of the State authorities to prevent and protect victims or would-be victims in West and South Kordofan", 20 September 2016, available at: <http://www.refworld.org/docid/57f3c8494.html>;
 - International Crisis Group, "Sudan's Southern Kordofan Problem: The Next Darfur", Africa Report No 145 -21 October, 2008, CIS16812
11. Although these reports pre-date the delegate's decision, I am satisfied that they could not have been given to the delegate before the decision was made and that there are exceptional circumstances which allow me to consider them. At the SHEV interview the delegate asked the applicant what part of Kordofan he came from and he responded "south west"; she said that she would have to look at a map, presumably after the interview and before she made her decision, in order to determine the exact location of his former place of residence. She therefore never discussed with the applicant at the interview any information which specifically related to the situation in West Kordofan, and in fact, none of the country information that was ultimately considered by the delegate refers specifically to the situation in West Kordofan. It refers to areas of conflict including South Kordofan and East Darfur which border West Kordofan. Moreover, the applicant made claims suggesting that he feared harm not just from the government, but in inter-clan violence. The delegate did not have before her any information about inter-clan violence in West Kordofan. I am satisfied that the applicant could not have known that the delegate would assess his claims apparently without having regard to country information specifically about the political and security situation in West Kordofan, his area of residence. I consider that in order to properly assess the applicant's claims it is necessary to have regard to information documenting the historical conflict in southern Sudan, which includes both South and West Kordofan, and the current situation there. I have therefore considered the new information submitted by the applicant. I have also obtained, pursuant to s.473DC(1), new information about the situation of the Miseriya tribe

and its sub-clans in West Kordofan, and for the same reasons, I consider that there are exceptional circumstances which allow me to consider this new information. The information is

- A report by the International Crisis Group, “Sudan’s Spreading Conflict” <https://www.crisisgroup.org/africa/horn-africa/sudan/sudan-s-spreading-conflict-i-war-south-kordofan>
 - A report by the African Centre for Justice and Peace Studies, “Misseriya Land Conflicts West Kordofan State 1990-2015”, <http://www.acjps.org/wp-content/uploads/2017/06/MISSERIA-LAND-Conflict.pdf>
12. The applicant’s representative referred to further new information in relation to the applicant’s claims about conscription. This is War Resisters’ International, “War Resisters’ International: Sudan”, 21 April 2015, CISEC96CF15550. I am not satisfied that the applicant could not have provided this information to the delegate before the decision was made, or that it is credible personal information which could, if known, have affected the delegate’s consideration of the applicant’s claims, as it is general information about Sudan’s conscription laws. Although this information is much more recent than that relied on by the delegate, the applicant’s claims about his eligibility for conscription were found not to be credible for several reasons other than their not being consistent with country information. I am also not satisfied that there are exceptional circumstances which justify consideration of this information.
13. Included in the material given to the IAA by the Secretary is information which is the subject of non-disclosure certificates issued pursuant to s.473GB of the Act. The information is speculative and not particularly authoritative, and I had not had regard to it.

Applicant’s claims for protection

14. At the **entry interview**, which was conducted about one month after the applicant arrived in Australia, he stated that he left Sudan because of difficult circumstances, and because life was hard. He said that the government caused a lot of problems; when he was [age] or [age] years old the government attacked his house in the night and he suffered [injuries]. He said that the government had taken their freedom, and although nothing had happened to him, if he had stayed there something would happen. He said that his brother had told him that their village had been shelled the day before. He said that if he returns the government will detain and torture him because his area is a war area. He said that he left Sudan using his own genuine passport. He said that he attended school for [a few] years and had worked on the family farm and as [another occupation]; to do that work he had travelled throughout Sudan. He said that otherwise he had always lived in [Town 1], where his father [and] siblings remain.
15. With his **SHEV application** the applicant provided a statutory declaration dated [in] April 2017 in which he claimed that he feared being killed by the authorities if he returned because he has refused to do military service and will be seen as being against the government; and because his home area is in a war zone. He said that the government targets areas where his tribe, the Miseriya live; they try to make the tribes go against each other. The government makes it difficult to grow crops because they spoil the earth. He said that he has been subjected to a wide variety of ill-treatment which began fifteen years ago when he was attacked in his home by the government at the age of [age] or [age]. Everyone in the village was attacked.
16. The applicant claimed that he had received a call-up for military service when he was [age] or [age]. The army came to his house and asked for him. He said that he remained on the run to avoid being grabbed by the army. It is not possible to leave Sudan without having completed

