HOUSE OF LORDS SESSION 2007–08
[2007] UKHL 49

on appeal from: [2007] EWCA civ 297

OPINIONS

OF THE LORDS OF APPEAL

FOR JUDGMENT IN THE CAUSE

Secretary of State for the Home Department (Appellant)
v.
AH (Sudan) and others (FC) (Respondents)

Appellate Committee

Lord Bingham of Cornhill
Lord Hoffmann
Lord Hope of Craighead
Baroness Hale of Richmond
Lord Brown of Eaton-under-Heywood

Counsel

Appellants:
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Robert Kellar
(Instructed by Treasury Solicitors)

Respondents:
AH: Manjit Gill QC
Abid Mahmood
(Instructed by Blakemores)
NM: Manjit Gill QC
Chris Jacobs
(Instructed by White Ryland)
IG: Manjit Gill QC
Basharat Ali
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Intervener
UNHCR: Tim Eicke
(Instructed by Baker and McKenzie)

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HOUSE OF LORDS

OPINIONS OF THE LORDS OF APPEAL FOR JUDGMENT IN THE CAUSE

Secretary of State for the Home Department (Appellant) *v* AH (Sudan) and others (FC) (Respondents)

[2007] UKHL 49

LORD BINGHAM OF CORNHILL

My Lords,

1. The three respondents, all of them men in their 30s, are Sudanese nationals. They are members of black African tribes, and formerly lived in Darfur. AH and IG worked as subsistence farmers. NM may have been employed in a business with his father. All three suffered severe persecution in Darfur at the hands of militias acting with government support or connivance. They fled from Darfur, in NM's case after a six-month sojourn in Khartoum, arrived in this country and claimed asylum as refugees on dates in October – December 2004. In each case asylum was refused by the Secretary of State, whose refusal was upheld on appeal to an adjudicator or immigration judge. The respondents sought to challenge these refusals under section 103A of the Nationality, Immigration and Asylum Act 2002, and their cases were referred to the Court of Appeal under section 103C of that Act. The Court of Appeal dismissed the appeals on 25 October 2005 ([2005] EWCA Civ 1219) and the respondents appealed to the House. Here the appeals were heard together with that of an Albanian Kosovar, whose case raised the same issues. He was the lead appellant and gave his name to the resulting judgment: *Januzi v Secretary of State for the Home Department* [2006] UKHL 5, [2006] 2 AC 426. Januzi's appeal was dismissed. With the agreement of the Secretary of State in the cases of AH and IG, the cases of all three of the respondents to the present appeal were referred to the Asylum and Immigration Tribunal ("the AIT") for further reconsideration. The AIT re-considered the cases in June 2006 and on 3 August 2006 promulgated a very lengthy judgment dismissing the appeals and thus upholding the Secretary of State's refusal of asylum as refugees: [2006] UKAIT 00062. The respondents again appealed to the Court of Appeal, and on this occasion succeeded, in the decision now

under appeal: [2007] EWCA Civ 297. The appeals were allowed, the decision of the AIT set aside and the refusals of asylum quashed.

2. It has been accepted throughout that the respondents have a well-founded fear of persecution in Darfur. The issues below were whether, if returned to Khartoum, the respondents would be at risk of persecution there and, if not, whether it would for other reasons be unreasonable or unduly harsh for the respondents to be returned to and relocated in Khartoum. The AIT concluded that the respondents would not be at risk of persecution in Khartoum if returned there. The Court of Appeal did not disturb this finding, and it has not been challenged in the House. The AIT also found that it would not be unreasonable or unduly harsh for the respondents to be returned to and relocated in Khartoum. It is this finding which the Court of Appeal rejected. It held that the AIT had misdirected itself by applying the wrong legal test to internal relocation, that it was therefore open to the Court of Appeal, applying the right test, to form its own judgment and, doing so, that it would be unreasonable or unduly harsh for the respondents to be returned to and relocated in Khartoum. The Secretary of State now contends that the AIT did not apply the wrong legal test and that the Court of Appeal was not entitled to disturb its judgment on the facts. I would acknowledge the help given by the United Nations High Commissioner for Refugees in resolving this appeal.

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3. The decision of the House in *Januzi* [2006] 2 AC 426 was also directed to the problem of internal relocation of claimants for asylum who had a well-founded fear of persecution in one part of their home state but who, it was said, could reasonably and without undue harshness be returned to and relocated in another part of that state. The common issue in the appeals (see para 1) was whether, in judging reasonableness and undue harshness in this context, account should be taken of any disparity between the civil, political and socio-economic rights which a claimant would enjoy under the leading international human rights conventions and covenants and those which he would enjoy at the place of relocation. The clear conclusion of the House was that, excepting breaches of fundamental rights such as are protected by articles 2 and 3 of the European Convention on Human Rights, it should not: paras 20, 23, 45-46, 61, 67, 70.

