



**Australian Government**  

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**Immigration Assessment Authority**

**Decision and Reasons**

**Referred application**

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SUDAN

IAA reference: IAA17/03696

Date and time of decision: 28 February 2018 16:39:00

Rosie Mathlin, Reviewer

**Decision**

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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

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### Visa application

1. The referred applicant (the applicant) claims to be from Sudan. He arrived in Australia by boat, undocumented, [in] June 2013. [In] February 2017 he lodged an application for a Safe Haven Enterprise visa (SHEV application). He claimed that the government of Sudan persecutes people and it is an unsafe place to live. He has not done military service and he could be seized by the military at any time and sent to fight in the south. He holds, and could be imputed to hold, anti-government political opinion because he has not done military service and does not want to do it. He faces harm if he returns as a failed asylum seeker.
2. [In] October 2017 a delegate of the Minister for Immigration and Border Protection refused the grant of the visa. The delegate did not accept that the applicant was at risk of harm for any of the reasons claimed. She considered that his claims about having been eligible for military service but managing to avoid conscription over a period of some fifteen years were not credible and she was not satisfied that he was at risk of being forcibly recruited into the army or of being punished as a deserter. She did not accept that he was, or would be regarded as a pacifist by the authorities, or that he would express anti-war views that would lead to him being viewed as anti-government. The delegate did not accept that the applicant belonged to tribes that were at risk of harm from the government, or that he would be imputed to hold anti-government views because of his ethnic origin. She was not satisfied, on the basis of country information, that he was at risk of harm on return as a failed asylum seeker.

### 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 22 February 2018 the IAA received an Appointment of Representative form and a letter from [Sister A] a lawyer and migration [agent]. She said that the applicant had sought assistance that day with his review application. She requested a copy of the delegate's decision record, which was provided to her the same day, and indicated that she would try to provide submissions by Monday (26 February 2018). She acknowledged that the 21 day period allowed under the IAA Practice Direction for the provision of submissions had passed, and did not make a formal request for an extension of the time to provide submissions.
5. No further information has been obtained or received. Given that two additional days have passed since the applicant's representative indicated she might provide submissions, given that no formal request for an extension of time was made, and given the nature of the "fast track" process to which the applicant is subject, I consider it appropriate to finalise the decision without further delay.

### Applicant's claims for protection

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6. The applicant's claims can be summarised as follows:
  - He was born in Al Jazeera province of Sudan and lived there until he was about [age].
  - He attended school for six years and then worked [in a certain role].
  - He has [a number of siblings], and is married with [a number of] children.

- In 1992 the applicant moved to Khartoum to work in his [cousin's] [business].
  - At first he lived with his cousin's family but moved to another area of Khartoum when he married in 2007.
  - He often witnessed incidents in the street where government security forces would beat or harass people for no apparent reason. He claimed that the situation in Sudan is terrible and it is very unsafe for people to live there.
  - There is forced military service in Sudan. The government can come to your house or your work and force you to join the army. There are checkpoints where they take people; the applicant used to go to work early and try to avoid being stopped at checkpoints.
  - If you are taken for military service they send you to Darfur to fight. The applicant does not want to fight in Darfur because he could be seriously injured or killed. He is also against the position of the government and does not want to kill other Muslims or Sudanese people.
  - Because of these issues he could not stand to stay in Sudan any longer and made arrangements to leave in 2013. At [the airport] he was asked why he was travelling and said he was going on a holiday. He had originally obtained a passport in 2000 in the hope of escaping the situation.
  - His family has told him that since he left, the situation in Sudan has become much worse and he should not return.
  - He fears that if he goes back he will be forced to serve in the military and if he refused he would be beaten, arrested and forced to do his military service.
  - He also fears harm as a failed asylum seeker
7. In a submission lodged after the protection interview the applicant's representative raised a new claim that the applicant feared persecution because of his tribal origins. His father is a member of the Bargo tribe and his mother is Mima. It was also claimed that he is a conscientious objector and that he faces harm on return because of a political opinion that would be imputed to him because of his ethnicity, because he is a pacifist, as a man of fighting age, and as a failed asylum seeker.

