



Australian Government
Immigration Assessment Authority

Decision and Reasons

Referred application

SUDAN

IAA reference: IAA18/04948

Date and time of decision: 29 June 2018 09:10:00

B Mericourt, Reviewer

Decision

In respect of the referred applicant (IAA18/4724) the IAA remits the decision for reconsideration with the direction that:

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

Any references appearing in square brackets indicate that information has been omitted from this decision pursuant to section 473EC(2) of the Migration Act 1958 and replaced with generic information which does not allow the identification of an referred applicant, or their relative or other dependant.

Background to the review

Visa application

1. The referred applicant (the applicant) claims to be a national of Sudan. On 16 December 2016 he lodged an application for a Safe Haven Enterprise Visa (SHEV). In a decision dated 8 May 2018 the delegate of the Minister of Immigration and Border Protection (the delegate) refused to grant the visa.
2. The delegate accepted the applicant was employed as a [Occupation 1] in Sudan and had been subject to being interrogated at various checkpoints, particularly when driving to and from Darfur, but that he had not suffered serious or significant harm as a consequence of his interrogation. The delegate was not satisfied the applicant had a well-founded fear of persecution for reasons of race, nationality, religion, political opinion or membership of a particular social group. He was also not satisfied there was a real chance or real risk the applicant would suffer serious or significant harm if he were to be returned to Sudan now or in the reasonably foreseeable future.

Information before the IAA

3. I have had regard to the material given by the Secretary under s.473CB of the *Migration Act 1958* (the Act).
4. The IAA received a submission from the applicant and his representative on 4 June 2018. To the extent that this engaged in argument with the delegate's decision based on information which was before the delegate, I have had regard to it.
5. The submission included a translated statement from the applicant dated 30 May 2018 which included new information including;
 - The applicant made contacts and held meetings with several entities that maintain relations with Darfur and the liberation movements led by the Justice and Equality Movement (JEM). He helped in communicating and dispatching messages and information which the Front wants to send as far as Almorra Mountain, Al-Mohajiriya, Um Al-batteekh, Kraidha and Azzoom.
 - When driving trucks government authorities, security forces and the Jinjaweed suspected the cargos being transported. He was intercepted in several places and his truck searched. They confiscated [items] and accused him of not having permits to transport these substances. He was accused of smuggling these materials to the opposition organisations besieged by government forces.
 - The applicant was arrested pending interrogation more than once and beaten, tortured, humiliated and cursed. They threatened him with murder if they found he had committed any violation, especially the transportation of smuggled materials.
 - On one occasion his truck which was transporting [product] was confiscated. The authorities claimed that the manifesto stated the cargo was [items] and not [product]. He was arrested and they tried to seize the truck. However, his employing company apologised to the Department and forced him to resign in April 2013.

- Although he had quit his job he maintained relations with the Darfuri Groups of the Zaghawa tribes especially the relatives of [Mr A] and [Mr B], the coordinator of the opposition groups of Darfur.
 - Due to the dangers the applicant faced and the depth of the relations he had established with the opposition groups, and, in the light of important information he had, many of his brethren Darfuris advised him to leave Sudan as if he were to be exposed to severe persecution or torture they feared he may inform on them, reveal their names and the depth of the areas through which the military and civil powers move.
 - The applicant spent 8 months lost within his city seized with fear about being arrested. The Sudanese security forces intensified the campaign of arrests and torture. He heard about Sudanese women being raped and killed because their husbands were attached to the Darfur Liberation Movement. He moved his [family] to Al Jazeera province away from the presence of security and civil authorities to protect them.
 - The applicant approached a friend and through his political group obtained a Sudanese passport for \$400. He was intercepted at Khartoum airport and was subjected to excruciating interrogation. The authorities claimed his name was on a list of those wanted and banned from travel. He spent 2 hours being interrogated and threatened and finally bribed one of the employees with his remaining funds of USD725 so that he could leave.
 - Today he is mentally sick and bankrupt. He is extremely terrified at the mere mention of return to Sudan. In practical terms he cannot return anyway as he threw his passport in the sea on the way to Australia. It is impossible for him to obtain a Sudanese passport. The Australian government has closed its embassy in Khartoum and there is no Sudanese government representation in Australia.
 - Sudan is a terrorist state governed by a terrorist wanted for international justice. The rejection of the applicant's application for protection means handing him over to an international criminal, thug and killer of humanity.
 - The oppression and fear he faced in Sudan was his first and foremost motive for his escape from Sudan. He was in a good job as a [Occupation 1]. His income was excellent and would secure him a comfortable life. It was only persecution and fear that forced him to leave.
6. The representative's submission refers to the applicant's interception, harassment and interrogation at Khartoum airport and that he had to pay a bribe of USD725 to one of the immigration officers in order to be able to leave. The applicant's representative did not refer specifically to any of the other claims or new information provided in the applicant's statement above. He confirmed the applicant fled Sudan for reasons of being 'intercepted and prosecuted' when he worked in Darfur. He argued the applicant should not be returned to a regime that has been indicted for its general violations against the citizens of its country.
7. Section 473DD of the Act provides that the IAA must not consider any new information unless it is satisfied that there are exceptional circumstances to justify considering it: s. 473DD(a) AND in relation to any new information that is given to the IAA by the referred applicant (including his or her legal representative who provides it on behalf of the referred applicant)

the IAA must be satisfied that the new information was not, and could not have been provided to the Minister before the primary decision was made (s.473DD(b)(i)) OR it is credible personal information, which was not previously known and, had it been known, may have affected the consideration of the applicant's claims (s.473DD(b)(ii)).