4. In reaching that conclusion the House took as its starting-point the definition of "refugee" in article 1A(2) of the 1951 United Nations Convention relating to the Status of Refugees, as amended by the 1967 Protocol, the terms of which it recited. It referred to a body of materials including the United Nations High Commissioner for Refugees' *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees* (1979), para 91; rule 343 of the *Statement of Changes in Immigration Rules* (1994) (HC 395); Council Directive 2004/83/EC of 29 April 2004 (OJ 2004 L 304.12); and UNHCR *Guidelines on International Protection* of 23 July 2003, paras 7 II(a), 28 and 29-30. It also referred to a body of judicial authority which included *Rasaratnam v Canada (Minister of Employment and Immigration)* [1992] 1 FC 706, 711; *Thirunavukkarasu v Canada (Minister of Employment and Immigration)* (1993) 109 DLR (4th) 682; *R v Secretary of State for the Home Department, Ex p Robinson* [1998] QB 929, 939-940; *Karanakaran v Secretary of State for the Home Department* [2000] 3 All ER 449, 470; *Ranganathan v Canada (Minister of Citizenship and Immigration)* [2001] 2 FC 164; and *E v Secretary of State for the Home Department* [2003] EWCA Civ 1032, [2004] QB 531. Reference was further made to G S Goodwin-Gill, *The Refugee in International Law*, 2nd ed (1996), p 74 and H Storey, "The Internal Flight Alternative Test: The Jurisprudence Re-examined", (1998) 10 International Journal of Refugee Law, 499, 529. In the present appeal the parties, naturally enough, rely on very much the same materials. I would refer to what was said by my noble and learned friends and myself in *Januzi*, but need not repeat it or refine it since it is not understood to be suggested that our understanding and exposition of these materials was defective.

5. In paragraph 21 of my opinion in *Januzi* I summarised the correct approach to the problem of internal relocation in terms with which all my noble and learned friends agreed:

> "The decision-maker, taking account of all relevant circumstances pertaining to the claimant and his country of origin, must decide whether it is reasonable to expect the claimant to relocate or whether it would be unduly harsh to expect him to do so . . . There is, as Simon Brown LJ aptly observed in *Svazas v Secretary of State for the Home Department*, [2002] 1 WLR 1891, para 55, a spectrum of cases. The decision-maker must do his best to decide, on such material as is available, where on the spectrum the particular case falls. . . . All must depend on a fair assessment of the relevant facts."

Although specifically directed to a secondary issue in the case, these observations are plainly of general application. It is not easy to see how the rule could be more simply or clearly expressed. It is, or should be, evident that the enquiry must be directed to the situation of the particular applicant, whose age, gender, experience, health, skills and family ties may all be very relevant. There is no warrant for excluding, or giving priority to, consideration of the applicant's way of life in the place of persecution. There is no warrant for excluding, or giving priority to, consideration of conditions generally prevailing in the home country. I do not underestimate the difficulty of making decisions in some cases. But the difficulty lies in applying the test, not in expressing it. The humanitarian object of the Refugee Convention is to secure a reasonable measure of protection for those with a well-founded fear of persecution in their home country or some part of it; it is not to procure a general levelling-up of living standards around the world, desirable though of course that is.

The decision of the AIT

6. The judgment of the AIT does not lend itself to succinct summary. The facts relating to the three individual respondents (then appellants), also summarised by my noble and learned friend Lord Hope of Craighead in *Januzi*, paras 35-43, were set out. The evidence and other materials before the Tribunal were summarised in some detail (paras 14-137) and later evaluated (paras 161-170). The opinions of the House in *Januzi* were cited (paras 144-145) and the Tribunal continued:

> "146. From the opinions of their Lordships in *Januzi* we extract several propositions of particular importance in deciding the issues before us in this case.
>
> 147. First, it is essential when considering internal relocation to have regard to both considerations of: (1) safety, in the sense of an absence of persecution; and (2) reasonableness, in the sense of whether conditions are unduly harsh (*Januzi*, paragraphs 7, 8, 47 and 48).
>
> 148. Secondly, whilst it may be relevant to deciding a particular case to have regard to whether a person sought to avail himself of internal relocation prior to departure, the test of whether someone faces real risk under the

Refugee Convention and under article 3 essentially concerns whether refoulement or return of a person would give rise to *current* risk: see for example Lord Bingham's approval at paragraph 20 of analyses made 'in the context of return' and Lord Hope's reference in paragraph 48 to 'the dangers of return'.

149. Thirdly, there is no presumption that internal relocation is impossible simply because the persecutors in a person's home area are agents of the state. Nevertheless, evidence of state involvement, whether that involvement is direct or indirect, is relevant (paragraphs 21, 48 and 49).

150. Fourthly, the issue of reasonableness or whether conditions are unduly harsh is a rigorous one (Lord Carswell, paragraph 67); and it is wrong to decide this, as urged by the Hathaway/New Zealand approach, by reference to whether those conditions meet the requirements of international human rights law in full. The issue is whether 'conditions in that country generally as regards the most basic human rights that are universally recognised — the right to life and the right not to be subjected to cruel or inhuman treatment — are so bad that, it would be unduly harsh to expect a person to seek a place of relocation' (Lord Hope, paragraph 54). At most all that can be expected is that basic human rights standards, in particular non-derogable rights, are not breached.