### **Refugee assessment**

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8. 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.

### **Identity and nationality**

9. On the basis of the identity documents provided, I am satisfied that the applicant is a national of Sudan whose identity is as claimed. There is no information before me to suggest that he has the right to enter and reside in any other country. Sudan is the receiving country for the purposes of the Act.

## Well-founded fear of persecution

10. 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.

## Does the applicant face persecution because of his ethnicity?

11. The applicant himself did not put forward the claim that he faced harm prior to his departure from Sudan because of his ethnic or tribal origin, or that he fears harm for this reason on return, either in the entry interview, in his written statement or at the SHEV interview. The applicant’s representative raised this claim for the first time in a submission dated 25 August 2017 which was provided after the SHEV interview. The delegate accepted that the applicant was a member of the Mima and Bargo tribes, but concluded that he is not, and would not be regarded as a Darfuri because he was not born there and had never lived there. According to a very recent UK Home Office country report cited in the submission<sup>1</sup>, the Mima and Bargo tribes are “non-Arab Darfuri tribes”.<sup>2</sup> This report states that non-Arab Darfuris face serious human rights violations in Darfur. Although the applicant has never lived in Darfur, was born in Al Jazeera Province and resided in Khartoum from [a young age], a UK Country Guidance case determined in January 2015<sup>3</sup> that the term “Darfuri” refers to a person’s ethnic not geographical origins, and includes Darfuris not born in Darfur. The 2017 Home Office Report cites information indicating that it is difficult to distinguish between non-Arab and Arab tribes: all speak Arabic, although non-Arab tribes also speak dialect, they are all Muslim, and because of inter-marriage are physically similar.<sup>4</sup> Based on this information, I accept that the applicant could be considered in Sudan to be a non-Arab Darfuri, although for reasons set out below I am not satisfied that he would necessarily be identified as one.

12. While a 2009 UK country guidance case determined that non-Arab Darfuris who were at risk of harm in Darfur could not reasonably be expected to relocate elsewhere in Sudan<sup>5</sup> the 2017 UK Home Office report states that by 2016 and 2017 most sources indicated that while non-Arab Darfuris might face discrimination in Khartoum, they did not face persecution there for reason

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<sup>1</sup> UK Home Office, "Country Policy and Information Note – Sudan: Non Arab Darfuris", 1 August 2017, OG6E7028844

<sup>2</sup> UK Home Office, "Country Policy and Information Note – Sudan: Non Arab Darfuris", 1 August 2017, OG6E7028844 at 1.2.1, also 4.3.2

<sup>3</sup> MM (Darfuris) Sudan (CG) [2015] UKUT 10 (IAC) (5 January 2015), cited in UK Home Office, "Country Policy and Information Note – Sudan: Non Arab Darfuris", 1 August 2017, OG6E7028844

<sup>4</sup> UK Home Office, "Country Policy and Information Note – Sudan: Non Arab Darfuris", 1 August 2017, OG6E7028844 at 4.3.5

<sup>5</sup> AA (Non-Arab Darfuris - relocation) Sudan CG [2009] UKAIT 00056 (18 December 2009, cited in UK Home Office, "Country Policy and Information Note – Sudan: Non Arab Darfuris", 1 August 2017, OG6E7028844

of their ethnicity alone. The Home Office concluded that recent country information superseded the findings in the two guidance cases, and that while non-Arab Darfuris may face discrimination of various kinds in Khartoum, such as economic disadvantage, difficulty accessing public services, education and employment, forced eviction and harassment from Arab Sudanese, this is generally not so severe as to amount to persecution or serious harm.<sup>6</sup>