8. I have had regard to the fact that at his protection interview the delegate advised the applicant that he should provide any information relating to his claim at the interview and that if he provided information after the decision was made it may not be considered on review. At his interview he was asked on two occasions whether there was anything he wished to add to his claims and the applicant answered no. No reasons were provided as to why this new information either could not have been provided before the date of the delegate's decision or why it should be considered credible personal information. The fact that the applicant has only raised the claims that he was connected to Darfur opposition groups and that he had to bribe officials at Khartoum airport in order to leave Sudan after his protection application was refused gives rise to concerns about the credibility of this new information.
9. I am satisfied that the applicant has consistently claimed that he has been accused by authorities of cooperating with the opposition when he has been driving his truck through checkpoints and that he genuinely feared arrest on some of these occasions (see below). However, the applicant's protection interview was at times very confusing and the delegate has misunderstood some information provided, e.g. that the applicant is Nubian. The applicant was never actually asked if he had contact or connections with the opposition or whether had transported goods for the opposition. He was not advised at the end of the interview that he could provide further information up to the time the delegate made her decision. Given the information in the applicant's written submission to the IAA is 'new' information which, had it been known, may have affected the consideration of the applicant's claims, together with the issues related to the interview itself, I considered in the circumstances of this case that I should interview the applicant about the new information he provided to determine if the new information is 'credible' personal information.
10. I conducted an interview (the IAA interview) with the applicant on 26 June 2017. His representative was present. The purpose of the interview was to discuss the applicant's claims about his connections /activities with the Justice and Equality Movement (JEM) in Darfur and incidents that occurred prior to his departure from Sudan. I discussed the content of the interview in more detail below in assessing the applicant's claims for protection. In summary, the applicant claimed that he was not a member of JEM or any other Darfur opposition group. However, on occasion he delivered messages for them and on at least one occasion he was paid to deliver fuel to members of opposition groups. He said he did this when people were surrounded by government security forces and unable to access fuel or food. He tried to avoid government security force checkpoints by taking back roads, but was accused of transporting supplies to opposition groups on two occasions - once in about 2006 and the second just before he left Sudan in 2013. The applicant also reiterated the claim he made in his submission to the IAA that he was forced to pay a bribe of USD725 in order to depart Khartoum airport, and he was told that if he applied for protection in another country and then returned to Sudan he would be killed.
11. The applicant claimed that he did not provide these details to the delegate prior to her decision as he did not trust the Department after receiving a letter from the Department that information about people applying for protection in Australia was on the internet. I established he was referring to the Department data breach which occurred in February 2014 and related to people in Immigration Detention on 31 January 2014. There was no

information on the Department file to suggest that he was in immigration detention himself at that time, however, upon making enquiries with the Department it was confirmed that he was in immigration detention at the time of the data breach. Although the applicant did not directly make any claims related to the data breach I consider it arises on the material due to his expressed concern about the Department releasing his personal information at that time and this being the reason he did not trust the Department at the time he lodged his application for protection.

12. Following the interview with the applicant I find that there are exceptional circumstances to justify considering some of the new information the applicant provided in his written submission to the IAA and at his IAA interview and s.473DD(a) is met. I also find that some of the new information provided (as detailed below) is credible personal information which, had it been known, may have affected consideration of the applicant's claims. I therefore find s.473DD(b) is also met.

Applicant's claims for protection

13. The applicant's claims can be summarised as follows:
 - The applicant claims he fears persecution for reasons of his actual or imputed political opinion.
 - The applicant claims that whilst working as a [Occupation 1] between 2002 and 2013 to have come to the adverse attention of the authorities when he was stopped at checkpoints, particularly when driving in and out of Darfur, interrogated and accused of supporting opposition rebels and transporting [goods], to them.
 - The applicant claims he is of adverse interest to the authorities and his name is on a list held by the security forces for being suspected of cooperating with Darfur rebels. If he were to be returned to Sudan he would be accused of being anti-regime, supporting rebels and consequently suffer serious or significant harm.
 - The applicant fears the Sudanese government has accessed the data released on the Department website when he was in immigration detention on 31 January 2014.
 - The applicant fears returning to Sudan as a failed asylum seeker without valid documents.