151. Fifthly, it is of particular importance in the context of whether internal relocation is reasonable in the sense of unduly harsh that matters are looked at cumulatively, taking account of 'all relevant circumstances': the importance of this approach is manifest from paragraphs 20-21 and 50 of their Lordships' opinions.

152. Sixthly, integral to the assessment which must be made is a comparison between the conditions in the country as a whole and those which prevail in the place of intended alternative relocation (paragraphs 19 and 54)."

7. The Tribunal summarised its conclusions on return to Khartoum in paragraph 309, of which sub-paragraphs (5) and (6) are germane to this appeal:

> "(5) The evidence does not show that any returnee of either of the origins described in sub-paragraph (4) will, regardless of their personal circumstances, have no option but to live in an IDP camp or a squatter area, if returned from the United Kingdom to Khartoum. It has not been suggested that the Sudanese authorities have a policy of requiring a returnee of either of the origins described in sub-paragraph (4) to go and live in IDP camps or squatter areas. The burden of proof is on the appellant to show a reasonable likelihood of having to live in such a place. This will involve showing that it is not reasonably likely that the returnee will have any money, or access to money, or access to friends or relatives who may be able to assist in helping the returnee to establish him or herself (paragraphs 221-228).
>
> (6) But even if such a person shows that it is reasonably likely he or she will end up in such a camp or area, conditions there, though poor, are not significantly worse than the subsistence level existence in which people in Sudan generally live. Applying the principle set out in *Januzi*, the conditions in such camps or areas are not generally such as to amount to unduly harsh conditions (paragraphs 229-245)."

The Tribunal then considered the respondents' individual appeals and upheld the Secretary of State's refusal of asylum.

The Court of Appeal decision

8. As recounted above, the Court of Appeal (Buxton, Moore-Bick and Moses LJJ) allowed the respondents' appeals. The judgment of the court was given by Buxton LJ. Having referred to the relevant authorities and materials, the court said:

> "33. An analysis of the judgment of Lord Phillips in *E* and of the speech of Lord Bingham in *Januzi* therefore yields the following propositions as to the approach to whether internal relocation is available in a particular case; bearing in mind always that the standard for rejecting the availability of internal flight is rigorous (per Brooke LJ in *Karanakaran v Secretary of State for the Home*

Department [2000] 3 All ER 449, 456, and Lord Carswell in *Januzi* [2006] 2 AC 426, para 67):

i) The starting-point must be conditions prevailing in the place of habitual residence

ii) Those conditions must be compared with the conditions prevailing in the safe haven

iii) The latter conditions must be assessed according to the impact that they will have on a person with the characteristics of the asylum seeker

iv) If under those conditions the asylum seeker cannot live a relatively normal life according to the standards of his country it will be unduly harsh to expect him to go to the safe haven

v) Traumatic changes of life-style, for instance from a city to a desert, or into slum conditions, should not be forced on the asylum seeker."

Building on this analysis, the court found two errors of law in the AIT's judgment. First (para 35), it had wrongly assimilated the Convention test of unreasonableness with the requirement that a person should not be treated in a way that would infringe article 3 of the European Convention or its equivalent, an approach not warranted by the opinions of the House in *Januzi*. Secondly (para 36), the AIT had wrongly made a comparison between conditions in the country as a whole and those prevailing in the place of intended alternative relocation and not, as envisaged by *Januzi* and other authority, between conditions in the place of habitual residence and those in the safe haven. It concluded that the AIT's conclusion in paragraph 309(6) was not open to it. Since the Tribunal had not properly applied the law (para 40), it fell to the court to do so, with the result already summarised.

The appeal

Article 3

9. If the AIT considered that conditions in the place of intended relocation could not be unreasonable or unduly harsh unless they were

liable to infringe an applicant's rights under article 3 or its equivalent, it was plainly wrong. Nothing in *Januzi* or in the materials referred to in *Januzi* suggested such a test. No argument to that effect was advanced in *Januzi*, because there was no issue on the point. To the extent that reference was made to article 3 in *Januzi* it was to make clear, as might be thought obvious, that a claimant for asylum could not reasonably or without undue hardship be expected to return to a place where his rights under article 3 or its equivalent might be infringed.

10. The Court of Appeal based its criticism primarily on paragraph 150 of the AIT judgment, quoted in paragraph 6 above. It also drew attention to paragraph 234 of the judgment, and reference may also be made to paragraph 235 where the AIT described the article 3 standard as

> "an important reference point for us in having to decide the issues in this case, since it is clear from *Januzi* that what we have to consider is whether the conditions in a place of relocation fall below the most basic human rights, in particular non-derogable human rights (see Lord Hope, *Januzi*, paragraph 54).

