

Asylum and Immigration Tribunal

BA (military service – no risk) Sudan CG [2006] UKAIT 00006

THE IMMIGRATION ACTS

**Heard at Field House
On 12 December 2005**

Determination Promulgated

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Before

**DR H H STOREY (SENIOR IMMIGRATION JUDGE)
MR H J E LATTER (SENIOR IMMIGRATION JUDGE)
MRS L R SCHMITT**

Between

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr M Gill QC of Counsel instructed by Blakemores Solicitors
For the Respondent: Miss J Webb, Home Office Presenting Officer

Country guidance is given in this case on the following issues and in the following terms:

- (i) On the available evidence Sudanese draft evaders and draft deserters do not face a real risk of imprisonment as a punishment. Instead they are forced to perform military service under close supervision.*
- (ii) In view of the ending in January 2005 of the north-south civil war, there is no longer a real risk of conscripts or draft evaders or draft deserters being required to fight in the south.*
- (iii) The recent conflict in Darfur (still ongoing) has been characterised by serious violations of international humanitarian law amounting to crimes under international law. However, on the available evidence it is not reasonably likely that conscripts or draft evaders or draft deserters are being or would be required to fight in Darfur.*

- (iv) *Accordingly, Sudanese who face conscription, or who are draft evaders and draft deserters do not face a real risk on return of persecution or treatment contrary to Article 3.*
- (v) *The case of **AM (Sudan Draft Evader) Sudan [2004] UKIAT 00335** is no longer to be followed and, even read historically, was wrongly decided.*
- (vi) *In view of the substantial political realignments in Sudan during the 2002-2005 period, none of the existing **Country Guideline** cases on Sudan (save for **TM (Persecution- Christians – Individual – General) Sudan CG [2002] UKIAT 04849** and **AE (Relocation – Darfur – Khartoum an option) Sudan CG [2005] UKAIT 00101**) are to be considered any longer to furnish current country guidance and are accordingly to be deleted from the AIT Country Guideline list.*

DETERMINATION AND REASONS

1. This is the reconsideration of an appeal against the respondent's decision made on 20 November 2004 to remove the appellant from the United Kingdom following a decision that he was not entitled to asylum. The appeal was originally heard by an Adjudicator, Mr P. Telford, on 12 February 2004. Permission was granted to appeal to the Immigration Appeal Tribunal on 17 August 2004 and by virtue of transitional provisions that appeal now proceeds as a reconsideration.
2. At a hearing on 7 September 2005 the Tribunal (Mr T. Davey, Immigration Judge and Mrs G. Greenwood) held that the Adjudicator had made a material error of law as follows:

‘The Adjudicator gave inadequate reasons (in paragraph 46 D&R) concerning the risk on return of a person to Sudan eligible for military service; and concerning the extent to which the appellant may be required to participate in or be involved with conduct contrary to the basic laws of human conduct and/or in brutal military conduct. **Sepet and Bulbul, Krotov** [in later context of **AM AIT reported 2004 UKIAT 00335**].

The only issues to be addressed in the light of up-to-date objective material are (1) concerning whether the call up to do military service gives rise to risk of being required to engage in acts of atrocity/brutality/abuse of human rights/contrary to basic human conduct; and (2) concerning whether there is a real risk of proscribed ill-treatment (contrary to the Refugee Convention Article 3 ECHR) as a draft evader.’
3. When the appeal was listed for further hearing, the parties were notified that this appeal was likely to be treated as a country guidance case. As the above indicates one of the purposes of this hearing was to consider to what extent reliance could still be placed on the reported case, **AM (Sudan Draft Evader) Sudan [2004] UKIAT 00335**.

The appellant's claim

4. The appellant is a citizen of Sudan born on 1 September 1975. From 1981 to 1987 he went to primary school in his home town of Labidia and then helped his father on the family farm. His father also owned a shop in Al-Abdia. The basis of his claim for asylum can briefly be described as follows. There were no problems until 1 August 2003 when four members of the military attended his father's shop telling him that the appellant had to attend the national service office on 20 October 2003. His father told them this was impossible as according to Sudanese law when there is only one son in the family, he was not required to undertake military service. The military disregarded this and repeated that the appellant would have to attend. The appellant asserts that after this the authorities started to go to his father's shop to harass him. On 5 August 2003 the appellant went to a committee where they had to obtain a letter to buy petrol for the tractor on the farm but this was refused with no explanation. The appellant therefore had to leave the farm as he was unable to obtain either petrol or seeds. He decided to help his uncle who was a member of the Communist Party. The appellant started taking down posters that the government put up at night. He said that he did this on 15, 16 and 17 August 2003. He was suspected of being a member of the Communist Party and was arrested on 17 August 2003 and taken to a security prison where he was held for three days. During this period he was beaten with sticks and hot metal bars were placed on his back. On 20 August 2003 his father paid a bribe to one of the officers and the appellant was released on condition that he had to report on 5 September 2003. The appellant's father died on 23 August 2003. He was a diabetic and his condition worsened because of stress and he died.
5. On 24 August 2003 the appellant decided to sell the livestock with the help of a friend. He believed that he had to escape to save his life due to the fact that he had to report back on 5 September 2003. On 24 August 2003 one of his father's friends took him to Port Sudan by lorry. They arrived on 26 August 2003. The appellant stayed at a house and on 28 August 2003 he left Sudan by ship, arriving in the United Kingdom on 23 December 2003. He claimed asylum the same day.