Factual findings

14. The applicant's claims as to his identity and nationality have been consistent since his arrival in Australia. He conducted interviews in Sudanese Arabic and has submitted his original Sudanese birth certificate and driver's licence and copies and translations of his marriage certificate and [child]'s birth certificate to the Department. I accept the applicant's nationality and identity are as claimed and find Sudan to be the receiving country for the purpose of the application. There is no evidence before me to suggest that the applicant has a right to enter and reside in any country other than Sudan and I am satisfied he does not: s.36(3).
15. I am satisfied the applicant worked as a [Occupation 1] in Sudan from about 1992, he is ethnically Nubian Sudanese and his religion is Islam. I am satisfied the applicant originates from Wadi Halfa in the north of Sudan and his family [currently] reside Al Jazeera (also spelt Gezira) state in Sudan.

Refugee assessment

16. 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

17. 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.
18. Real chance is a substantial chance as distinct from a remote or far-fetched possibility.¹

Claims of fear of persecution for reasons of actual or imputed political opinion

19. Since his entry interview on 28 August 2013 the applicant has consistently claimed that he was employed as a [Occupation 1] from about 2000 for one particular company and he drove [through] Sudan, including the Darfur region as well as in South Sudan, Kenya, Uganda, Somalia and Chad. He stated that at checkpoints he has been stopped by security forces, interrogated and accused of co-operating with people in opposition to the authorities. He feared being arrested and accused of supporting rebel groups. He also feared being shot by members of the rebel groups if he didn't stop.
20. At his entry interview the applicant said this happened on 6 or 7 occasions. He thought the first time was in 2009 and the last time in about May 2012. He said he had never been formally arrested, detained or charged with any offences, but the risk is always there. After the last occasion he started making plans to leave Sudan and he departed [in] May 2013. When he departed he was the holder of a genuine passport he had obtained legally. He feared that if he returned to Sudan he may be arrested and detained “for 15 days for investigations or something.”
21. In his written application for protection lodged on 16 December 2016 the applicant stated that in about 2005 he was employed by a company ([employer]) as a [Occupation 1] to

¹ *Chan v MIEA*, (1989) 169 CLR 379 at 389.

transport fuel, good and supplies to various areas. Since the rise of rebellions the government has randomly arrested many civilians for questioning. He was arrested many times at checkpoints and interrogated. He was accused of sending supplies and fuel to support the rebels. He believes his name has been included on a suspect list and he will be executed if found guilty. In response to the question about what would happen if he returned to Sudan he said *"I do not know what will happen to me. The only employment I can do best in Sudan is [Occupation 1] with the same company. As of being suspected of being rebellion I do not know how long I can survive there."* If he was returned he had concerns about his safety and about being accused.

22. At his protection interview on 20 February 2018 the applicant claimed he had been detained, questioned and physically mistreated on three occasions at checkpoints. In 2003 or 2004 he and other [Occupation 1]s were stopped at a checkpoint near Nyala and threatened by armed security officials who accused them of working with the opposition. When the delegate stated that it would be understandable that checkpoints would be established and drivers questioned during a civil war, the applicant stated that they had nothing to do with either side and just wanted to do their job. They were very scared because the army was bombing the opposition groups. At checkpoints they will always asked why they were transporting goods.
23. On another occasion in about 2006 or 2007 the applicant and another [Occupation 1] was stopped at a checkpoint near Gerieda and were interrogated. They were accused of co-operating with opposition groups and giving them fuel. The applicant and his fellow [Occupation 1] realised that the security officers had been in contact with other checkpoints via walkie-talkies and that they had been monitored from the air by planes. They were made to sit on the ground in the sun for four hours without water. They were kicked by the security officers. However they were released after nothing was found in their trucks.
24. On the third occasion the applicant stated he was stopped at Al Kowai and again accused of co-operating with the opposition groups. He was hit. One of the other [Occupation 1]s had a relative who was a member of the opposition group and was beaten badly.
25. The applicant stated several times that he was concerned that his name was in the security forces database as a person who cooperated with the opposition parties and that this was the reason he feared returning to Sudan.
26. At the IAA interview on 26 June 2018, the applicant stated that he was stopped at checkpoints on a number of occasions. In his work as a [Occupation 1] he transported aid from different countries to various parts of Sudan and other countries including South Sudan, Chad, Somalia, and Kenya. He transported [products]. The company was based in El Obeid in Northern Kordofan state.
27. I asked the applicant if he actually had been transporting any goods for the opposition or was a member of any of the Darfur opposition groups. He identified the leader of JEM by name but said he was not a member. However, on occasion he would take messages for opposition groups. He did not know what the messages were. They would give him a sealed envelope when he was in Darfur having delivered goods and when he returned to his base someone would come and collect the envelope. On one occasion a group which had no fuel or food and was surrounded by government security forces paid him to bring fuel. He considered this to be like a "requisition". When asked if he feared for his own safety, he said yes but he felt he had to help people in this situation, especially as he knew them personally. He tried to avoid checkpoints by taking back roads.