11. The Court of Appeal's criticism does not lack substance. Read strictly and grammatically, paragraph 150 does appear to assimilate the reasonableness issue with the article 3 issue, an impression also given by paragraph 235 just quoted. But paragraph 151 does not appear to support this narrow and wrong approach, which does not feature in the Tribunal's conclusions, and at repeated points in the judgment (as in paras 228, 244, 264 and 265) the Tribunal directed their attention to whether, if returned to Khartoum, the respondents would be subjected to persecutory harm, ill treatment contrary to article 3 or to undue hardship in the context of a claim for international protection under the Refugee Convention. This reflects an entirely correct approach. It may very well be that the multiplicity of issues with which it had to deal led the Tribunal into making less plain than it should the issue it was addressing at some points in the judgment. I do not, however, think that the Court of Appeal was entitled to attribute to this experienced and well-qualified Tribunal what would, if made, have been an egregious and inexplicable error, and read as a whole the judgment does not suggest that the Tribunal made such an error.

The assessment of reasonableness and undue hardship

12. In paragraph 152 of its judgment (quoted in para 6 above) the AIT described as integral to its assessment a comparison between conditions in an applicant's home country as a whole and those prevailing in the place of intended alternative relocation. The Court of Appeal in paragraph 33 of its judgment (quoted in para 8 above) ruled that the starting point must be conditions in the place of habitual residence. In each case the conclusion was said to derive from the opinions of the House in *Januzi*.

13. Those opinions support both these bases of comparison: see for instance paragraphs 13, 15, 19, 20, 46, 47. But there was no contest between the two bases in *Januzi* and nothing was said to suggest that one basis is to be preferred, or is to be the starting point. Both are relevant, and the weight to be given to each is a matter to be judged by the decision-maker in the context of a claim for asylum by a particular applicant in a particular case. As already indicated (para 5 above) the test propounded by the House in *Januzi* was one of great generality, excluding from consideration very little other than the standard of rights protection which an applicant would enjoy in the country where refuge is sought.

14. Had the AIT excluded from consideration the conditions in which the respondents had lived in Darfur, it would have been wrong to do so. But this is not in my opinion a justified criticism. It acknowledged the home area in Darfur to be the natural habitat of those living there (para 158) and recognised that many non-Arab Darfuris were ill-equipped for city dwelling slum life, having come in the main from settled rural backgrounds as farmers (para 239). It is not, I think, suggested that there was evidence on this point which the AIT ignored. I do not consider that the Court of Appeal's criticism of the Tribunal was justified; nor was the Court of Appeal's own approach entirely accurate.

The facts

15. Mr Manjit Gill QC, for the respondents, understandably laid stress on the immense human tragedy which has unfolded in Darfur and on the traumatic and life-changing implications for his clients. He criticised the Tribunal's factual conclusions and urged the House to read the underlying evidential material before the Tribunal and make its own judgment. But this, as the Court of Appeal correctly recognised, is a course open to an appellate court only if an error of law has been made by the Tribunal which vitiates its conclusion. In this case I conclude,

differing from the Court of Appeal, that the Tribunal made no vitiating error of law. It follows that the House is not, in my opinion, entitled to trespass on the area of factual assessment and judgment reserved to the Tribunal.

16. In the result, I would allow the Secretary of State's appeal, set aside the Court of Appeal's order and reinstate the order of the Tribunal. There will be no order for costs save for assessment of the respondents' costs on the usual legally-aided basis.

LORD HOFFMANN

My Lords,

17. I have had the advantage of reading in draft the speech of my noble and learned friend Lord Bingham of Cornhill. I agree with it, and for the reasons he gives I too would allow the appeal and make the order that he proposes.

LORD HOPE OF CRAIGHEAD

My Lords,

18. I have had the advantage of reading in draft the speeches of my noble and learned friends Lord Bingham of Cornhill and Lord Brown of Eaton-under-Heywood. I agree with them, and for the reasons they give I would allow the appeal and make the order that Lord Bingham proposes.

19. I agree also with what my noble and learned friend Baroness Hale of Richmond says about the caution with which the ordinary courts should approach the decision of an expert tribunal. A decision that is clearly based on a mistake of law must, of course, be corrected. Its reasoning must be explained, but it ought not to be subjected to an unduly critical analysis. As your Lordships have indicated, there are passages in the decision that is before us which might, when read in

isolation, suggest that the tribunal misdirected itself. But I am quite satisfied that the decision as a whole was soundly based, and that a more accurate wording of the passages that have attracted criticism would have made no difference to the tribunal's conclusion on the facts that the Secretary of State's refusal of asylum in these cases should be upheld.

BARONESS HALE OF RICHMOND

My Lords,

20. We are all agreed that the correct approach to the question of internal relocation under the Refugee Convention is that set out so clearly by my noble and learned friend, Lord Bingham of Cornhill, in *Januzi and others v Secretary of State for the Home Department* [2006] UKHL 5, [2006] 2 AC 426, at para 21:

> "The decision-maker, taking account of all relevant circumstances pertaining to the claimant and his country of origin, must decide whether it is reasonable to expect the claimant to relocate or whether it would be unduly harsh to expect him to do so."