13. The applicant has not claimed to have suffered discrimination as a non-Arab Darfuri. As a long term resident of Khartoum he was consistently employed, albeit in a relative's business, from 1992 until his departure. Although he says that it took him many years to save the money to travel outside Sudan, he was able to do so. He was married and rented a home where he resided for six years and where his wife and children remain. He was able to obtain documents including birth and marriage certificates, a national identity card, a driver's licence and a passport. According to their birth certificates, his children were born in hospital. Although he claims to have witnessed human rights abuses and heavy handed treatment of ordinary people in the street by government forces, he does not claim that he himself was ever the victim of such mistreatment. Nor does he claim that he suffered discriminatory treatment at the hands of ordinary Sudanese. Based on the country information and the applicant's own evidence, I am not satisfied that he has in the past, or that there is a real chance that he would in the reasonably foreseeable future, face discrimination in Khartoum, the place to which I am satisfied he would return, because of his ethnic status as a non-Arab Darfuri.
14. The UK report referred to above concludes that non-Arab Darfuris are not targeted by the authorities merely because of their ethnicity, but states that non-Arab Darfuris may be more likely to come to the adverse attention of the state authorities and to experience abuse or mistreatment if they do. Those who are targeted have, or are perceived to have, a profile of opposition to the government.<sup>7</sup> As noted above, the applicant does not claim to have ever come to the adverse attention of the authorities and in fact he claims that he was able to avoid checkpoints and other measures put in place to forcibly enlist recruits to military service. Given the evidence suggesting that non-Darfuri Arabs are more likely to attract adverse attention from the security authorities, this history and the absence of any apparent discriminatory treatment suggests that he may not have been identified as a non-Arab Darfuri.
15. I am not satisfied on the basis of the information before me, that the applicant faces discrimination amounting to serious harm, or any other form of harm, as a non-Arab Darfuri residing in Khartoum where he lived from 1992 until his departure, and where I am satisfied he would return. The country information does not support a conclusion that members of non-Arab Darfuri tribes are imputed, for that reason alone, to hold anti-government political views. In any event, I consider, based on the information provided by the applicant about his past experiences, and the country information, that it is unlikely that he would be identified as a non-Arab Darfuri.

#### **Does the applicant face harm because he has not done military service**

16. Country information indicates that military service is currently obligatory in Sudan for males aged between 18 and 45. According to War Resisters' International<sup>8</sup>, the age was extended

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<sup>6</sup> UK Home Office, "Country Policy and Information Note – Sudan: Non Arab Darfuris", 1 August 2017, OG6E7028844 at 22.3.9

<sup>7</sup> UK Home Office, "Country Policy and Information Note – Sudan: Non Arab Darfuris", 1 August 2017, OG6E7028844 at 2.3.13

<sup>8</sup> War Resisters' International, 21 April 2015, CIDSEC96CF15550

from 33 to 45 in 2013.<sup>9</sup> This information suggests that at the time of his departure from Sudan in 2013, the applicant had exceeded the age for compulsory military service although he would now be within the extended age limit.