military service so he paid a bribe to get a military service certificate. The government will see him as a traitor because he has avoided military service and he will be imprisoned in terrible conditions and tortured; he could be killed or sent to war. It was too dangerous to speak out against the government and the only way he could show he did not support the government was by refusing to serve in the military. The government has been to his village asking about him. His records will be checked at the airport and it will be seen that he fled Sudan and has not completed military service.

17. At the SHEV **interview** he said that none of his brothers, who range in age from late [age] to [age], have done military service. He indicated that none have had any problems, but he said that if they are caught they will be taken to do military service. He said that sometimes the government comes and asks for them but they find out that the government is coming and leave the area. He indicated that the government had looked for him when he was [age] but he had left the area. He said that he does not want to kill anyone. The delegate put to the applicant that 33 is the cut off age for military service; she asked, in those circumstances, why the government would make him do military service on return. She also put to the applicant that the military service card he acquired to leave the country would show that he had completed military service, so the authorities at the airport would be unlikely to know that he had not done it.
18. The applicant was asked why he had not mentioned his concerns about military service at the entry interview. He did not respond directly, saying that "For sure life is hard there". He now says that he did not realise at that time, but only after he received the decision, that he had not mentioned the issue of military service at the entry interview. The delegate put to him that the government is attacking rebel held areas in "Kordofan" and he said that he lives in that area, the government or others come and attack, and it is not clear who they are. The applicant said that there is a military base in his village. The delegate put to the applicant that it was hard to believe that he had been able to avoid the government for [several] years since he was called up, given his evidence that they knew where he lived. He said that he went from one village to another doing his [job]. He was asked why the government had not been asking about his brothers when they came for the applicant, and he said that they come for one person at a time. He was asked about his claim that he was too scared to speak out against the government and he said that it was obvious that if you spoke out you would be harmed; but he has not been politically active in Australia because he is a peaceful person. He was asked about the claim that this family had difficulty growing crops and he said that sometimes there were insects or drought, or animals ate the crops.
19. The **delegate**, in her **decision record**, accepted the applicant's claims as to his identity and nationality. She accepted that he is from the Miseriya, an Arab tribe. While she accepted that the Sudanese government had waged war on non-Arab tribes, she found no evidence to suggest that it targeted the Miseriya and indeed noted that this tribe had been armed by the government during the 1980's to wage war on non-Arab tribes on behalf of the government. She accepted that his home was targeted in about 1989 (when he was [age] or [age]) but did not accept that this was because of his ethnicity. She noted that his family had remained in the village without incident since then. Based on the applicant's evidence she did not accept that his family had been unable to grow crops because of actions by the government; rather the problems he identified at the SHEV interview were natural phenomena. She found that he had no intention to voice his political opinion in Sudan or Australia and that he would not be targeted for that reason. As to his claim that he had been subjected to a wide variety of ill treatment and attacks by the government, the only such incident he specified was the attack on his home when he was [age] or [age]. She found that any requirement that the applicant perform compulsory military service was implemented under a law of general application.