28. The applicant described the same incidents as he had described at his protection interview with some more details. He said he was frequently accused of transporting goods and cooperating with Darfur opposition groups. Although he was somewhat vague about dates in which particular events occurred he stated that from about 2002 until just before he left Sudan in April 2013 he was frequently stopped at checkpoints with other drivers and they were interrogated and on occasion accused of co-operating with the opposition and had their trucks searched. The applicant described an incident in about 2006 or 2007 in which he and other drivers had their trucks confiscated. He said the security officers treated them aggressively and accuse them of co-operating with opposition groups. His company intervened and told the government that he would no longer be working for them. After this incident he did casual work for the company more or less unofficially. If there was a big ship carrying aid then the company would call him to transport and deliver the goods as he had experience. He was "in hiding" in villages outlying El Obeid and maintained contact with other drivers which is how he obtained casual work.
29. I asked the applicant about the incidents in which he was beaten. He said that he and two other [Occupation 1]s were trying to avoid security points and were taking back roads when they were pulled over by security officers in a Land Rover in an area [which] is in the middle of the desert. They were taken to a small tent where they were accused of transporting [product] to the opposition. They had already delivered the [product] and [their] trucks were empty. They were beaten and not given any food or water and he was very dizzy. An officer left the tent with a walkie-talkie and went out and talked with other people. Four people came from two other cars and beat them "very hard". He heard one of them say if they die just let them die. Eventually they were taken to a place outside Al Kowai which they did not know and left there. They were told to abandon their trucks. One of the officers said the applicant's name was "in the system" as being a member of the opposition. At that particular time it was not true that they had delivered [product] to the opposition, although he had done so on other occasions.
30. The applicant claimed that he left Sudan after an informant told the government security forces in about April 2013 that he was continuing to work for the truck company. On that occasion security forces threatened to kill him if they found him driving again and he took this threat seriously.
31. I put to the applicant the differences in his evidence between his entry interview, protection interview and in the IAA interview about the number of occasions that something happened to him at checkpoints and the years in which this happened. I indicated that these inconsistencies gave rise to concerns about the credibility of his evidence. It was clear the applicant did not really understand the issue and I had to put the differences in his evidence to him three times. He said these type of incidents happened all the time; sometimes people are even killed. He then said what happened 2007 was the last time but it also happened in 2013 (that is, the threat to his life) and that is when he decided he could no longer stay in Sudan.
32. I asked the applicant about the new claim that he had had to pay a bribe of USD725 in order to depart the airport in Khartoum. The applicant repeated this claim stating that he was questioned for over two hours by three or four immigration officials. They made him empty his pockets, took all his money and shared it between themselves. He was then allowed to pass through immigration. He had anticipated this and given USD2500 to a friend who was also travelling to Indonesia but in his case, on a business visa. When they met in Indonesia, he was able to get the money from his friend and pay the Indonesian officials another \$400

bribe. The applicant also stated that the immigration officials in Sudan told him that if he applied for protection in another country and then returned they would kill him.

33. I put to the applicant that he had not mentioned any of this to the Department either in his written claims or at his protection interview. He said he didn't mention it because they tore up his document. When asked what he was talking about he referred to a request he made in a letter to the Department of Foreign Affairs in Sudan to confirm that he had been employed as a [Occupation 1] there and his letter of request had been torn up. I asked the applicant again about why he had not mentioned this new information about paying a bribe and being threatened at the airport and he said "everything had been done to me - bribes are paid all the time in Sudan. I told the Department my name is on a list. For me and my understanding it is all the same". He also said that he had received a letter from the Department saying they had put his information on the internet. After several more questions I established he was referring to receiving a letter about the Department data breach in February 2014 when names and some other details about persons in Immigration detention on 31 January 2014 were accessible on the Department website. He claimed he did not trust the Department would keep everything confidential after he received this letter and was concerned the Sudanese government would know he was seeking protection and how he transported goods for opposition groups.
34. Sudan is a republic with power concentrated in the hands of authoritarian President Omar Hassan Al-Bashir and his inner circle. The National Congress Party (NCO) which is an Islamist party and an offshoot of the pan-Arab Muslim Brotherhood, has had 29 years of nearly absolute political authority.² The US Department of State reported that *"the three most significant human rights problems were inability of citizens to choose the government, aerial bombardments of civilian areas by military forces and attacks on civilians by government and other armed groups in conflict zones, and abuses perpetrated by the National Intelligence and Security Services (NISS) with impunity through special security powers given it by the regime..... The NISS continued to show a pattern of widespread disregard for rule of law, committing major abuses, such as extrajudicial killings; torture, beatings, rape and other cruel or inhuman treatment or punishment; arbitrary arrest and detention by security forces; harsh and life-threatening prison conditions; incommunicado detention; prolonged pre-trial detention; obstruction of humanitarian assistance"*³
35. Beginning in 1987, three successive armed conflicts occurred in Darfur, mainly between the government (and associated militias often referred to as the Janjaweed, who were armed by the government) and rebel groups linked to the Fur, Massalit and Zaghawa tribes such as the Justice and Quality Movement (JEM) and the Sudan Liberation Movement (SLM) which has two factions. The most serious conflict started in 2003 and whilst intensity of the formal conflict in Darfur has diminished since its peak from late 2003 to mid-2004, conflict continues in the region with counterinsurgency military operations led by the government, aimed at decreasing the capability of the armed opposition. In mid-2013, the Rapid Support Forces (RSF) were formed, reportedly under the command of the NISS in order to defeat the armed opposition in Darfur.⁴