The Secretary of State's decision

6. His application was refused by the Secretary of State. The latter did not believe that the appellant had been arrested, detained or ill-treated or that he would be of any adverse interest to the Sudanese authorities on the grounds of his imputed political opinion. So far as the issue of national service was concerned, the Secretary of State noted that national service was compulsory for males between the age of eighteen and thirty-three. There were a number of categories of people who could have their national call up postponed, including the sole supporter of a family, but as the appellant was not the sole supporter, the appellant did not appear to fall into this category. It was not considered that the requirement for the appellant to undergo military service was unduly harsh or that he was being singled out for other reasons. The application for asylum was refused and the appellant appealed on both asylum and human rights grounds.

The hearing before the Adjudicator

7. The appeal was heard by the Adjudicator on 12 February 2004. The Adjudicator said that he found some of the appellant's evidence credible but most of his account incredible. He accepted that the appellant was born in Sudan and had worked on a farm owned by his family and that his family also owned a farm shop; that there had been problems with local corruption; and that the appellant had been called up to do military service. However, he found that the appellant was not a member of the Communist Party nor suspected of being one, although he had been arrested for damage to road signs. He found the rest of the account to be incredible. He did not believe that the appellant was or had been sought as a Communist sympathiser. He found that there was no court date and that his father had not died. He did not believe the claim that everything on the farm had been sold. The Adjudicator set out his reasons for these findings. They are not in issue before us. The Adjudicator then summarised the position as follows:

'The reality here is that he (the appellant) knew he was going to be called up to do military service and he resented it. There is no risk ironically on his own account of him doing that military service now, nor was there when he left because although he applied and was refused exemption on the basis that his father was alive, and therefore the appellant did not qualify as the sole or main breadwinner, because he has claimed his father was dead, the appellant would therefore become the main breadwinner. When the appellant finished his oral evidence by stating that the call up was in fact the main reason he did not want to live in Sudan and why he wanted to leave, he undermined his account of his father being dead because he would have known that he would have been exempt if his father really were dead.

Taking all these factors into account this is not a well made up claim and not one which can be accepted even on the low standard which applies. There has to be a real risk and not a potential fanciful risk of persecution.

These matters cause me to find that he is not at real risk under either the 1951 Convention or at real risk of breach of his human rights.

The objective evidence does not point to the appellant being incapable of being returned to Sudan as there is no real risk to returnees and in his case no case against him other than as a draft dodger. If there is punishment, it does not follow on this evidence that it is out of all proportion to the crime.'

8. When granting permission to appeal to the Immigration Appeal Tribunal, the Vice President commented firstly that it was clear from the determination that the appellant fled Sudan to avoid being drafted into the Sudanese army, and secondly that the Adjudicator had not applied the principles in ***Sepet and Bulbul*** [2003] 1 WLR 856 in his consideration of the evidence. Subsequently on 7 September 2005 the Tribunal accepted, and indeed it was agreed between the parties, that the Adjudicator had materially erred in law by failing to give adequate reasons

concerning the risk on return for a person who had evaded military service. We have already set out the terms in which they set out that decision.

Documents produced at the hearing

9. At this hearing the appellant produced two bundles of documents, 1A and 2A, together with a skeleton argument which annexed the Operational Guidance Note (OGN), June 2005 and the War Resisters International (CONCODOC) report for Sudan dated 15 September 1998 together with a Save The Children report dated May 2004. The respondent produced the report of the Danish Fact Finding Mission to Cairo, Khartoum and Nairobi prepared by the Danish Immigration Service in 2001 (DFFM). The full list of background evidence before the Tribunal appears in the Appendix to this determination. The Tribunal referred the parties to the report of the UN Secretary General on Sudan dated 12 September 2005.

The submissions

10. Mr Gill submitted that the appellant had deliberately evaded the draft and was therefore at risk of imprisonment for that reason. The appeal should be allowed on the same basis as in ***MA (Operational Guidance – Prison conditions – significance) Sudan [2005] UKIAT 00149***. Prison conditions in Sudan were likely to reach the Article 3 threshold. Further, at the time the appellant left Sudan and avoided his military service, the Sudanese military were involved in actions contrary to the basic rules of human conduct. If the appellant were now to be punished for that failure, his punishment would amount to persecution. He submitted that the risk to the appellant would either be imprisonment or being required to undertake military service with a real risk of now being required to participate in similar activities in Darfur. He referred to the CIPU Report for April 2005 and in particular paragraphs 5.82-5.86 and paragraph 6.204-207.
11. Miss Webb submitted that the appellant, in the light of the Adjudicator's findings, could not be regarded as having a political profile. He was simply an Arab from northern Sudan. He was someone on his own account who was called up when he was twenty-eight, not when he was a teenager. There was nothing to indicate that the authorities would have any adverse interest in him save to require him to carry out his military service.
12. In order to decide the issues raised by this case it is necessary to set out relevant facts about the current situation in Sudan.