Based on the number of males reaching the age for military service every year, which vastly exceeds the number of personnel serving in the military she found that it would be impossible for the government to enforce military service obligations. She noted that he had passed the cut off age for military service when he left Sudan and also noted that because he had only [a few] years school education his birth certificate would not have been passed to the military authorities in 1997 when all students' birth certificates were passed on to make recruiting easier. She found it not credible that the army had been to his house several times asking about him, yet he and his brothers had been able to avoid them over a period of [several] years. She was concerned that he had not mentioned not wanting to do military service at the entry interview as a reason for leaving. She noted that the records at the airport would show that he had not done military service, and that he therefore would not have been able to leave in these circumstances despite having a military service card. The delegate considered whether the applicant would face harm as a failed asylum seeker, and relied on country information to find that he would not.

Refugee assessment

20. 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

21. 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.

Identity and nationality

22. The applicant has provided a copy of his citizenship card. He has consistently claimed to be a national of Sudan and has provided broadly consistent and plausible biographical information. There appears to be no issue as to his nationality or identity and I am satisfied that he is a national of Sudan with the identity claimed. There is no information before me to suggest that the applicant has the right to enter and reside in any other country. I am satisfied that Sudan is the receiving country for the purposes of the Act.

Security situation in West Kordofan

23. The applicant's home village of [Town 1] is in West Kordofan State. Information obtained by the IAA indicates that the state of West Kordofan was "abolished" in 2005 and its land area was absorbed into North and South Kordofan States.¹ It was re-established in 2013.²
24. While country information indicates that areas in proximity to West Kordofan have been afflicted by conflict between government forces and various rebel groups over many years, neither the country information before me nor the evidence presented by the applicant himself indicates that he has been personally affected, and certainly not subjected to serious or significant harm, at any time apart from the incident when he was [age] or [age] years old, when his house and village were attacked and he sustained [injuries]. This incident is discussed further below.
25. The country information does not support the applicant's claim that West Kordofan, his home area, is a conflict zone in relation to government military action. DFAT reported in April 2016 that conflict continued in Darfur, South Kordofan and the Blue Nile (the latter regions are known as the Two Areas) but other areas of the country were relatively stable despite general lawlessness and possible violence throughout Sudan attributable to the proliferation of weapons, food insecurity and an influx of refugees from South Sudan.³ The CIA World Fact Book similarly stated in its 2017 assessment that fighting in the Two Areas and Darfur had largely subsided but the civilian populations are affected by low level violence including banditry and inter-tribal conflict largely as the result of the weak rule of law.⁴
26. Neither of these reports, nor any other country information that is available to me, indicates that West Kordofan is affected by the conflict in Darfur, or in South Kordofan between the Sudanese government and the SPLM – North rebels.⁵ The frontlines and conflict zones in South Kordofan do not appear to be in the vicinity of the applicant's place of residence, [Town 1], which is in the far west of West Kordofan state. A report of government counter-insurgency strikes against communities suspected of supporting the rebels does not specifically mention attacks on Misseriya areas or populations, and seems to be referring specifically to areas in South Kordofan, and not West Kordofan.⁶ Country information indicates that Darfur and South Kordofan, neighbouring areas, have until recently and may continue to be affected by conflict between government forces and rebel groups, but there is no credible information before me to suggest that the applicant's home area in West Kordofan is affected by this conflict in any way.

¹ International Crisis Group, "Sudan's Southern Kordofan Problem: The Next Darfur", Africa Report No 145 -21 October, 2008, CIS16812 at p. 13

² International Crisis Group (ICG), "Sudan's Spreading Conflict (I): War in South Kordofan", 14 February 2013, Africa Report No. 198, <https://www.crisisgroup.org/africa/horn-africa/sudan/sudan-s-spreading-conflict-i-war-south-kordofan>; African Centre for Justice and Peace Studies, "Misseriya Land Conflicts West Kordofan State 1990-2015", <http://www.acjps.org/wp-content/uploads/2017/06/MISSERIA-LAND-Conflict.pdf>

³ Department of Foreign Affairs and Trade (DFAT), "DFAT Country Information Report – Sudan", 27 April 2016, CIS38A8012704 at 2.32

⁴ US Central Intelligence Agency, "The World Factbook – Sudan", 26 July 2017, CISED50AD5050

⁵ "Sudan's Spreading Conflict (I): War in South Kordofan", 14 February 2013, Africa Report No. 198, <https://www.crisisgroup.org/africa/horn-africa/sudan/sudan-s-spreading-conflict-i-war-south-kordofan>; DFAT, "DFAT Country Information Report – Sudan", 27 April 2016, CIS38A8012704 at 2.37 – 2.40.