² US Department of State, "Country Report on Human Rights Practices for 2016 – Sudan", 3 March 2017, OGD95BE926908

³ Ibid

⁴ Department of Foreign Affairs and Trade (DFAT), DFAT Country Information Report Sudan, 27 April 2016, pp.8-9, CIS38012704

36. A number of sources reported that individuals have been detained due to the actual or assumed support of anti-government forces, such as various Darfur rebel movements.⁵ Security forces frequently conduct searches without warrants and target persons suspected of political crimes. In 2016 the UN Mission in Darfur (UNAMID) reported abductions in Darfur which were mostly perpetrated by government or government aligned entities and included an abduction of a World Food Program (WFP) contract driver and his truck.⁶ DFAT assesses that the NISS targets and detains individuals associated with the armed opposition, an armed opposition, NGOs, journalists and individuals associated with particular religious organisations. It reports that Amnesty International has highlighted that the 2010 National Security Act provides immunity to members of the NISS from prosecution and disciplinary action for all acts committed in the course of their work.⁷
37. In the 2016 Sudan country report, DFAT assessed that individuals who are associated with, or are perceived to be associated with, the armed opposition face a high risk of discrimination and violence by the government, particularly in areas that are controlled by the government. DFAT further assesses that this risk is faced by both individuals who are actively involved with armed opposition, as well as individuals who are simply located in areas controlled by the armed opposition.⁸ DFAT also assessed that individuals who work on issues including the provision of humanitarian assistance are likely to attract negative attention from authorities. This is likely to be in the form of harassment and intimidation and may escalate when individual being detained or experiencing violence.⁹
38. Having regard to the above information, I consider that it is credible the applicant was interrogated, threatened and harassed on numerous occasions when driving trucks with humanitarian aid to and from Darfur over a period of about 10 years.
39. DFAT reports that the NISS has a significant presence at Khartoum International Airport and reviews the documentation of all individuals exiting or entering Sudan. It assesses that an individual come to the attention of the authorities if they did not leave Sudan with a valid exit visa or were of specific interest to the authorities. The NISS are known to detain 'persons of interest' on their return to Sudan.¹⁰ In 2015 Amnesty International reported that the role of the NISS has been enhanced from an intelligence agency focused on information gathering, analysis and advice, to a security agency with a broader mandate to exercise functions usually carried out by the Armed Forces or other law enforcement agencies.¹¹
40. Sudan ranks 165th out of 168 countries on Transparency International's Corruption Perceptions Index in 2015, suggesting an extremely high level of corruption.¹²

⁵ Department of Foreign Affairs and Trade (DFAT), DFAT Country Information Report Sudan, 27 April 2016, CIS38012704; US Department of State, "Country Report on Human Rights Practices for 2016 – Sudan", 3 March 2017, OGD95BE926908; Freedom House, "Freedom in the World 2016 – Sudan", 14 July 2016, NGE43874C431

⁶ US Department of State, "Country Report on Human Rights Practices for 2016 – Sudan", 3 March 2017, OGD95BE926908

⁷ Department of Foreign Affairs and Trade (DFAT), DFAT Country Information Report Sudan, 27 April 2016, p.24, CIS38012704.

⁸ Department of Foreign Affairs and Trade (DFAT), DFAT Country Information Report Sudan, 27 April 2016, p.16, CIS38012704

⁹ Department of Foreign Affairs and Trade (DFAT), DFAT Country Information Report Sudan, 27 April 2016, pp.16-17, CIS38012704

¹⁰ UK Home Office Country Information and Guidance - Sudan - Treatment on Return, 1 August 2015, OGD95BE926908

¹¹ UK Home Office Country information and Guidance – Sudan - Failed asylum seekers, August 2016

¹² Department of Foreign Affairs and Trade (DFAT), DFAT Country Information Report Sudan, 27 April 2016, p.6, CIS38012704

41. Insofar as I could understand the applicant's narrative of events, and given the consistencies in his evidence about the details of specific events and the above country information, I accept the following:

- the applicant worked as a [Occupation 1] in Sudan, and for one particular company – the [employer] since about 2000. He transported goods [throughout] Sudan and in South Sudan, Chad, Kenya, Uganda and Somalia usually in convoy with other trucks;
- the applicant's work meant that he was frequently stopped at checkpoints by government security forces, interrogated about the goods he was carrying, and on occasion accused of cooperating with or transporting goods for opposition groups in Darfur;
- on at least one occasion the applicant carried messages for members of various Darfur opposition groups to the truck company's headquarters where the messages were collected and he also transported fuel to members of Darfur opposition groups when paid to do so;
- on at least three occasions, around 2004 and 2006/07 in or near Nyala, Gereida and Al Kowai, the applicant and his truck driving colleagues were detained, interrogated, physically abused and threatened with death. During the incident in 2007, he was accused of cooperating with Darfur opposition groups and transporting fuel for them, his truck was confiscated and his employing company told the government that he would no longer be working for them;
- the applicant continued working on an informal or unofficial basis for the same company, delivering humanitarian aid in the Darfur region, using backroads and attempting to avoid checkpoints, not always successfully;
- in early 2013 an informant told the government that the applicant was continuing to work for the [employer] and he was threatened with death if he continued to do so;
- the applicant was interrogated at Khartoum airport at the time of his departure and he was allowed to depart after immigration officials took the USD cash he was carrying;
- The applicant believes he is on a list held by government security forces of people associated with rebel groups in Darfur and that he would be at risk of imprisonment, torture and possible death if he were to return to Sudan.