The North-South Conflict

13. The civil war between the fundamentalist Muslim Government of Sudan of the National Islamic Front (NIF) on the one side and the Sudan People's Liberation Movement (SPLM/A) on the other, which began in 1983, has now ended. A Comprehensive Peace Agreement signed on 9 January 2005 has been implemented. A new Interim National Constitution was signed by President Bashir on 9 July 2005. A caretaker government was installed the same month, pending the establishment of a Government of National Unity. Two chambers of the national legislature, the National Assembly and the Council of State, were inaugurated on 31 August 2005. The new chairman of the Sudan People's Liberation Movement, Salva Kiir (replacing Vice President John Garang following

his death in a plane crash in July 2005) was sworn in as Vice President on 11 August 2005. In the south itself, the Peace Agreement provided for the SPLM/A to establish a Government of Southern Sudan within a larger federal entity. A South Sudanese Assembly has been established. Tensions between the SPLM/A and the Southern Sudanese Defence Force remain, but are subject to ongoing 'south-south' dialogue. Pursuant to Resolution 1590 (2005), the UN has taken a range of measures to assist in disarmament, demobilisation and reintegration programmes. The UN Secretary-General in his September 2005 Report stated that the ceasefire is holding and that the peace process has been 'moving slowly but steadily forward' despite the setback caused by the death of First Vice-President John Garang. He added that plans are well advanced to support facilitated returns.

The situation in Darfur

14. The International Commission of Inquiry on Darfur in its report of 25 June 2005 to the UN Secretary-General found that:

'The roots of the present conflict in Darfur are complex. In addition to the tribal feuds resulting from desertification, the availability of modern weapons, and the other factors noted above, deep layers relating to identity, governance, and the emergence of armed rebel movements which enjoy popular support among certain tribes, are playing a major role in shaping the current crisis.'
15. It appears that Darfurian discontent at a perceived lack of government protection and marginalisation of their region led in 2003 to a campaign of attacks against government installations and police barracks by two rebel movements, the Sudan Liberation Movement/Army SLM/A and the Justice and Equality Movement (JEM). The government responded by calling upon the support of local Arab nomadic tribes, as well as tribes from Libya, Chad and other states. Collectively they were known as the Janjaweed, a traditional Darfurian term denoting an armed bandit or outlaw on horseback or camel. Land grabbing and looting of livestock became common: it is estimated that during the 2003-4 period 75% of livestock in the region was looted from civilians. During 2004 and early 2005 a number of human rights reports drew attention to a pattern of serious human rights abuses and atrocities carried out against the population of Darfur by Janjaweed militia, apparently acting systematically, with government support.
16. Despite a number of ceasefires wide-scale fighting continued during 2004 and early mid-2005, causing the destruction of hundreds of villages and widespread looting, pillaging and rape. Government complicity in these actions showed itself in particular in offensive operations described as 'road clearing', in fact a clearing of ground up to 20 Km on each side of certain main roads by methods such as the burning of villages and looting, causing additional displacement.
17. In January 2005 the International Commission of Inquiry on Sudan published its report to the UN Secretary General. What this report demonstrated was that whilst the authorities in Darfur were not necessarily involved in genocide (one of the most serious of international crimes under international law and international humanitarian law), it was involved in wide-scale crimes against humanity. As such,

it was involved in widespread acts contrary to the basic rules of human conduct. The summary given at page 3 of the report states, inter alia:

'Based on a thorough analysis of the information gathered in the course of its investigations, the Commission established that the Government of Sudan and the Janjaweed are responsible for serious violations of international human rights and humanitarian law amounting to crimes under international law. In particular, the Commission found that Government forces and militias conducted indiscriminate attacks, including killing of civilians, torture, enforced disappearances, destruction of villages, rape and other forms of sexual violence, pillaging and forced displacement, throughout Darfur. These acts were conducted on a widespread and systematic basis, and therefore may amount to crimes against humanity. The extensive destruction and displacement resulted in a loss of livelihood and means of survival for countless women, men and children. In addition to the large scale attacks, many people have been arrested and detained, and many have been held *incommunicado* for prolonged periods and tortured. The vast majority of the victims of all these violations have been from the Fur, Zaghawa, Massaliet, Jebel, Arnaga and other so-called "African" tribes.'