⁶ ICG, "Sudan's Spreading Conflict (I): War in South Kordofan", 14 February 2013, Africa Report No. 198, <https://www.crisisgroup.org/africa/horn-africa/sudan/sudan-s-spreading-conflict-i-war-south-kordofan>;

27. Independent information indicates that inter-tribal and inter-clan conflict arose in West Kordofan in the early 1990's, over land and resource issues.⁷ Independent information also indicates that conflict has increased since early 2014.⁸ It is suggested that the government has contributed to the problem by its land and resources policies, by arming certain groups and by failing to take action to stop the violence.⁹ Nonetheless, the information does not suggest that government forces are perpetrators of the violence; and indeed, DFAT advises that the government does provide effective protection in areas of Sudan other than Darfur and the Two Areas.¹⁰ The country information details various inter-clan disputes over the last several years, only one of which involved the applicant's sub-clan, when in February 2016 two members of the applicant's sub-clan were killed, along with two from another clan, in an attack by "unknown assailants".¹¹ The same report refers to other clashes in which the sub-clan membership of those killed is not specified, but the overwhelming majority of violence appears to involve sub-clans other than the applicant's. While I accept that it is possible that the applicant's sub-clan could be affected by fighting between other groups, I am not satisfied on the basis of the available evidence that there exists a real chance of harm to the applicant, either because of the direct involvement of his sub-clan in conflict, or as a result of violence or conflict between other tribal groups in West Kordofan.
28. In so finding I give considerable weight to the applicant's own evidence. Despite claiming broadly that he lives in a war zone, his evidence about what specifically happened to him and his family indicates that apart from the 1990 incident, his family was never targeted in or affected by inter-clan violence; since then they have continued to farm their crops and land, and the applicant was able to travel around doing his [work]. As noted by the delegate, although the applicant claimed that his family were unable to farm their crops because of government actions, when asked about problems with the crops he referred to their destruction by natural phenomena. His account of his and his family's experience is therefore consistent with the country information indicating that the area of his residence has not been substantially affected by violence or conflict, despite ongoing conflict in surrounding regions, particularly South Kordofan, and inter-clan violence within the state.

Membership of the Misseriya tribe

29. In his SHEV application the applicant stated that the government targets areas where the Misseriya tribe live and also stirs up conflict between tribes. In the statutory declaration given to the IAA the applicant responded to the delegate's finding that the government did not target the Misseriya tribe by providing details of his clan, group and sub-clan.
30. There is no country information to support the applicant's claim that his tribe is viewed with suspicion and targeted by the government. Country information indicates that for many years the government received support from the applicant's tribe which it armed and used to fight

⁷ African Centre for Justice and Peace Studies, "Misseriya Land Conflicts West Kordofan State 1990-2015", <http://www.acjps.org/wp-content/uploads/2017/06/MISSERIA-LAND-Conflict.pdf>

⁸ Ibid; see also Asylum Research Consultancy (ARC), "West and South Kordofan COI Query Response: (1) Inter-communal violence in West Kordofan, (2) Impact on the civilian population: humanitarian situation and internal displacement in West Kordofan (3) Cattle-raiding in West and South Kordofan (4) The ability of the State authorities to prevent and protect victims or would-be victims in West and South Kordofan", 20 September 2016, <http://www.refworld.org/docid/57f3c8494.html>

⁹ Ibid

¹⁰ DFAT, "DFAT Country Information Report – Sudan", 27 April 2016, CIS38A8012704.