42. Based on the above findings I am satisfied the applicant was of adverse interest to the authorities at the time of his departure from Sudan, for reasons of his imputed political opinion, that is, his perceived association with rebel groups in Darfur. Given the country information about corruption in Sudan, I am also satisfied that the applicant was interrogated at Khartoum International airport, but was able to leave on the "payment" of a bribe. I do not accept that he was told by the immigration officers that if he applied for protection in another country and then returned he would be killed. I consider the applicant embellished his evidence in this respect.

43. The NISS are known to detain 'persons of interest' on their return to Sudan.¹³ In 2015 Amnesty International reported that the role of the NISS has been enhanced from an intelligence agency focused on information gathering, analysis and advice, to a security agency with a broader mandate to exercise functions usually carried out by the Armed Forces or other law enforcement agencies.¹⁴ The UK Home Office also noted that a Waging Peace report dated September 2014 stated that government officials working in the Sudanese immigration Department were known to work for NISS. Under the National Security Act 2010 individual suspected of presenting a threat to the state may be detained without charge for up to 45 days without judicial review, which the director of security may extend for a further three months. Sources consistently highlighted NISS as responsible for significant human rights violations in Sudan. A British Embassy letter dated 19 February 2015 stated *"allegations of mistreatment amounting to cruel and inhumane treatment or torture by NISS are a matter of public record Without prejudice to comments above about allegations of mistreatment attributed to NISS, it is important to note that such detentions are an extremely common occurrence and it should not be assumed that everyone detained would be subject to the same sort of treatment. The treatment received could be determined by a number of factors including, but not limited to: the nature of the accusations; public and international profile; age; family connections; and, ethnic background."*¹⁵
44. Whilst I have some concerns about whether the applicant's name is on a list held by the NISS, I consider that there is more than a remote chance that, as a result of his past activities, the NISS has considered him to be a 'person of interest' in the past, and that, given the current situation in Sudan, that will still be the case if he is to be returned to Sudan now or in the reasonably foreseeable future.
45. I accept there is a real chance that the applicant will be interrogated at the airport by NISS on his return to Sudan. I have found there is a more than a remote chance the NISS has identified him as 'a person of interest' who is associated with and/or cooperating with armed rebel groups in Darfur. Having regard to the extensive country information about arbitrary arrests, detainment, physical mistreatment, torture and executions conducted with impunity by the NISS of persons they considered to be members of armed opposition groups or associated with such groups, I consider there is more than a remote chance, that is, there is a real chance that the applicant will suffer serious harm such as physical ill treatment and harassment and threats to his life for reasons of his imputed political opinion if he is returned to Sudan now or in the reasonably foreseeable future.
46. I am therefore satisfied the applicant has a genuine well-founded fear of persecution in Sudan.
47. I am satisfied that it is not possible for the applicant to obtain protection from the relevant authorities in Sudan as it is the authorities who would perpetuate the harm. I am satisfied that the harm he fears applies to all areas of the country for the same reason.

Refugee: conclusion

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

¹³ UK Home Office Country Information and Guidance - Sudan - Treatment on Return, 1 August 2015, OG8F59D8D52

¹⁴ UK Home Office Country information and Guidance – Sudan - Failed asylum seekers, August 2016, p.6

¹⁵ Ibid, p.7

Decision

In respect of the referred applicant (IAA18/4724) the IAA remits the decision for reconsideration with the direction that:

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

Applicable law

Migration Act 1958

5 (1) Interpretation

In this Act, unless the contrary intention appears:

...

bogus document, in relation to a person, means a document that the Minister reasonably suspects is a document that:

- (a) purports to have been, but was not, issued in respect of the person; or
- (b) is counterfeit or has been altered by a person who does not have authority to do so; or
- (c) was obtained because of a false or misleading statement, whether or not made knowingly

...

cruel or inhuman treatment or punishment means an act or omission by which:

- (a) severe pain or suffering, whether physical or mental, is intentionally inflicted on a person; or
- (b) pain or suffering, whether physical or mental, is intentionally inflicted on a person so long as, in all the circumstances, the act or omission could reasonably be regarded as cruel or inhuman in nature; but does not include an act or omission:
 - (c) that is not inconsistent with Article 7 of the Covenant; or
 - (d) arising only from, inherent in or incidental to, lawful sanctions that are not inconsistent with the Articles of the Covenant.