18. On 28 February 2005 the UN published the 'Report of the independent expert on the situation of human rights in the Sudan, Emmanuel Akwei Addo' which spoke of a 'sharp deterioration' in the situation and highlighted continuing human rights abuses committed against internally displaced persons (IDPs) and the rape of women in particular.
19. Nevertheless, in tandem with peace negotiations over the North-south conflict, the UN Secretary General in his 12 September 2005 report notes that the key players in the Darfur conflict – the Government of Sudan, the Sudanese Liberation Movement/Army (SLM/A) and the Justice and Equality Movement (JEM) – have adopted a Declaration of Principles at Abuja on 5 July 2005. According to the Secretary-General, the Declaration contains important provisions regarding the shape of future negotiations on matters such as unity, power and wealth-sharing, security arrangements and use and ownership. The UN Mission in the Sudan (UNMIS) and the African Union (AU) have a presence in the region, both pursuing efforts at reconciliation and peace-building.
20. The conflict continues despite the passing of UN Security Council Resolutions 1556 of July 2004 and 1590 of March 2005, the arrival of African Union (AU) monitors and continued attempts at mediation. It is estimated to have affected in excess of 2 million people and to have caused the internal displacement of some 1.2 million. There are a further 80,000 refugees living in Chad's eastern border. The UN estimates that some 150,000 civilians may have been killed. Concerns have been expressed about a dangerous descent into warlordism and lawlessness.

The background evidence relating to military service

21. The 1998 CONCODOC Report by War Resisters International states that in 1992 the National Islamic Front (NIF) government introduced conscription with the 1993 National Service Law. All men between eighteen and thirty-three were liable. The length of military service was twenty-four months albeit less for high school and university graduates. Postponement was possible for sole breadwinners and for those working for the government. Exemption was also possible for some students and for medical reasons. During the 1990s, the government had difficulty in recruiting conscripts and so sought to complement numbers by forced recruitment. In 1997 the government authorised a general mobilisation.
22. Parallel to National Service is service in the Popular Defence Force (PDF), created in 1990. In addition there are so-called 'tribal PDF militias' aligned to the government. The right to conscientious objection is not legally recognised.
23. Avoiding military service is punishable by two to three years' imprisonment (National Service Law, art. 28). Draft evasion and desertion were seen to be widespread.
24. The issue of military service in Sudan is also considered in paragraphs 5.72-80 of the CIPU Report April 2005. Military service is stated as compulsory for all males aged eighteen and over with recruitment age being adjusted from time to time. Those called up for military service are not allowed to follow an education or get a job and men of conscription age are forbidden to leave the country for any reason. The US State Department Report for 2004 records that the government officially required that young men between the ages of seventeen and nineteen enter military or national service in order to be able to receive a certificate on leaving secondary school. According to the 2001 Danish Fact Finding Mission report, in the year 2000, virtually all students at Khartoum University had completed their military service and many had been deployed at the front in the south.
25. The 1998 CONCODOC report also stated that draft evasion and desertion was widespread. Those who responded to a call up received a booklet containing all the details about military service, the date of call-up and completion of military service and the possible reasons for postponement or exemption. The government had at times turned to forced recruitment such as press ganging. Draft evaders and deserters may also be tracked down this way and sent into the armed forces. Not much was known about the punishment of evaders and deserters. According to one source, deserters risked detention, ill-treatment and torture. Those who had left the country and avoided military service risked interrogation and detention on return. Being sent to war areas in the south might also be a possible punishment for draft evaders and deserters.
26. The specific issues of conscientious objection, desertion and evasion are considered in paragraphs 5.82-92 of the same CIPU Report. That refers to the Danish Fact Finding Report 2001 stating that a well-informed source in Cairo said that deserters are not normally punished with imprisonment. The CIPU Report reports that in 2001 if a deserter was caught, he was sent to the front under threat of harassment and under close supervision. Otherwise the sentence for desertion was three years. But there had been very few examples of deserters being sentenced to three years in prison. The Foreign and Commonwealth Office in a

letter of February 2005 had said that, although they were not aware of specific cases of draft evaders/deserters facing inhuman, degrading or persecutory treatment, they would not be surprised to find that this was the case. The 1998 CONCODOC report is described as reporting that draft evasion and desertion seemed to be widespread and it is noted that according to the Danish report a person's ability to avoid military service in Sudan in 2001 would depend very much on his and his family's connection to the regime and the social and economic position of his family in Sudan.

27. Given the considerable reliance placed by CIPU and the US State Department Reports on the Danish FFM Report 2001 it is important that we note its findings in more detail. It deals at length with issues of conscription and the risk of being sent into active service. There is a reference at page 38 of that report to an announcement in the Sudanese press before the delegation's visit to Khartoum in August 2001 that no one would be sent into battle against his will any more and that all recruits therefore had been sent home from training camps. It mentions that one source explained that only volunteer soldiers in the army and the People's Defence Force (PDF) were sent on active service to the front, adding that the press announcement had been greeted with great relief by families in Khartoum and the rest of Sudan who had children of conscript age. As to the issue of conscripts being sent into active war service against their will, it records that one source could not dismiss the possibility of this happening, but said that it was particularly southern Sudanese who were sent south into war zones (page 44). Another source added that there were many examples of recruits being sent into war zones in Sudan without the military authorities informing them where in the country they were being deployed. When dealing with the issue of desertion and draft evaders, the report notes that one source in Cairo, whom it describes as well informed, said that deserters were not normally punished with imprisonment. This is the source referred to in the CIPU Report. Deserters were not usually imprisoned and often sent directly to the front under close supervision. The penalty for avoiding military service was between two and three years imprisonment but in practice the authorities did not insist on such sentences and those who wanted to evade military service had some opportunity of doing so. It was believed that only a few people were able to bribe their way out of military service. Another source was not aware of cases of deserters or draft evaders being punished for their actions. If such people were caught the authorities would simply demand that they returned to service. The report mentions one Sudanese professor working in exile in a European country expressing the belief that almost none of the Sudanese men who had sought asylum in Europe and who had cited as grounds for seeking asylum their fear of having to perform military service were actually at risk having to perform it against their will.