17. It is reported that there are no systematic measures to identify and trace those liable for compulsory military service. Consistent with the applicant's claims, it is reportedly usually enforced, at least in Khartoum, by roundups in schools, public places and residential areas, mainly by traffic checkpoints manned by plain clothes military personnel. Some reports indicate that in Khartoum, recruitment drives focus on students and IDP's.<sup>10</sup> Information before the delegate indicates that enforcement of military service obligations is somewhat haphazard: according to one source, "... 'compulsory national service' has... in the recent past been enforced by random, forcible methods. Meanwhile avoidance of military service is widespread and unimpeded among the population outside the conflict zones".<sup>11</sup>
18. I have serious doubts about the applicant's account of having been able to avoid military service for some thirteen years, from 2000 when he says the authorities first started trying to recruit him, until his departure in 2013. The applicant claims that he was able to avoid checkpoints by going to work early in the morning, and says that he did not go out on weekends. His evidence is, however, that from 1992 he worked in the same job, which was situated a [certain distance] from his home; he was married and had [a number of] children. He has provided evidence of incidents involving abuses by security forces of ordinary people that he observed while out and about. He has acquired numerous documents including birth and marriage certificates and a driver's licence. I simply do not accept that the applicant did not leave his home at weekends for some thirteen years. Although he states in his written claims that authorities could come to his house or his workplace at any time and take him for military service, he says that this never happened to him, and indeed, when asked about this at the SHEV interview he said that the military do not go to homes, the only way they find people is by the checkpoints. This contradiction, in my view, casts doubt on the credibility and accuracy of the applicant's account overall. In my view, his evidence overall suggests that he lived a normal life and I am not satisfied that, in effect, he lived in hiding for this long period of time to avoid being forcibly recruited. Given his own evidence about the intensity of the military's efforts to recruit people – although I note that this is contradicted to some extent by the country information indicating that the process is disorganised and haphazard - I find it difficult to accept that he would have been able to do so over such a long period of time had he actually been eligible for or required to do military service.
19. This claim is also undermined by his ability to obtain documents including a national identity card, driver's licence and a passport which he says he renewed every two years from 2000. Country information indicates that people who refuse to do military service may be refused official identity documents such as travel documents and identity papers.<sup>12</sup> The applicant does not claim that he had any difficulty obtaining any of these documents. 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

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<sup>9</sup> Ibid

<sup>10</sup> Ibid; Country of Origin Research and Information (CORI), Sudan: Information on military service and treatment of deserters/draft evaders in Sudan, 6 November 2014, available at: <http://www.refworld.org/docid/55c9a4484.html>, cited in post-interview submission

<sup>11</sup> Country of Origin Research and Information (CORI), Sudan: Information on military service and treatment of deserters / draft evaders in Sudan, 6 November 2014, Sud1114, available at: <http://www.refworld.org/docid/55c9a4484.html>, cited in post-interview submission

<sup>12</sup> 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

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.

20. Moreover, Sudanese citizens are required to obtain an exit visa to leave the country. The documents required for an exit visa include a valid passport and a "travel card/performing national service Card to individuals that have not completed their national service".<sup>13</sup> Once registered or "called in" for service, individuals are not allowed to leave the country without a certificate of exemption, pardon or relief, fulfilment or postponement of military service. A person who does not present himself for recruitment or tries to avoid service by deceit or self harm is liable for two to three years imprisonment and may then be required to report for service. Anyone who helps them (except a spouse) may also be punished.<sup>14</sup> The applicant states that he had an exit permit which somebody obtained for him. He has not claimed that the document was obtained by bribery or fraudulently. The credible information does not suggest that the applicant was disentitled, because of outstanding military service obligations, to exit the country.
21. Country information that was before the delegate indicates that twice as many young men become eligible for military service each year than there are personnel actually serving, including reservists.<sup>15</sup> Moreover, in 2015 60% of the population of Sudan was under 24 years of age.<sup>16</sup> In these circumstances, given that the applicant was older than the recruitment age at the time of his departure (although it has since been extended) and so is at the upper end of the age range for conscription, given the number of much younger men who become eligible each year compared to the capacity of the armed forces to absorb them, I am satisfied that the possibility that the applicant would be targeted for compulsory conscription or forcibly recruited in the reasonably foreseeable future – even accepting that he has not done it and is eligible to do it - is small, and does not rise to a real chance.
22. None of the information before the delegate about the treatment of returnees to Sudan indicates that those people who are questioned at the airport are asked about outstanding military service obligations; nor does the country information indicate that the National Intelligence and Security Services (NISS), which is the government agency with a presence at the airport to whom persons of adverse interest are handed over by immigration officials, have any responsibility for or interest in individuals who have not done military service. In these circumstances, I am not satisfied that, even if the applicant did have outstanding military service obligations, he would be identified as such on return and either punished or forced to complete military service.
23. While the applicant's representative states that he cannot reasonably be expected to continue to live in hiding in order to avoid military service, I am not satisfied that, in fact he did so for the thirteen years that he claims to have been eligible for military service prior to his departure. As noted above, I do not accept that he did not go out over weekends but remained in hiding. He worked consistently, had a wife and [[a number of]] children who were born in hospitals, and had numerous identity documents. In my view it is probable that the applicant