...

degrading treatment or punishment means an act or omission that causes, and is intended to cause, extreme humiliation which is unreasonable, but does not include an act or omission:

- (a) that is not inconsistent with Article 7 of the Covenant; or
- (b) that causes, and is intended to cause, extreme humiliation arising only from, inherent in or incidental to, lawful sanctions that are not inconsistent with the Articles of the Covenant.

...

receiving country, in relation to a non-citizen, means:

- (a) a country of which the non-citizen is a national, to be determined solely by reference to the law of the relevant country; or
- (b) if the non-citizen has no country of nationality—a country of his or her former habitual residence, regardless of whether it would be possible to return the non-citizen to the country.

...

torture means an act or omission by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person:

- (a) for the purpose of obtaining from the person or from a third person information or a confession; or
- (b) for the purpose of punishing the person for an act which that person or a third person has committed or is suspected of having committed; or
- (c) for the purpose of intimidating or coercing the person or a third person; or
- (d) for a purpose related to a purpose mentioned in paragraph (a), (b) or (c); or
- (e) for any reason based on discrimination that is inconsistent with the Articles of the Covenant; but does not include an act or omission arising only from, inherent in or incidental to, lawful sanctions that are not inconsistent with the Articles of the Covenant.

...

5H Meaning of refugee

(1) For the purposes of the application of this Act and the regulations to a particular person in Australia, the person is a refugee if the person:

- (a) in a case where the person has a nationality—is outside the country of his or her nationality and, owing to a well-founded fear of persecution, is unable or unwilling to avail himself or herself of the protection of that country; or
- (b) in a case where the person does not have a nationality—is outside the country of his or her former habitual residence and owing to a well-founded fear of persecution, is unable or unwilling to return to it.

Note: For the meaning of ***well-founded fear of persecution***, see section 5J.

...

5J Meaning of well-founded fear of persecution

- (1) For the purposes of the application of this Act and the regulations to a particular person, the person has a well-founded fear of persecution if:
 - (a) the person fears being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion; and
 - (b) there is a real chance that, if the person returned to the receiving country, the person would be persecuted for one or more of the reasons mentioned in paragraph (a); and
 - (c) the real chance of persecution relates to all areas of a receiving country.

Note: For membership of a particular social group, see sections 5K and 5L.
- (2) A person does not have a well-founded fear of persecution if effective protection measures are available to the person in a receiving country.

Note: For effective protection measures, see section 5LA.
- (3) A person does not have a well-founded fear of persecution if the person could take reasonable steps to modify his or her behaviour so as to avoid a real chance of persecution in a receiving country, other than a modification that would:
 - (a) conflict with a characteristic that is fundamental to the person's identity or conscience; or
 - (b) conceal an innate or immutable characteristic of the person; or
 - (c) without limiting paragraph (a) or (b), require the person to do any of the following:
 - (i) alter his or her religious beliefs, including by renouncing a religious conversion, or conceal his or her true religious beliefs, or cease to be involved in the practice of his or her faith;
 - (ii) conceal his or her true race, ethnicity, nationality or country of origin;
 - (iii) alter his or her political beliefs or conceal his or her true political beliefs;
 - (iv) conceal a physical, psychological or intellectual disability;
 - (v) enter into or remain in a marriage to which that person is opposed, or accept the forced marriage of a child;
 - (vi) alter his or her sexual orientation or gender identity or conceal his or her true sexual orientation, gender identity or intersex status.
- (4) If a person fears persecution for one or more of the reasons mentioned in paragraph (1)(a):
 - (a) that reason must be the essential and significant reason, or those reasons must be the essential and significant reasons, for the persecution; and
 - (b) the persecution must involve serious harm to the person; and
 - (c) the persecution must involve systematic and discriminatory conduct.
- (5) Without limiting what is serious harm for the purposes of paragraph (4)(b), the following are instances of **serious harm** for the purposes of that paragraph:
 - (a) a threat to the person's life or liberty;
 - (b) significant physical harassment of the person;
 - (c) significant physical ill-treatment of the person;
 - (d) significant economic hardship that threatens the person's capacity to subsist;
 - (e) denial of access to basic services, where the denial threatens the person's capacity to subsist;
 - (f) denial of capacity to earn a livelihood of any kind, where the denial threatens the person's capacity to subsist.
- (6) In determining whether the person has a **well-founded fear of persecution** for one or more of the reasons mentioned in paragraph (1)(a), any conduct engaged in by the person in Australia is to be disregarded unless the person satisfies the Minister that the person engaged in the conduct otherwise than for the purpose of strengthening the person's claim to be a refugee.

5K Membership of a particular social group consisting of family

For the purposes of the application of this Act and the regulations to a particular person (the **first person**), in determining whether the first person has a well-founded fear of persecution for the reason of membership of a particular social group that consists of the first person's family:

- (a) disregard any fear of persecution, or any persecution, that any other member or former member (whether alive or dead) of the family has ever experienced, where the reason for the fear or persecution is not a reason mentioned in paragraph 5J(1)(a); and
- (b) disregard any fear of persecution, or any persecution, that:
 - (i) the first person has ever experienced; or

- (ii) any other member or former member (whether alive or dead) of the family has ever experienced;

where it is reasonable to conclude that the fear or persecution would not exist if it were assumed that the fear or persecution mentioned in paragraph (a) had never existed.