Our Conclusions

Risk of imprisonment for draft evaders and deserters

28. Mr Gill has submitted that the appeal can readily be allowed on the same basis as ***MA (Operational Guidance – prison conditions – significance) Sudan [2005] UKIAT 00149***, since the appellant is accepted as having evaded the draft and as such would be at risk of imprisonment by way of punishment.

29. We would accept that if there was a real risk of this appellant or any draft evader or deserter facing imprisonment as punishment, he would be entitled to succeed on Article 3 grounds. The background evidence relating to conditions in prison in Sudan discloses that there is a consistent pattern of gross, frequent and mass abuses of the human rights of detainees: see e.g. CIPU April 2004 at paragraph 5.78.
30. We need not expand further on our reasons for taking this view, since, as Miss Webb conceded, it is currently accepted by the Home Office in its June 2005 Operational Guidance Note on Sudan that prison conditions are generally contrary to Article 3: see **MA**.
31. We do not consider it appropriate to go on to consider the further hypothetical question of whether, if draft evaders did generally face imprisonment, that punishment would be on account of a Refugee Convention reason of political opinion – and so amount to persecution as well as treatment contrary to Article 3.
32. However, whilst accepting that prison conditions are contrary to Article 3 we do not accept Mr Gill's submission that there is currently a real risk that draft evaders generally would face imprisonment. We acknowledge that the evidence relating to this issue is not all one-way. The 1998 CONCODOC report, although stating that '[n]ot much is known about the punishment of draft evaders and deserters', elsewhere states:

“According to one source, deserters and those helping deserters, risk detention, ill-treatment and torture; those who have left the country and avoided military service risk interrogation and detention on return. The FCO in a February 2005 letter has stated that, although they were not aware of specific cases of draft evaders/deserters facing inhuman, degrading or persecutory treatment, they would not be surprised to find that this was the case.”

33. But there is a clear preponderance of evidence to the effect that the general response of the Sudanese authorities to draft evaders when caught is not to imprison them, but to take steps instead to ensure they are sent to serve in the army, under supervision. Thus the 2001 Danish FFM report (which is the most detailed and multi-sourced study on this issue) states that:

‘A well informed local source in Cairo said that deserters were not normally punished with imprisonment. [In 2001] If a deserter was caught he would be sent to the front under genuine threat of harassment and under close supervision. Otherwise the sentence for desertion was three years, but there had been few examples of deserters being sentenced to three years in prison’.

34. The same report noted further that:

‘The same well-informed [Cairo] source also explained that a persons’ ability to avoid military service in Sudan [in 2001] would

depend very much on his and his family's connection to the regime, and the social and economic position for the family in Sudan'.

35. The report also states that two other sources, Barach and Ngot, confirmed that deserters were not usually imprisoned, but were often sent directly to the front under close supervision. It stated that another source, Lehne, said that in practice the military authorities did not insist on sentences [for avoiding military service] (52). At p.53 it noted that a further source, El Mufti was not aware of cases of deserters or draft evaders being punished for their actions. If the authorities caught such people they would simply demand that they returned to service.

Accordingly we conclude that the background evidence considered in the round does not demonstrate that draft evaders and deserters in general face a real risk of imprisonment in Sudan.

Risk of conscripts/draft evaders or deserters being required to perform military service in Darfur

36. There are a significant number of references in the background materials to conscripts being required, during the period of civil war between the national government and the SPLM(A) in the south, to serve in the *south*. The 1998 CONCODAC report notes that military service had become increasing unpopular:

'due to the ongoing civil war, the brutality of forced recruitment and the risk of being sent to fight in the south of the country. The Ministry of Defence denies that conscripts are sent to serve in the south of the country, but maintains they volunteer to do so. For instance, in 1995 the government stated that 1,850 conscripts volunteered to serve in the war areas in the south'.

37. In the context of treatment meted out to deserters, the same report adds:

'Being sent to the war areas in the south might also be a possible punishment for draft evaders and deserters.'

As a source for this it cites Amnesty International (Dutch Section) 1996: letter to Staatssecretaris van Justitie, Amsterdam, 20 September 1996. This report notes that those joining the PDF were urged, for religious reasons, to 'volunteer' for combat duty in the south. It stated further that: 'In 1995 many secondary school students were recruited by the PDF to fight in the south.'