¹¹ ARC, "West and South Kordofan COI Query Response: (1) Inter-communal violence in West Kordofan, (2) Impact on the civilian population: humanitarian situation and internal displacement in West Kordofan (3) Cattle-raiding in West and South Kordofan (4) The ability of the State authorities to prevent and protect victims or would-be victims in West and South Kordofan", 20 September 2016, <http://www.refworld.org/docid/57f3c8494.html>, p.13

on its behalf against rebels in Darfur and South Kordofan.¹² It was reported in 2013 that the situation had changed and that the Miseriya tribe had become disgruntled over a number of issues, including the abolition of their state of West Kordofan in 2005, and many had joined the SPLM – N fighting in South Kordofan.¹³ Despite a comment in the ICG report that the government views the Miseriya with “general distrust” because of this, there is no independent information indicating that members of the Miseriya tribe are subjected as a group to any form of harm because they are imputed to be supporters of the SPLM - N, or are otherwise anti-government. There is no information either from 2013 or more recently to indicate that this distrust has resulted in reprisals or human rights abuses against the tribe generally, or the tribe in West Kordofan, an area outside the conflict zone, such that the applicant faces a real chance of harm of any kind as a member of that tribe. DFAT, for example, identifies certain tribes in its April 2016 report which it considers are specifically targeted by the government, and these do not include the Miseriya.¹⁴

31. Despite claiming that he has been subject to a wide variety of ill treatment by the government over many years, the only concrete example the applicant has provided relates to an attack on his village when he was [age] or [age]. I accept that this incident occurred. Country information indicates that the attack most likely occurred in the context of inter-clan conflict, although I am prepared to accept that it was possible that it was carried out by government forces or a government backed tribal militia. However, the country information does not indicate that there is a real chance that the applicant would be a victim of any similar attack now or looking to the reasonably foreseeable future. While country information supports the applicant’s broad contentions that there is inter-clan conflict, insecurity and a degree of lawlessness in his home area contributing to the life of hardship that he has complained of, I am not satisfied that the level or type of violence described in the country information supports a conclusion that the applicant faces a real chance of harm in such violence from other sub-clans or tribes, from the government or security forces, or from any other source. While one source refers to [Town 1] having been a scene of inter-clan conflict in early 2014, the conflict does not appear to have involved the applicant’s sub-clan.¹⁵ The applicant’s evidence about the situation of his family indicates that they maintain their nomadic lifestyle, alternating between their home in the town and their traditional lands. He has not suggested that they have experienced significant harm in the course of doing so. While I accept that conditions may be hard, the applicant has presented no evidence to support a conclusion that their living conditions are such that on return, he would face serious harm of any kind for any of the reasons in s.5J(1) of the Act.

Military service

32. I do not accept the applicant’s claim that he is eligible for military service but has not performed it, and may face severe punishment on return as a result.
33. Firstly, I am concerned about the applicant’s failure to mention this issue at all in his entry interviews, when it was a central claim later raised in his SHEV application. The applicant states that he is illiterate, from a remote rural area of Sudan, and that he had difficulty with the

¹² ARC, “West and South Kordofan COI Query Response: (1) Inter-communal violence in West Kordofan, (2) Impact on the civilian population: humanitarian situation and internal displacement in West Kordofan (3) Cattle-raiding in West and South Kordofan (4) The ability of the State authorities to prevent and protect victims or would-be victims in West and South Kordofan”, 20 September 2016, <http://www.refworld.org/docid/57f3c8494.html>

¹³ ICG, “Sudan’s Spreading Conflict (I): War in South Kordofan”, 14 February 2013, Africa Report No. 198, <https://www.crisisgroup.org/africa/horn-africa/sudan/sudan-s-spreading-conflict-i-war-south-kordofan>;

¹⁴ DFAT, “DFAT Country Information Report – Sudan”, 27 April 2016, CIS38A8012704 at 3.4 – 3.12.

¹⁵ [Source deleted].