Note: Section 5G may be relevant for determining family relationships for the purposes of this section.

5L Membership of a particular social group other than family

For the purposes of the application of this Act and the regulations to a particular person, the person is to be treated as a member of a particular social group (other than the person's family) if:

- (a) a characteristic is shared by each member of the group; and
- (b) the person shares, or is perceived as sharing, the characteristic; and
- (c) any of the following apply:
 - (i) the characteristic is an innate or immutable characteristic;
 - (ii) the characteristic is so fundamental to a member's identity or conscience, the member should not be forced to renounce it;
 - (iii) the characteristic distinguishes the group from society; and
- (d) the characteristic is not a fear of persecution.

5LA Effective protection measures

- (1) For the purposes of the application of this Act and the regulations to a particular person, effective protection measures are available to the person in a receiving country if:
 - (a) protection against persecution could be provided to the person by:
 - (i) the relevant State; or
 - (ii) a party or organisation, including an international organisation, that controls the relevant State or a substantial part of the territory of the relevant State; and
 - (b) the relevant State, party or organisation mentioned in paragraph (a) is willing and able to offer such protection.
- (2) A relevant State, party or organisation mentioned in paragraph (1)(a) is taken to be able to offer protection against persecution to a person if:
 - (a) the person can access the protection; and
 - (b) the protection is durable; and
 - (c) in the case of protection provided by the relevant State—the protection consists of an appropriate criminal law, a reasonably effective police force and an impartial judicial system.

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36 Protection visas – criteria provided for by this Act

...

- (2) A criterion for a protection visa is that the applicant for the visa is:
 - (a) a non-citizen in Australia in respect of whom the Minister is satisfied Australia has protection obligations because the person is a refugee; or
 - (aa) a non-citizen in Australia (other than a non-citizen mentioned in paragraph (a)) in respect of whom the Minister is satisfied Australia has protection obligations because the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the non-citizen being removed from Australia to a receiving country, there is a real risk that the non-citizen will suffer significant harm; or
 - (b) a non-citizen in Australia who is a member of the same family unit as a non-citizen who:
 - (i) is mentioned in paragraph (a); and
 - (ii) holds a protection visa of the same class as that applied for by the applicant; or
 - (c) a non-citizen in Australia who is a member of the same family unit as a non-citizen who:
 - (i) is mentioned in paragraph (aa); and
 - (ii) holds a protection visa of the same class as that applied for by the applicant.
- (2A) A non-citizen will suffer **significant harm** if:
 - (a) the non-citizen will be arbitrarily deprived of his or her life; or
 - (b) the death penalty will be carried out on the non-citizen; or
 - (c) the non-citizen will be subjected to torture; or
 - (d) the non-citizen will be subjected to cruel or inhuman treatment or punishment; or
 - (e) the non-citizen will be subjected to degrading treatment or punishment.

- (2B) However, there is taken not to be a real risk that a non-citizen will suffer significant harm in a country if the Minister is satisfied that:
- (a) it would be reasonable for the non-citizen to relocate to an area of the country where there would not be a real risk that the non-citizen will suffer significant harm; or
 - (b) the non-citizen could obtain, from an authority of the country, protection such that there would not be a real risk that the non-citizen will suffer significant harm; or
 - (c) the real risk is one faced by the population of the country generally and is not faced by the non-citizen personally.

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Protection obligations

- (3) Australia is taken not to have protection obligations in respect of a non-citizen who has not taken all possible steps to avail himself or herself of a right to enter and reside in, whether temporarily or permanently and however that right arose or is expressed, any country apart from Australia, including countries of which the non-citizen is a national.
- (4) However, subsection (3) does not apply in relation to a country in respect of which:
- (a) the non-citizen has a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion; or
 - (b) the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the non-citizen availing himself or herself of a right mentioned in subsection (3), there would be a real risk that the non-citizen will suffer significant harm in relation to the country.
- (5) Subsection (3) does not apply in relation to a country if the non-citizen has a well-founded fear that:
- (a) the country will return the non-citizen to another country; and
 - (b) the non-citizen will be persecuted in that other country for reasons of race, religion, nationality, membership of a particular social group or political opinion.
- (5A) Also, subsection (3) does not apply in relation to a country if:
- (a) the non-citizen has a well-founded fear that the country will return the non-citizen to another country; and
 - (b) the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the non-citizen availing himself or herself of a right mentioned in subsection (3), there would be a real risk that the non-citizen will suffer significant harm in relation to the other country.

Determining nationality

- (6) For the purposes of subsection (3), the question of whether a non-citizen is a national of a particular country must be determined solely by reference to the law of that country.
- (7) Subsection (6) does not, by implication, affect the interpretation of any other provision of this Act.