As the UNHCR put it in their very helpful intervention in this case,

> " . . . the correct approach when considering the reasonableness of IRA [internal relocation alternative] is to assess all the circumstances of the individual's case holistically and with specific reference to the individual's personal circumstances (including past persecution or fear thereof, psychological and health condition, family and social situation, and survival capacities). This assessment is to be made in the context of the conditions in the place of relocation (including basic human rights, security conditions, socio-economic conditions, accommodation, access to health care facilities), in order to determine the impact on that individual of settling in the proposed place of relocation and whether the individual could live a relatively normal life without undue hardship."

I do not understand there to be any difference between this approach and that commended by Lord Bingham in paragraph 5 of his opinion. Very little, apart from the conditions in the country to which the claimant has fled, is ruled out.

21. We are also all agreed that the test for internal relocation under the Refugee Convention is not to be equated either with a "well-founded fear of persecution" under the Convention or with a "real risk of ill-treatment" contrary to article 3 of the European Convention on Human Rights. By definition, if the claimant had a well-founded fear of persecution, not only in the place from which he has fled, but also in the place to which he might be returned, there can be no question of internal relocation. The question pre-supposes that there is some place within his country of origin to which he could be returned without fear of persecution. It asks whether, in all the circumstances, it would be unduly harsh to expect him to go there. If it is reasonable to expect him to go there, then he can no longer claim to be outside his country of origin because of his well-founded fear of persecution. Mercifully, the test accepts that if it is not reasonable to expect him to go there, then his continued absence from his country of origin remains due to his well-founded fear of persecution.

22. Further, although the test of reasonableness is a stringent one - whether it would be "unduly harsh" to expect the claimant to return – it is not to be equated with a real risk that the claimant would be subjected to inhuman or degrading treatment or punishment so serious as to meet the high threshold set by article 3 of the European Convention on Human Rights. As Lord Bingham points out, this is not what was meant by the references to article 3 in *Januzi*, including what was said by my noble and learned friend, Lord Hope of Craighead, when he referred to "the most basic of human rights that are universally recognised" at para 54. Obviously, if there were a real risk of such ill-treatment, return would be precluded by article 3 itself as well as being unreasonable in Refugee Convention terms. But internal relocation is a different question.

23. My concern has been that, in the course of an immensely long and detailed consideration of the huge quantity of evidence before them, the Tribunal did not clearly separate the three questions which had to be asked of that evidence. Much of their discussion is directed at the risks, whether of persecution or of article 3 ill-treatment, which would face people in general, and non-Arab Darfuris in particular, if returned to Khartoum. They found that, except in certain types of case, the evidence

did not support such risks: there were not the specific instances of ill-treatment or disappearances of people returning to Khartoum which they would expect to find if such general risks were real. These findings may well be controversial; there may now be further evidence which requires the issue to be reconsidered; but the Tribunal's findings on those issues are not the subject of this appeal. We are concerned with the discrete question of relocation, in which risk is only one factor to be considered.

24. At several points in the determination, the Tribunal refer to "persecutory harm, ill treatment contrary to article 3 *or* to undue hardship in the context of a claim for international protection under the Refugee Convention" (para 228; emphasis supplied; also para 264); "real risk of serious harm or of ill-treatment contrary to article 3 *or* of unduly harsh conditions" (para 244; emphasis supplied); "persecutory harm, ill treatment contrary to article 3 *or* difficulties which are unduly harsh or unreasonable in the context of claims for international protection" (para 265; emphasis supplied). Although these phrases refer to the three different concepts, Mr Manjit Gill QC argues powerfully on behalf of the claimants that they do so in terms which suggest that they amount to much the same thing.

25. The impression that the Tribunal may be equating "unduly harsh" with an article 3 risk is reinforced in several places. Most notable is para 150, quoted by Lord Bingham at para 6 earlier, because this is where the Tribunal summarize the principles derived from *Januzi* that they intend to apply. Also notable, however, is the approach in those paragraphs which are expressly dealing with the conditions in squatter areas and IDP camps in and around Khartoum: the Tribunal correctly state, in para 230, that they have to examine "two distinct matters. One relates to safety. The other relates [to] the extent to which conditions are unduly harsh or unreasonable". But they go on in para 235 to state:

> "The lack of any UN-related finding that conditions in the camps and/or squatter areas are generally at the level of the international equivalent to what we in Europe refer to as the article 3 ECHR standard, is an important reference point for us in having to decide the issues in this case, since it is clear from *Januzi* that what we have to consider is whether the conditions in the place of relocation fall below the most basic human rights, in particular non-derogable human rights (see Lord Hope, *Januzi*, para 54)."