38. According to the 2001 Danish Fact Finding Mission Report, in the year 2000, virtually all students at Khartoum University had thus completed their military service and many had been deployed at the front in the south. It also records Waltman-Molier as stating that any conscript in Sudan was at risk of being sent to the front (2.2) and Barach and Ngot as confirming that deserters risked being subjected to serious humiliation and could be at great risk of being pushed into the front line.

39. However, there is a comparative silence regarding any use of conscripts being forced to fight in *Darfur*. We have only been able to find two isolated references in the very extensive bundle of materials placed before us. There is firstly a reference to Darfurian children being conscripted to fight in Darfur. Save the Children in its May 2004 report expressed its concerns regarding the apparent forced conscription of children by Government/Government-allied forces in Darfur. This appears, however, to refer to children in Darfur.
40. There is also a mention in section 3 of the Aegis Trust June 2005 'Lives in Our Hands' report which describes a 'well informed Darfur African currently living in Khartoum' reporting the sentencing in Khartoum of 47 Darfur Africans to 5-15 years imprisonment:

'One of them, Mohamed Haroun, a Darfur African officer in the Sudanese armed forces was ordered to go to Darfur to fight. He refused. When he was forced to go to Darfur, he went absent without leave. He was caught and [faces sentence].'

The fact that Mahomed Haroun was an example of a Darfurian refusing to fight in Darfur limits its value as evidence of what happens to non-Darfurian deserters, but even disregarding this limitation, it is the only example in a large body of background material of any deserter or draft evader, Darfurian or non-Darfurian, being forced to fight in Darfur.

41. Given the frequent reference to draft evaders and deserters being required to fight in the south during the civil war, we find this lack of reference of considerable significance. That is particularly so for this reason. From the materials before us it is clear that internal and external human rights bodies have paid particular attention to the use made by the Sudanese authorities of military service over the past two decades. Furthermore, in Darfur itself we note that the humanitarian community is said to consist of 12,500 aid workers, 13 UN agencies and 81 international NGOs on the ground. Additionally, there are 2,309 persons including 145 military observers and 86 UN police officers who comprise the UN Mission in Sudan (UNMIS), plus 49 international human rights officers including 17 international UN Volunteers working in teams on monitoring and protection issues. The Save The Children Fund also has monitors concerned with recruitment of child soldiers. We accept that Darfur, which is in the west of Sudan, is a large region roughly equivalent in size to France, but we think that if there was any practice of requiring draft evaders or deserters or even conscripts, to fight in that region, this would have been observed and chronicled by one or more of the agencies and forces we have just described. We are a body which must decide cases on the evidence. If in the future representatives are able to adduce evidence casting a different light, we shall then need to think again. But on the evidence before us we consider the position we have reached is the right one.

The AM (Sudan Draft Evader) case

42. As noted earlier, one of the purposes of convening this case as a Country Guideline hearing was to revisit the reported case of **AM (Sudan Draft Evader) Sudan [2004]**

UKIAT 00335. It was promulgated on 29 December 2004. This case concerned an appellant from the Nuba part of Sudan who had lived in the north of Sudan since childhood. Upon being called up he had evaded the draft. He claimed that he objected to military service on the basis that the conduct of war in Sudan is such as would bring it within the definition of a war which would be condemned by the international community.

43. Before addressing **AM's** conclusion on this issue it is necessary that we address what the case also found as regards risk of imprisonment. Mr Gill did not seek to rely on this aspect of **AM**, but to our mind we need to consider its findings. The case of **AM** had previously been before the Court of Appeal, who had remitted it primarily on the issue of risk on return. Although the Court of Appeal did not address the issue of participation in a military conflict contrary to the basic rules of human conduct, Schiemann LJ did address the submission raised by Counsel on that occasion (Ms Plimmer) relating to the earlier assessment of the IAT that the penalties for refusing to perform military service are not imposed. At paragraph 15 the Tribunal in **AM** quoted Lord Justice Schiemann as follows:

'It may well be that circumstances can arise when a law is shown to be never enforced in which case there would be no real risk to a citizen that he would be imprisoned pursuant to it. but for my part I do not consider that it was open to the IAT to conclude from the evidence before it that the present was such a case.'

44. Having considered the evidence presented to it, the Tribunal who dealt with the **AM** case on remittal back from the Court of Appeal concurred:-

'25. Turning to the question of whether or not he would be imprisoned we accept that the US State Department report [for 2004] indicates that there is no record of any imprisonment for failure to do military service in the year 2003 but, bearing in mind the fact that the appellant is a Nuban, bearing in mind the fact that he has been out of the country for some time, we would again respectfully agree with the Court of Appeal at paragraph 12 of its judgment in this case.'