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<sup>13</sup> UK Home Office, "Country Policy and Information Note – Sudan: Rejected asylum seekers ", 1 August 2017, OSG6E7028845 at 5.1.3

<sup>14</sup> Country of Origin Research and Information (CORI), Sudan: Information on military service and treatment of deserters / draft evaders in Sudan, 6 November 2014, Sud1114, available at: <http://www.refworld.org/docid/55c9a4484.html>

<sup>15</sup> World Fact Book – Sudan military 2017, CISED50AD5050; Global Fire Power, 2017 Sudan Military Strength, 1 January 2017, CISED50AD5049

<sup>16</sup> The Fanack Chronicle of the Middle East and North Africa, Population of Sudan, 20 June 2017, CISED50AD5048

had completed his military service or had obtained an exemption, as is suggested by his ability to obtain an exit permit. Even if this were not the case, the available information indicates that he may have never registered for military service and therefore was not formally subject to being called up. Given the information indicating that it appears to be through the education system that those eligible for military service are registered, I consider that there is no real chance that the applicant, as an older man who attended primary school for only five years, would come on to the formal radar of the authorities. If I were wrong about this and if, in fact, the applicant has been able to avoid being forcibly or officially conscripted since 2000, in my view, this indicates that while there might be some possibility that he would come to the attention of the military in a random round-up, that possibility is not so great as to constitute a real chance that he would face conscription or forcible recruitment in the reasonably foreseeable future on return to Sudan. I am not satisfied that there is a real chance that the applicant faces harm on return to Sudan because he has not done his military service, or as a man of fighting age.

24. There is no information before me, apart from the applicant's unsupported assertion, to suggest that people who do not do compulsory military service are imputed to hold anti-government political opinion for that reason, regardless of any other factors such as place of birth or tribal origin.

#### **Treatment of failed asylum seekers on return to Sudan**

25. A 2017 UK Home Office report takes the view that failed asylum seekers do not face a real chance of harm on return purely on the basis that they have sought asylum overseas, although the report notes that the number of returns is limited and no ongoing monitoring is done by the authorities of countries from which they are returned.<sup>17</sup> 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 by immigration authorities to the security authorities; this might happen if a person had a record of contact with opposition groups outside Sudan.<sup>18</sup> DFAT advises that the NISS has a significant presence at the airport and reviews the documentation of all individuals leaving and entering the country, and assesses that persons of interest and individuals returning without an exit visa would be questioned.<sup>19</sup> I note that the applicant would not be returning without an exit visa per se, as he no longer has his passport at all; his evidence is that he did have an exit visa or permit on departure. In my view, the weight of country information indicates that individuals returning on temporary travel documents or without a passport would be questioned as to their identity and activities outside Sudan, but would not be subject to particular suspicion, or to harm, in the absence of some additional characteristic.
26. 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 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

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<sup>17</sup> UK Home Office, "Country Policy and Information Note – Sudan: Rejected asylum seekers", 1 August 2017, OG6E7028845

<sup>18</sup> Ibid, Annex C, Letter from British Embassy, Khartoum, 19 February 2015

<sup>19</sup> DFAT, "DFAT Country Information Report – Sudan", 27 April 2016, CIS38A8012704

Darfur.<sup>20</sup> In my view, the weight of country information obtained from a wide range of sources indicates that those returnees likely to come to the adverse attention of the authorities at the airport are those with a political profile and people returning from countries such as Israel (it is an offence for Sudanese nationals to travel to Israel) and Uganda (which is regarded as a hub of opposition parties).<sup>21</sup> The applicant does not fit this profile; nor does he come from a conflict area.