And again, when examining medical facilities, in the context of their "specific bearing on the issue of internal relocation", the Tribunal quote for a third time from para 54 of *Januzi* (in para 257), giving once more the impression that in their view, the tests for "unduly harsh" and Article 3 are the same. They go on to conclude in para 259:

> "Nor does the evidence show . . . that the health facilities available in the squatter areas and camps for displaced persons in and around Khartoum are so bad as to deprive those who live there, not just of the 'basic norms of civil, political and socio-economic rights that are regarded as acceptable internationally' but also of 'the most basic of human rights that are universally recognised – the right to life, and the right not to be subjected to cruel or inhuman treatment'".

26. In short, while the determination often runs the three concepts together in the manner quoted above, where it separates off the question of whether conditions in the Khartoum area are "unduly harsh", it appears to be equating that with inhuman treatment under Article 3. If that is indeed what the Tribunal did, then they themselves applied too harsh a test.

27. That concern is allied to another. We know that the standard of comparison is not the lives which the returning claimants are living here: that is what *Januzi* was all about. We know that the lives they led before the persecution are a relevant factor but not, as the Court of Appeal thought, the starting point. We know that the lives they will face on return have to be considered in the context of "standards prevailing generally in the country of nationality": Lord Bingham in *Januzi*, para 20. If people can return to live a life which is normal in that context, and free from the well-founded fear of persecution, they cannot take advantage of past persecution to achieve a better life in the country to which they have fled: see Lord Bingham in para 5 of his opinion. But this does not mean that the holistic consideration of all the relevant factors, looked at cumulatively, can be replaced by a consideration of whether their circumstances will be worse than the circumstances of *anyone else* in that country.

28. Yet the Tribunal concluded that because the conditions faced by returning Darfuris, however appalling, would be no worse than those faced by other Sudanese IDPs it would not be not "unduly harsh" to expect them to return. The standard of comparison was, not with their

lives in Darfur before their persecution, not with the general run of ordinary lives in Sudan, not even with the lives of poor people in Sudan, but with the lives of the poorest of the poor, internally displaced victims of the civil war in the south, living in camps or squatter slums, and "subject from time to time to relocations, sometimes involving force and human rights violations" (para 244). They too had been subsistence farmers, ill-equipped to survive in the city slums (para 239); they too had suffered the psychological horrors of civil war (para 238), if not of government-backed genocide; the Darfuris would be no worse off, unless particular individuals attracted the adverse interest of the authorities (para 242). With respect, this is not the individualised, holistic assessment which the question requires.

29. My concern, therefore, is that, although the determination does refer to many relevant considerations, it effectively equates "unduly harsh" with Article 3 ill-treatment; subordinates all considerations to a comparison with the very worst lives led by other Sudanese; and rejects any claim unless there is reason to believe that the individual will be targeted for special attention by the authorities, thus harking back to the fear of persecution as well as Article 3 ill-treatment. No doubt this is the product of the mass of evidence and the multi-pronged case the Tribunal had to consider. But a thorough reading of the determination as a whole has not entirely dispelled these concerns.

30. I spell them out, not to disagree with the result upon which your lordships are agreed, but in the hope that similar concerns will not arise in such cases in the future. This is an expert tribunal charged with administering a complex area of law in challenging circumstances. To paraphrase a view I have expressed about such expert tribunals in another context, the ordinary courts should approach appeals from them with an appropriate degree of caution; it is probable that in understanding and applying the law in their specialised field the tribunal will have got it right: see *Cooke v Secretary of State for Social Security* [2001] EWCA Civ 734, [2002] 3 All ER 279, para 16. They and they alone are the judges of the facts. It is not enough that their decision on those facts may seem harsh to people who have not heard and read the evidence and arguments which they have heard and read. Their decisions should be respected unless it is quite clear that they have misdirected themselves in law. Appellate courts should not rush to find such misdirections simply because they might have reached a different conclusion on the facts or expressed themselves differently. I cannot believe that this eminent Tribunal had indeed confused the three tests or neglected to apply the correct relocation test. The structure of their determination can be explained by the fact that this was a "country

guidance" case: but that makes it all the more important that the proper approach to the internal relocation alternative, as explained by the House in this case, is followed in future.

31. In agreement with the reasoning of Lord Bingham, therefore, I would allow these appeals. I should add that, in any event, I would have dismissed the appeal of NM. The adjudicator found that he had no good reason for leaving Khartoum where he had been living a normal life for six months after leaving Darfur. His claim could properly be regarded as opportunistic.

LORD BROWN OF EATON-UNDER-HEYWOOD

My Lords,

32. Millions living in the poorer countries of the world suffer terribly from poverty, from famine, from floods, from ill-health, from various human rights abuses. Many in addition suffer, or at any rate have a well-founded fear of, persecution. But such as suffer this additional fear, provided only that they can escape to a richer and safer country, are in a sense the lucky ones. For them the risk of persecution is often in reality amongst the least of their problems, less threatening than the direr risks they face from ill-health and extreme poverty. Yet once they achieve refugee status, not merely are they safeguarded from return home but they secure all the manifold other benefits provided for under the Refugee Convention.