45. It is important that we bear in mind the observation of Schiemann LJ. It reflects the view, we think, that where the law of a country creates an offence for draft evasion punishable by imprisonment, one should not lightly assume that in fact there is no enforcement. Equally, however, we have to found our assessment of real risk on the basis of evidence as to what is the actual practice of the Sudanese authorities, not simply on the basis of what laws are on their statute books. We do not know what the precise state of the evidence was before the Court of Appeal or was before the subsequent Tribunal who dealt with **AM** on remittal from that court. What we do know, however, is that the **AM** determination does not refer to any evidence in support of its above conclusion, apart from the appellant's own assertions. Mr Gill has been apprised of the issue in this case for some time and has had ample opportunity to adduce evidence to show that draft evaders and deserters are in fact imprisoned. As he himself conceded, the evidence he had submitted indicates that

the authorities do not impose imprisonment, and that instead they impose a requirement to perform military service under supervision.

46. Returning to the issue of the nature of the military service, the appellant would have to perform, the Tribunal in **AM** recorded the respondent's submissions that there was no evidence of conscripts or draft evaders or deserters being sent to Darfur. At paragraph 29 it nevertheless concluded, with reference to the CIPU Report and the Sudan Organisation Against Torture Annual Human Rights Report covering the period to March 2004, that:

'We are satisfied that there is a reasonable likelihood that the appellant might be sent to the front and that the front might well include Darfur, but could also include, as Miss Plimmer has indicated, other regions in the Sudan where the Sudanese military authorities are currently involved [it goes on to mention seven areas where the government has been responsible for violence against the local population]'

47. The Tribunal went on to consider whether the nature of the military conflicts in Sudan in which government forces were involved were contrary to the basic rules of human conduct. Having set out the principles identified by the Court of Appeal in **Krotov [2004] EWCA Civ 69**, it concluded:

'33. Having considered the objective material which is before us we take the view that the conduct of the Sudanese army in relation to the recent military activity in the south, in relation to the current activities in Darfur, and in relation to the activities in other parts of the country, are such as to come within the definition of acts contrary to the basic rules of human conduct.

34. If the appellant were required to perform military service on his being apprehended, we are satisfied that he might be required to participate in the commission of international crimes.'

48. We note several things about this assessment. Firstly, written in December 2004, it refers to ongoing military activity in the south, whereas, as we have noted elsewhere, the civil war between the government and the SPLM/A has since ended. Secondly, to the extent that this Tribunal considered the acts of government forces in seven areas of Sudan, other than Darfur and the south, it did not point to any evidence that those conflicts have been characterised as contrary to the basic rules of human conduct. Thirdly, it failed to identify any evidence to support its view that conscripts or draft evaders have or are being sent to Darfur.

49. At this point it is necessary to bear in mind two very important legal principles identified in leading cases dealing with risk of persecution arising from performance of military service obligations. In the first place International law does not seek to pass judgment on the performance of a country's military generally. It concerns

itself with specific armed conflicts. Thus Common Article to the four *Geneva Conventions* of August 12 1949, to which 191 States are party, provides:

“In the case of armed conflict not of an international character occurring in a territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply as a minimum, the following provisions:

- (1) persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, should in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any similar criteria.

To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

- (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
- (b) taking of hostages;
- (c) outrages upon personal dignity, in particular humiliating and degrading treatment;

50. In the second place, in order for a person to show a real risk of being required to serve in a military situation contrary to the basic rules of human conduct, more is necessary than the simple occurrence of some incidents which amount to crimes under international criminal law or crimes against humanity. The conflict must be one in which there is a consistent pattern of such incidents. The reason for this is that what has to be assessed is whether there is a real as opposed to a remote risk, of a person being required to engage in acts contrary to the basic rules of human conduct. As Potter LJ stated in *Krotov [2004] EWCA Civ 69* at paragraph 37:

'37. In my view, the crimes listed above, if committed on a systematic basis as an aspect of deliberate policy, or as a result of official indifference to the widespread actions of a brutal military, qualify as acts contrary to the basic rules of human conduct in respect of which punishment for a refusal to participate will constitute persecution within the ambit of the 1951 Convention. [emphasis added]'

51. These principles are important in the instant case because, so far as we are aware, it is only in respect of Darfur that it has been firmly established that the armed conflict taking place in that region has been characterised by a consistent pattern of acts contrary to the basic rules of human conduct.

52. We note further and in any event that, even if it were thought that the situation in the south during the civil war was also characterised by a consistent pattern of acts contrary to the basic rules of human conduct (consisting in crimes under international criminal law or violations of international humanitarian law), that war has come to an end and we have to focus on the issue of current risk.
53. The upshot of our analysis of **AM** is that it can no longer be treated as affording guidance on the issue of draft evasion and desertion. It is out of date. Even considered historically, it furnishes no evidential basis for its general conclusion about the nature of military conflicts in the Sudan during the relevant period. It is only in respect of Darfur, where the armed conflicts have involved a consistent pattern of acts contrary to the basic rules of human conduct, that its assessment finds evidential support. However, in respect of Darfur, we do not consider that it was right to conclude that conscripts or draft evaders or deserters would be forced to fight in this region, since **AM** referred to no evidence to support that conclusion and it is not one which we have found to be substantiated, even on the much fuller body of evidence we had presented to us.