27. 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. As noted above, the country information indicates that there is a possibility that he may be detained and investigated for a period of possibly up to 24 hours on return.<sup>22</sup> Based on the applicant's credible 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 for any reason. While some information indicates that people originating from Darfur might have problems at the airport on return, and while I have accepted that the applicant is a non-Arab Darfuri, I am also satisfied that this would not be readily apparent to the authorities at the airport. His identity document shows that he was not born in Darfur and he has never lived there. Given the country information indicating that Arab and non-Arab Darfuri tribes are often not physically distinguishable, and given my finding based on his past history of not having experienced discrimination or harassment as a non-Arab Darfuri in the face of country information indicating that non-Arab Darfuris in Khartoum do, I am satisfied that the applicant is not easily, if at all, identifiable as a non-Arab Darfuri. I am satisfied that there is no real chance that he would face harm for that reason at the airport on return. In any event, the country information indicates that merely being from a non-Arab Darfuri tribe would not necessarily, of itself, cause a person to receive adverse attention on return; I am satisfied that if they have not lived in Darfur or a conflict area, as in the case of this applicant, and if there is no suggestion of any past political activity, as in this case, the risk of being subjected to harm of any kind on return is minimal and does not rise to the level of a real chance.

28. The country information therefore indicates, and I find that there is not a real chance that the applicant 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. In any case, there is no country information before me to suggest that NISS, the security authority with a presence at the airport, has any role in enforcing military service obligations.<sup>23</sup> Sources considered by the delegate indicate that the purpose of the NISS screening at the airport is to identify potential terrorists or political activists. There is no country information before me to suggest that returnees are screened for outstanding military service obligations, nor does the information suggest that the authorities have the capacity to do so, given the apparently random and haphazard recruitment process.

29. If the applicant 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

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<sup>20</sup> UK Home Office, "Country Policy and Information Note – Sudan: Rejected asylum seekers", 1 August 2017, OGD6E7028845 at 6.2.2 – 6.2.7

<sup>21</sup> UK Home Office, "Country Policy and Information Note – Sudan: Rejected asylum seekers", 1 August 2017, OGD6E7028845; 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

<sup>22</sup> UK Home Office, "Country Policy and Information Note – Sudan: Rejected asylum seekers", 1 August 2017, OGD6E7028845, Annex C, Letter from British Embassy, Khartoum, 19 February 2015.

<sup>23</sup> DFAT, "DFAT Country Information Report Sudan", 27 April 2016, CIS38A8012704; US Department of State, "Country Report on Human Rights Practices 2016 – Sudan", 3 March 2017, OGD95BE926908

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.

30. 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.
31. 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 tribe, as a failed asylum seeker, because he has outstanding military service obligations or because he would be imputed to hold an anti-government political opinion for those or any other reasons.

#### **Imputed political opinion**

32. Based on the evidence before me, I am not satisfied that the applicant would be imputed to hold anti-government political opinions for any reason including his ethnicity, the fact that the tribes from which he is descended come from Darfur, because he has not done compulsory military service, or because he sought asylum. I am not satisfied that there is a real chance that he would face harm of any kind in Sudan because of any political opinion that he actually holds, or that might be imputed to him.

#### **Refugee: conclusion**

33. 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**

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34. 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**

35. 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.

36. 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 tribal origin, and specifically because he is or might be identified as a non-Arab Darfuri; because of his actual or imputed political opinion; or as a man of fighting age who 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.

37. 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 who may require that his identity be investigated. 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 for the purpose of a routine investigation into his identity 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.

#### **Complementary protection: conclusion**

38. 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**

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

## Applicable law

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### **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.