33. To secure these benefits, however, an asylum-seeker must fall strictly within the definition of "refugee" set out in article 1A(2) of the Refugee Convention. This is not a Convention designed to meet all humanitarian needs—far from it, perhaps understandably given the countless millions who would otherwise be entitled to its benefits. Consider the range of those excluded from its protection. As was observed in the Australian case of *A v Minister for Immigration and Ethnic Affairs* [1998] INLR 1, 18:

> "No matter how devastating may be epidemic, natural disaster or famine, a person fleeing them is not a refugee within the terms of the Convention."

Nor are those involved in civil war. Nor those persecuted for non-Convention reasons. Nor those affected by ill-health, even if their return home would dramatically shorten their life expectancy—see *N v Secretary of State for the Home Department* [2005] 2 AC 296, holding AIDS sufferers to be outside the protection even of article 3 of the ECHR. Nor is refugee protection extended to those who have no present fear of persecution—circumstances in their home country having improved— (*Adan v Secretary of State for the Home Department* [1991] 1 AC 293), not even if there exist compelling reasons arising out of their previous persecution for them not to be returned home (*R (Hoxha) v Special Adjudicator* [2005] 1 WLR 1063).

34. What, then, is the position of those who would continue to suffer persecution if returned to the same part of their country of origin from which they fled (their place of habitual residence) but who would be safe from persecution if they relocated elsewhere within that country (a safe haven)? That is the situation of the three respondents before the House: they would be persecuted if returned to Darfur but not if relocated in Khartoum. The Tribunal so found, justifiably as the Court of Appeal held, and your Lordships are not asked to revisit this issue.

35. I have had the advantage of reading in draft the opinion of my noble and learned friend Lord Bingham of Cornhill and there is not a word of it with which I disagree. As my Lord has observed, as recently as last year (indeed in a case involving these same respondents), the House in *Januzi v Secretary of State for the Home Department* [2006] 2 AC 426 was concerned with much the same questions as arise now: the position of those able to be safely relocated at home who nevertheless seek refugee status. The relevance of the relocation option was explained; it goes to the question whether, within the article 1A(2) definition of refugee, the asylum-seeker is properly to be regarded as outside his home country (a) because of a well founded fear of persecution or (b) given that he could in fact be safely relocated elsewhere in that country, for different, if entirely understandable, reasons such as a general desire to improve his lot. *Januzi* also examined at length the extensive jurisprudence surrounding the whole question of internal relocation and laid down the approach to be taken when the possibility arises:

> "The decision-maker, taking account of all relevant circumstances pertaining to the claimant and his country of origin, must decide whether it is reasonable to expect

> the claimant to relocate or whether it would be unduly harsh to expect him to do so." (Lord Bingham at para 21).

36. As Lord Bingham now observes (para 5): "It is not easy to see how the rule could be more simply or clearly expressed." And (at para 13), the test "exclud[es] from consideration very little other than the standard of rights protection which an applicant would enjoy in the country where refuge is sought."

37. Despite the apparent clarity and simplicity of the test, however, the arguments before your Lordships suggest that doubts and misconceptions still exist about its proper application, and not least the relevance of the conditions prevailing in the place of habitual residence (the place of persecution from which the claimant fled and to which he cannot safely return.) The ultimate decision to be made is, as stated, whether it is on the one hand "reasonable" or on the other hand "unduly harsh" to require the claimant to relocate. Clearly the conditions and circumstances of his previous way of life may inform that decision, bearing for example upon his ability to adapt to whatever changes and challenges are involved in relocation. But it is wrong to suggest, as the Court of Appeal do, that the critical contrast to be struck is between the circumstances in which the claimant lived when persecuted and those he would face in the proposed safe haven—so that if, for example, he had been rich and lived well but now, if relocated, would face comparative poverty, he would for that reason be entitled to asylum.

38. True it is that in the Court of Appeal's judgment in *E v Secretary of State for the Home Department* [2004] QB 531 (to which I myself was party) there appears this (at para 24):

> "[T]he nature of the test of whether an asylum seeker could reasonably have been expected to have moved to a safe haven is clear. It involves a comparison between the conditions prevailing in the place of habitual residence and those which prevail in the safe haven, having regard to the impact that they will have on a person with the characteristics of the asylum seeker. What the test will not involve is a comparison between the conditions prevailing in the safe haven and those prevailing in the country in which asylum is sought."

And this (at para 64):

> "So far as refugee status is concerned, a comparison must be made between the asylum seeker's conditions and circumstances in the place where he has reason to fear persecution and those that he would be faced with in the suggested place of internal location. If that comparison suggests that it would be unreasonable, or unduly harsh, to expect him to relocate in order to escape the risk of persecution, his refugee status is established."

Nor were those passages specifically criticised by the House in *Januzi*. The real point decided in *E*, however, was not that but rather the rejection of the asylum seeker's contended-for test by which he sought to take advantage of a contrast with the conditions prevailing in the country in which asylum is sought.