Arabic dialects used by the interpreters at the interviews. He claims that, having listened to the recordings of the interviews with a friend who speaks English and Sudanese Arabic, he now realises that lots of questions and answers were misunderstood and mistranslated. The applicant has not, however, specified that any questions or answers relating to his fears about conscription were among those misunderstood or mistranslated. The applicant now claims that he was confused and thought that he had mentioned this claim, an assertion which I find difficult to accept. There were a number of questions at the entry interview that touched upon this issue – he was asked directly whether he had been involved in military service; and he replied “no” to questions about whether police or security authorities had impacted on his day to day life in Sudan, and whether he had any involvement with armed groups in his area. He was recorded as saying that there was a particular armed group in his area which was part of the government, and later explained that the term he had used at the entry interview actually referred to a “military base”; nonetheless, he did not claim to have had any involvement with military stationed at this base, apart from observing them come and go. He did not mention fears arising from his failure to do military service in answer to questions about why he left Sudan or why he feared return. While it does appear that there were some misunderstandings in the entry interviews – as indicated, for example, by a number of corrections that were made in the second part of the entry interview to information that had been provided in the first part - I am not satisfied that the applicant either thought he had provided the information that he feared returning to Sudan because he had not done military service, or that he did not provide this information because of problems communicating with the interpreters.

34. Secondly, I have great difficulty accepting that the applicant would have been able to avoid military service for a period of [several] years, had he been required to undertake it. I likewise have difficulty accepting his evidence that his [brothers] (excluding one who is [disabled]) were also required to do compulsory military service, but none of them had done so. He claims that government officials came to the family home more than once to ask about them, and said that they were directed to the home by spies in the community. In his statutory declaration of September 2017 the applicant said that their house was “regularly approached in this way”. He stated that he and his brothers were able to avoid the authorities because they were nomadic and were not in the town for five to six months of the year. I do not accept that the applicant and his brothers were able to avoid conscription in this way: the local informers and government officials would have known when the nomads were present in the town and when they were not. I do not accept that they would have gone looking for members of a nomadic family in their town house during the season when they were on their tribal lands, and that they would not have been able to find the applicant and his brothers when they were in residence. Nor do I accept the applicant’s explanation that the authorities only came to the house looking for one person at a time, which is on its face inherently implausible and unlikely. Moreover, I consider that had the authorities come to the house looking for the applicant or any one of his brothers who happened not to be there, they would have been more likely to seize any of the others who were present. Even if it were plausible that the applicant had successfully avoided military service for over a decade, I do not accept that [other] members of his family would have as well. Accepting that the applicant also travelled around doing his [work], but given his evidence that there was a military base and “a lot of military activity” in his area, that local informers were used to identify people eligible for military service, that mobile recruitment drives were used to round up young men for conscription, but that nonetheless, neither he nor any of his brothers were ever located and forced into service over a period of many years, I consider that his evidence on this entire issue is not credible.
35. Thirdly, the applicant has a citizenship certificate issued in 2001, and he obtained a passport in 2013. Country information indicates that people who refuse to do military service may be

refused official identity documents such as travel documents and identity papers.¹⁶ The applicant does not claim that he had any difficulty obtaining either document. While not definitive, I have considered the information that individuals who have not done military service may be refused identity documents in the light of the other problems with the applicant's evidence about his claimed military service obligations. I consider that the fact that the applicant was able to obtain these identity documents apparently without difficulty casts further doubt on his claim that he was eligible for military service but had not done it.