Consideration of whether there are any issues personal to the appellant which put him at real risk of persecution or treatment contrary to Article 3

54. The Adjudicator accepted that the appellant had been called up to do military service and that his unwillingness to do so was the main reason for leaving Sudan. The issue was raised before the Adjudicator of whether the appellant would be able to seek exemption on the basis that he supported his family. His argument is based on the provisions of Article 12.1 of the Sudanese National Service Act 1992 (set out at page 69 of the Danish report). This provides that service shall be postponed for the sole supporter of the family, or the husband, the son or the brother until the family is provided with public finance equivalent to that which the person concerned provided his family. We accept that we must be cautious in seeking to interpret a foreign statute. We note that in paragraph 9 of the Secretary of State's reasons for refusal letter dated 17 November 2003, he took the view that the appellant could not bring himself within the category of being the sole supporter of a family as on his evidence his father was running the shop and the appellant the farm. There is nothing in the evidence or submissions which satisfies us that the respondent was wrong to take this view and we are satisfied that the appellant would not be entitled to apply for a postponement of his service on this basis. The position therefore is that on the Adjudicator's findings the appellant would be liable for military service on return.
55. We are not satisfied that there is any basis for an argument that there is anything in the appellant's own background or circumstances which would give him a profile that would make him of any interest to the authorities save insofar as he has attempted to evade military service. The Adjudicator rejected the evidence that the appellant would be regarded by the Sudanese authorities as a communist sympathiser. He rejected the account the appellant gave of being detained, arrested and ill-treated. He did not believe that there were any pending court appearance or charges outstanding in Sudan.

56. Accordingly there is nothing to distinguish the appellant from any other Sudanese citizen who had sought to evade military service and the question of whether he is at real risk of persecution or treatment contrary to Article 3 depends on whether draft evaders as a class (or some subset of them) are at such risk on return to Sudan.
57. Earlier we have concluded that neither draft evaders nor draft deserters as a class are at real risk of persecution or treatment contrary to Article 3. (Our full conclusions on the issues relating to country conditions on which guidance is given in this determination are set out in the summary at the beginning of this decision.)
58. In the course of considering this appeal we have found it necessary to have regard to not only the reported Tribunal case of **AM** but cases which are listed on the AIT website as current Country Guideline cases on Sudan. It is clear to us that in view of the very substantial changes in the political situation which have occurred in Sudan in the 2002-2005 period, most of which we have covered in this case, only **TM (Persecution – Christians – Individual – General) Sudan CG [2002] UKIAT 04849** and the latest case – **AE (Relocation - Darfur – Khartoum an option) Sudan CG [2005] UKAIT 00101** – remains viable as country guidance. **TM** remains because, although there has been a cessation of civil war in the south, what is said in paragraph 11 continues to accurately reflect the Tribunal view that Christians per se are not targeted as a group for treatment amounting to persecution, although in individual cases harassment and discrimination against individual Christians in Sudan may amount to persecution.
59. Accordingly, the following cases are no longer to be considered as furnishing current country guidance and are to be removed from the AIT Country Guideline list:
- ME (Failed asylum seeker – Danian) Sudan CG [2002] UKIAT 00997;**
- MS (DUP Activities Abroad) Sudan CG [2002] UKIAT 02385;**
- MH and Others (Article 3 – FGM) Sudan CG [2002] UKIAT 02691;**
- GA (Umma – Reconciliation with Government) Sudan CG [2002] UKIAT 04605;**
- AA (Failed asylum seeker) Sudan CG [2002] UKIAT 05894;**
- AB (Return of Southern Sudanese) Sudan CG [2004] UKIAT 00260**
60. For the above reasons:
- As already found, the Adjudicator materially erred in law.
- The decision we substitute for that of the Adjudicator is to dismiss the appeal on asylum and human rights grounds.

Signed

Date

Dr H.H. Storey
Senior Immigration Judge

APPENDIX

Background Materials before the Tribunal

Sudan: War Resisters International CONCODAC 1998 Report

Danish Fact Finding Mission Report on findings and conclusions mission to Cairo 'Human Rights situation, military service and entry and embarkation procedure in Sudan', Khartoum and Nairobi, 8-19 August and 20-23 November 2001.

The Economist Intelligence Unit, Country Profile 2001, Sudan, London, 2001

US State Department report on Sudan ,February 2004

Child Protection in Darfur, Save the Children (SC UK), May 2004

Report of the International Commission of Inquiry (ICI) on Darfur to the UN Secretary General, published in January 2005

US State Department Report on Sudan February 2005

CIPU Sudan Assessment April 2005

Amnesty International Report on Sudan 25 May 2005

Human Rights Watch Report on Sudan 13 January 2005 Sudan

Freedom House, Freedom in the World 2005, Sudan, 31 March 2005

World Refugee Survey 2005, Sudan 15 June 2005

Aegis Trust (UK), Lives in Our Hands: Darfuri Asylum Seekers facing removal to Khartoum, 30 June 2005.

World Refugee Survey 2005, Sudan 15 June 2005

Report of the UN Secretary General on Sudan, 12 September 2005