39. Taken as a whole the speeches in *Januzi* are really quite irreconcilable with the respondents' submission to your Lordships that the comparison between conditions in the place of persecution and those in the safe haven is the all important one. Rather, as *Januzi*—and, indeed, the 2003 UNHCR guidelines—make clear, in determining the reasonableness of the proposed relocation regard must be had to conditions generally in the country of origin.

40. Paragraph 7 II (a) of the Guidelines asks: "Can the claimant, in the context of the country concerned, lead a relatively normal life without facing undue hardship?" Entirely consistently, my noble and learned friend Lord Hope of Craighead in *Januzi* (at para 47) observed:

> "The question . . . is whether it would be unduly harsh to expect a claimant who is being persecuted for a Convention reason in one part of his country to move to a less hostile part before seeking refugee status abroad. The words 'unduly harsh' set the standard that must be met for this to be regarded as unreasonable. If the claimant can live a relatively normal life there judged by the standards that prevail in his country of nationality generally, . . . it will not be unreasonable to expect him to move there."

And this surely is the logical approach. As Lord Bingham put it in *Januzi* (at para 19): "It would be strange if the accident of persecution were to entitle him [an asylum seeker who, having escaped from a poor to a rich country, could without fear of persecution return to live elsewhere in his country of origin] to escape, not only from that persecution, but from the deprivation to which his home country is subject."

41. Certainly, as I suggested at the outset, there *are* cases in which "the accident of persecution" does enable the asylum seeker to escape not merely persecution but all the other, often more threatening, afflictions (ill-health, starvation and the like) facing his future well-being at home. But they are not cases where there exists the possibility of safe internal relocation. In these, safe option, cases, an argument could no doubt be made for saying—as is said in cases where the persecution from which the claimant fled has now ended—that, without more, international protection from persecution is no longer required. But such an argument is not made. Instead it has long been accepted that refugee status will not be withheld where it would be "unduly harsh" to expect the claimant to relocate in his home country. And it is conceded by the Secretary of State before your Lordships that it could, in principle be unduly harsh to require an asylum seeker to relocate in his or her home country if, for example, that would involve the sort of devastating consequences to health that were expected to follow the HIV sufferer *N's* return to Uganda: [2005] 2 AC 296. In short, the strictness of what might be seen as the logical application of the Convention has, as Brooke LJ put it in *Karanakaran v Secretary of State for the Home Department* [2000] 3 All ER 449, 456, "been tempered by a small amount of humanity". Nevertheless, as Brooke LJ also observed there, the test of undue harshness "is still a very rigorous test", a point re-emphasised by Lord Carswell [2006] 2 AC 426, para 67 (and, I apprehend, accepted by the other members of the Committee) in *Januzi* itself.

42. As mentioned, one touchstone of whether relocation would involve undue hardship, identified in the UNHCR guidelines and referred to in the passage already cited from para 47 of Lord Hope's speech in *Januzi*, is whether "in the context of the country concerned" the claimant can live "a relatively normal life". The respondents are fiercely critical of the Tribunal's approach to this question in the present case. In particular they criticise the Tribunal's conclusion as to "the subsistence level existence in which people in Sudan generally live". To my mind, however, this criticism is misplaced. It is not necessary to establish that a *majority* of the population live at subsistence level for

that to be regarded as a "relatively normal" existence in the country as a whole. If a significant minority suffer equivalent hardship to that likely to be suffered by a claimant on relocation and if the claimant is as well able to bear it as most, it may well be appropriate to refuse him international protection. Hard-hearted as this may sound, and sympathetic although inevitably one feels towards those who have suffered as have these respondents (and the tens of thousands like them), the Refugee Convention, as I have sought to explain, is really intended only to protect those threatened with specific forms of persecution. It is not a general humanitarian measure. For these respondents, persecution is no longer a risk. Given that they can now safely be returned home, only proof that their lives on return would be quite simply intolerable compared even to the problems and deprivations of so many of their fellow countrymen would entitle them to refugee status. Compassion alone cannot justify the grant of asylum.

43. I too regard the Court of Appeal's approach to have been wrong. There was no sound basis here for overturning the Tribunal's decision. Certainly, as both Lord Bingham (at para 11) and my noble and learned friend Baroness Hale of Richmond (throughout her opinion) indicate, the Tribunal's determination could have been clearer. (Lady Hale's concerns, I would respectfully suggest, valuably illuminate the correct approach to the question of undue harshness by focusing on a series of what plainly would have been errors of approach—such as to have asked whether the claimant's "circumstances will be worse than the circumstances of *anyone else* in that country" (para 27)). I too conclude, however, that so expert and experienced a Tribunal cannot readily be supposed to have committed any of these errors sought to be inferred from its sometimes infelicitous drafting. I too, therefore, would allow the Secretary of State's appeal and make the order Lord Bingham proposes.