36. I do not accept that the applicant has outstanding military service obligations which would result in his being identified at the airport as a draft evader and subjected to harm of any kind. I found his evidence about his (and his brothers') claimed military service obligations and their ability to avoid them not to be credible, and consider that the applicant's failure to mention this as a concern at the entry interview to indicate that the claim is not true.
37. The applicant claimed in his SHEV application that he had been unable to speak out against the government of Sudan because it was too dangerous and the only way he could show that he didn't support the government was to refuse to serve in the military. For the reasons set out above, I have not accepted that the applicant refused to do compulsory military service. Nor do I accept that the applicant chose not to speak out against the government in Sudan because of fear, in circumstances where he would have wished to do so. The applicant's evidence suggests that he and his family were poorly educated nomadic farmers living in a remote rural area. While the applicant may well have had held political views opposed to the government, there is no credible evidence to suggest that he was denied the opportunity to express his views in a manner amounting to serious or significant harm. The applicant has not taken the opportunity to engage in political activity since he has been in Australia and while he said that this is because he is a peaceful person, I am of the view that, as in Sudan, his priorities lie elsewhere. There is no evidence before me to suggest that he would not have been able to express his views in private in Sudan. The credible evidence does not suggest that the applicant ever wished to express his political views through organised activity or protest, but refrained from doing so out of fear. The credible evidence suggests that his priorities were working, farming and subsisting in generally difficult conditions.

Treatment on return to Sudan

38. A UK Home Office report takes the view that failed asylum seekers do not face a real chance of harm on return, although the report concludes by noting that the number of returns is limited and no ongoing monitoring is done by the authorities of countries from which they are returned. The British Embassy in Khartoum advised in February 2015 that it was standard procedure for failed asylum seekers to have their documents removed and be detained for investigation by immigration authorities for up to 24 hours on arrival. If the investigation revealed criminal activity or a "nefarious" reason for leaving Sudan the person would be blacklisted from leaving again. Persons of interest might be referred to the security authorities; this might happen if a person had a record of contact with opposition groups outside Sudan.¹⁷ DFAT advises that the National Intelligence and Security Services (NISS) has a significant presence at the airport and reviews the documentation of all individuals entering the country. Persons of interest and individuals returning without an exit visa would be questioned.¹⁸

¹⁶ Canadian IRB: Immigration and Refugee Board of Canada, "SDN102445.E Sudan: Military service including age of conscription, gender, length of service, recruitment practices and training, exemption conditions and alternative service options", 28 February 2007, 899

¹⁷ UK Home Office, "Country Information and Guidance Sudan: Failed asylum seekers", 9 August 2016, OGD7C848D61

¹⁸ DFAT, "DFAT Country Information Report – Sudan", 27 April 2016, CIS38A8012704

Country information that was before the delegate indicates that the NISS is known to mistreat people in its custody.

39. The UK Home Office Report quotes a UK NGO called Waging Peace which in 2012 and 2014 published reports of failed asylum seekers being detained and severely mistreated on return to Sudan. Some testimonies indicated that the Sudanese authorities viewed the act of claiming asylum negatively, however all of the people concerned had been politically active, had a political profile or had demonstrated publicly in the UK; all were from conflict areas, particularly Darfur.
40. I accept that the applicant may come to the attention of immigration or security authorities when he returns to Sudan, as he may be travelling on a temporary travel document, having destroyed the passport on which he left the country. The country information indicates that there is a possibility that the applicant would be detained and investigated for a period of possibly up to 24 hours on return. Based on the applicant's evidence about his circumstances and the country information, I am not satisfied that he would be regarded as a person of interest to the authorities, or as suspicious in any way because of his place of origin in West Kordofan, his membership of the Miseriya tribe, or for any other reason arising from the credible information before me. In these circumstances, the country information indicates, and I find that there is not a real chance that he would be handed over to the intelligence authorities by the immigration authorities. As noted above I do not accept that the applicant has outstanding military service obligations. If he were identified as a failed asylum seeker, the weight of country information indicates that this would not result in a real chance of serious harm. While there are some reports of failed asylum seekers having been mistreated on return, in the context of which adverse comments were made about the fact that they had claimed asylum, the individuals in question appear to have had other characteristics, not shared by the applicant, which resulted in this mistreatment. Unlike the applicant, they came from actual areas of conflict, notably Darfur, and had either been politically active or had links to politically active people. Given the country information about economic conditions in Sudan and West Kordofan in particular¹⁹, I think it highly likely that the authorities would assume that the applicant had left Sudan for economic reasons. Overall, I am satisfied that if the applicant were to be detained for up to 24 hours while his situation was investigated in the light of the irregular circumstances in which he might be returning - without the passport on which he departed and with a temporary travel document, after a long absence - this would not constitute serious harm, including a threat to liberty, having regard to the duration and likely circumstances of the detention, which the information suggests would be by immigration authorities at the airport; nor am I satisfied that there is a real chance that he would be subjected to any other form of serious harm as part of this process.
41. I am not satisfied that there is a real chance that the applicant will face serious harm on return to Sudan, either because of his place of origin, because of his tribe, as a failed asylum seeker or because he would be imputed to hold an anti-government political opinion for those or any other reasons.

¹⁹ See for example, ARC, "West and South Kordofan COI Query Response: (1) Inter-communal violence in West Kordofan, (2) Impact on the civilian population: humanitarian situation and internal displacement in West Kordofan (3) Cattle-raiding in West and South Kordofan (4) The ability of the State authorities to prevent and protect victims or would-be victims in West and South Kordofan", 20 September 2016, <http://www.refworld.org/docid/57f3c8494.html>

Refugee: conclusion

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

Complementary protection assessment

43. 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

44. 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.
45. As set out above I have found that the applicant does not face a real chance of harm at the hands of the government because of his place of residence in West Kordofan State, or his membership of the Miseriya tribe, or because he has not done military service. For the same reasons and based on the same evidence I am also satisfied that he is not at real risk of harm for those reasons.
46. The applicant's representative has submitted to the IAA that due to the lawlessness in West Kordofan there is a real risk that the applicant will face significant harm in inter-tribal violence. Country information indicates that such violence has escalated since the applicant's departure, however, the available information does not indicate that the applicant's particular sub-clan is involved to a significant extent. The applicant himself has not presented any evidence to support a conclusion that his family has been much affected and that he faces a real risk of harm arising from this kind of violence. Although he stated at the entry interview that his village had been shelled the day before, I am not satisfied on the basis of that alone, and in the absence of country information about ongoing conflict in that area, that this reflects a real risk of harm to the applicant now and for the reasonably foreseeable future. In my view the country information does not support a conclusion that the applicant is at real risk of harm as a member of his particular sub-clan, or indeed as a result of generalised violence between other sub-clans. In any case, s.36(2B) provides that there is taken not to be a real risk that a person will suffer significant harm in a country if the real risk is one faced by the population of the country generally and is not faced by the person personally. I am satisfied that any risk to the applicant resulting from generalised inter-clan violence or lawlessness is a risk faced by the population of the country generally in areas where such conditions exist.
47. I have accepted that the applicant may be detained for a period of up to 24 hours at the airport on return because his documents or the other circumstances of his return may bring him to the attention of immigration officials. While country information suggests that prison conditions

are harsh, the information does not suggest that the applicant would be detained in a prison. I am not satisfied that there is a real risk that detention for 24 hours by immigration officials would result in any form of significant harm as defined. This is the case even if the applicant is identified as a failed asylum seeker, given that the country information indicates that failed asylum seekers do not face harm for that reason alone.

48. I accept that the applicant is married to an Australian permanent resident who is expecting their child. I accept that he would prefer not to take his wife and child to Sudan where conditions might be difficult. I accept that if the applicant and his wife decided that it would not be desirable for her and their child to return to Sudan with him, their separation would cause emotional and possibly psychological hardship. I am not satisfied, however that such hardship constitutes any form of significant harm, as defined. The definition of “cruel or inhuman treatment or punishment” in s.5(1) of the Act requires that any pain or suffering be intentionally inflicted on a person. Similarly, “degrading treatment or punishment” is defined to mean an act or omission that causes and is intended to cause extreme humiliation. I am not satisfied that any pain or suffering caused to the applicant by separation from his wife and child would be intentionally inflicted, nor is it intended to cause extreme humiliation. I am not satisfied that it would constitute any other form of significant harm.

Complementary protection: conclusion

49. 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

...

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.